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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
GRANTED OR DENIED

JANUARY—MARCH, 1915

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⁴ Resigned January 31, 1915.

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UNITED STATES CIRCUIT COURTS OF APPEALS
AND THE DISTRICT COURTS

No. 2616.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
218 F.—1 † Rehearing denied January 11, 1915.

the speedy and efficient enforcement of such liens, gives a lien to the classes of persons therein named, which exists independent of statute, so that, though the statutes of the state may provide for liens in addition to those provided for by the Constitution, they cannot impair or detract from the rights to liens conferred by the constitutional provision.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 4; Dec. Dig. § 3.*]

4. MECHANICS' LIENS (§ 106*)—RIGHT TO LIEN—MATERIALMAN.

Where a bankrupt had a subcontract to furnish a building contractor with certain material and millwork called for by the general contract for the construction of a building, to be used by the contractor in the work, and the bankrupt, though having nothing to do with the placing of the material in the building, in order to perform its contract, contracted with petitioner to manufacture and furnish certain material and millwork called for by the bankrupt's contract in accordance with details furnished to petitioner for the manufacture of such materials, the same having been manufactured, supplied to the bankrupt, and used by the contractor in the building, petitioner was entitled to a lien under Const. Tex. art. 16, § 37, providing that mechanics, artisans, and materialmen of every class shall have a lien on the buildings and articles made or repaired by them for the value of their labor done thereon or materials furnished therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 138; Dec. Dig. § 106.*]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Texas, in Bankruptcy; Edward R. Meek, Judge.

Petition to superintend and revise an order of the District Court in favor of J. W. Stitt, trustee in bankruptcy of the Texas Planing Mill & Manufacturing Company, denying the right of petitioner, the Huttig Sash & Door Company, to a lien on property held by the trustee. Petition granted, order reversed, and cause remanded.

George Q. McGown and E. T. Murphy, both of Ft. Worth, Tex., for petitioner.

George W. Steere, of Ft. Worth, Tex., for respondent.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

WALKER, Circuit Judge. [1] We do not think that the motion to dismiss the petition to superintend and revise is well taken. The ground stated in the motion is that the proper remedy open to petitioner was an appeal under subdivision "a" of section 25 of the Bankruptcy Act, and not a petition to superintend and revise under subdivision "b" of section 24 of that act. The claim filed by the petitioner against the bankrupt estate was for the sum of \$1,484.30, \$1,157 of which he claimed was secured by a lien on property held by the trustee in bankruptcy. The total amount claimed was allowed as an unsecured debt, but the asserted right to a lien was denied. The claim presented was not rejected, so as to confer upon the claimant the right to appeal given by subdivision 3 of section 25a of the Bankruptcy Act. Only the asserted right to a lien for a part of the amount of the claim was denied. In this respect the case was different from the one considered in *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

725, in which the claim, as it was presented, was rejected, with the result of giving the claimant the right to appeal from the judgment "rejecting a debt or claim," etc. It is also unlike the case of *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, in which an appeal was held proper, as the matter sought to be reviewed was a judgment allowing the claim made and the asserted lien for its security.

We understand the opinion in the last-mentioned case to recognize the propriety of a resort to a petition to superintend and revise under subdivision "b" of section 24 of the Bankruptcy Act, when the claimant complains of a supposed mistake of law made, not in the rejection of his claim, which in fact was allowed for its full amount, but in the court's exercise of its incidental right to consider and determine the validity of the lien for a part of the amount of the debt claimed asserted upon property in the hands of the bankrupt's trustee. The claimant has no right of appeal in such a case, his claim as he presented it having been allowed, and he may resort to a petition to superintend and revise the action of the court in dealing with an incident of that claim, the asserted right to a lien. The controversy resulting from the assertion of the right to a lien on the bankrupt's property to secure part of the allowed debt owing by him is to be regarded as one arising in the bankruptcy proceeding, within the meaning of section 24 of the Bankruptcy Act, and the order by which that controversy was disposed of is subject to review in the manner provided for by subdivision "b" of that section. *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; *In re Doran*, 154 Fed. 467, 83 C. C. A. 265; *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

[2] Furthermore, we think that an agreement, set out in the record, which the bankrupt, his trustee, the original contractor, and the claimant entered into before the latter presented his claim against the bankrupt estate, and in pursuance of which the claim was presented, shows that it was distinctly recognized by all parties that the subject of controversy between the creditor on one side and the bankrupt and his trustee on the other side was the legal question of the right of the former, under the state of facts which was agreed upon, to the lien claimed, and that it was understood that that question would be presented as a controversy arising in the bankruptcy proceeding on a claim to be filed by the creditor for the full amount of the debt due to it. The substance of one of the provisions of that agreement was that the creditor would in due time file with the referee in bankruptcy a properly proven claim for the amount of its debt against the bankrupt, claiming, because of the furnishing of the materials and millwork as above stated, a mechanic's and materialman's lien upon the building in the construction of which they were used and upon the lot on which that building was erected, and that it would diligently prosecute said claim to a final decision in the bankruptcy court. In view of that agreement, and of the creditor's proceedings in conformity with its terms, it hardly is consistent for the bankrupt or its trustee to contend that the action of the court in determining the legal question in dispute was not the disposition of a controversy arising in the bankruptcy proceedings in the manner contemplated by the parties to it, or that that disposition of

that legal question is not subject to be reviewed on a petition to superintend and revise the action of the court in the matter of law so arising in the bankruptcy proceeding on the claim as it was presented pursuant to the agreement. It was in effect agreed in advance that the disputed question of law should arise in the proceedings in bankruptcy on the creditor's claim for the full amount of the debt owing to it, only a part of which amount was claimed to be secured by the asserted lien; and the record shows that it did so arise, as contemplated by the parties.

The controversy in this case is as to the asserted right of the claimant to a lien on a building for the price of certain material and millwork supplied by it under a contract with the bankrupt and which was used in the construction of that building. One McCoy was the original and general contractor for that building. Under a contract with him the bankrupt undertook to furnish to him certain material and millwork, called for in the contractor's contract with the owner of the building, and to be used by the contractor in the construction of the building; the bankrupt having nothing to do with the placing of the material and millwork in the building. The bankrupt, in turn, in order to perform its contract with McCoy, entered into an agreement with the claimant whereby the latter undertook to furnish to the bankrupt certain material and millwork called for by the bankrupt's contract with McCoy. Under this agreement the bankrupt made and caused to be made details from the plans and specifications of the building, and supplied these details to the claimant to be observed by the latter in the manufacture and supply of the material and millwork called for by its contract with the bankrupt. The claimant manufactured and supplied the material and millwork in accordance with those details, shipped the same to McCoy, as directed by the bankrupt, and the things so supplied were accepted by both the bankrupt and McCoy as being the same as were called for by the latter's contract for the building, and were used and placed by McCoy in the construction of the building. The referee found that the claimant had complied with the statutory requisites for fixing a lien, but denied it the lien asserted by it. The order of the referee to this effect was affirmed by the District Court.

[3] Section 37 of article 16 of the Constitution of the state of Texas provides that:

"Mechanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

This provision, as it has been construed by the Supreme Court of Texas, gives a lien to the classes of persons therein named, and such lien exists independent of any statute. That court has expressly recognized that the provision, "in so far as it gives a lien, is as broad as language can make it." *Bassett v. Mills*, 89 Tex. 162, 34 S. W. 93; *Warner Elevator Mfg. Co. v. Maverick*, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499. Statutes may provide for liens in addition to those provided for by the Constitution, but cannot impair or detract from the rights to liens which the quoted provision of the Constitution confers.

A Texas statute (article 5621, Rev. Civil Stat. of Texas 1911) provides as follows:

"Any person, or firm, lumber dealer, or corporation, artisan, laborer, mechanic, or subcontractor, who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement or to repair any building or improvement whatever, * * * within this state under or by virtue of a contract with the owner or his agent, trustee, receiver, contractor or contractors, upon complying with the provisions of this chapter, shall have a lien on such house, building, fixtures, * * * to secure payment for the labor done, lumber, material, machinery or fixtures * * * furnished for construction or repair."

In the case of *Bassett v. Mills*, supra, the question was presented of the right under this statute to a lien claimed by one who furnished labor and material for a building to a subcontractor; the claimant having had no dealing with the original contractor. It is to be noted that the statute does not in express terms provide for a lien in favor of such a person. In deciding that there was a lien as claimed, the court, in the course of the opinion rendered, said:

"It is by no means clear from this statute, standing alone, that laborers or materialmen contracting with a subcontractor were intended to be included in its benefits. But section 37 of article 16 of our Constitution provides that 'mechanics, artisans and materialmen of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon or material furnished therefor; and the Legislature shall provide for the speedy and efficient enforcement of such liens.' This provision, in so far as it gives a lien, is as broad as language can make it. It includes materialmen who furnish material, though to a subcontractor, as well as those who furnish it to an original contractor. This does not prohibit the Legislature from providing for liens in cases not mentioned; nor, as we have held, does it prevent the Legislature from making reasonable regulations for the enforcement of the liens provided for in the section. But it does not (?) make it the duty of the Legislature to provide a speedy and efficient remedy for the enforcement of the rights conferred. The purpose of the act of April 5, 1889, was not only to declare the liens created by the Constitution, and to give liens in other cases, but also to provide a remedy by which they could be secured and enforced. The latter it was their duty to do; and one of two propositions is true—either the act was intended to apply to those who contracted with subcontractors, or the Legislature has neglected its duty. If the act does not apply to that class of claimants, then the Legislature has omitted to confer upon them the benefits of provisions which it has made for others, and has been derelict in the performance of a duty expressly imposed by the Constitution. A failure to obey a requirement of the fundamental law, which the members take oath to support, should not lightly be imputed to the Legislature; and where a statute is capable of two constructions, one of which would give effect to a positive requirement of the Constitution, and the other would leave a duty unperformed, the former should prevail. If those who deal with a subcontractor are included within the provisions of the act, then the plaintiff in error is entitled to a lien, not only upon the improvements, but also upon the lots upon which they are situate." *Bassett v. Mills*, 89 Tex. 162, 167, 34 S. W. 93, 95.

[4] While what was decided in that case was that there was a lien in favor of all persons who labor upon or furnish materials for the work, whether the contract under which this was done was with the owner, the original contractor, or a subcontractor, yet nothing said in the opinion indicates that the lien would not exist in favor of one who furnished material for use in the building under a contract, not with either the owner, the contractor, or a subcontractor, but with another

materialman, who had contracted with the original contractor to supply material for the building. On the contrary, the expressions used in the opinion are persuasive in support of the conclusion that the constitutional and statutory provisions in question are to be so liberally construed in favor of the classes of persons sought to be protected as to make them cover the case of a materialman who furnishes material for the construction of a building, though he does so under a contract, not with the owner, the contractor, or a subcontractor, but with another materialman who had a contract with the original contractor to furnish that material for that building. The materialman belongs to a class provided for, if the material he furnished was for use in the particular building in which it was in fact used. 27 Cyc. 48.

We are of opinion that the facts of the instant case bring the claimant within the scope of the provisions mentioned. The materials he supplied were manufactured pursuant to details furnished to him from the plans and specifications of the particular building, in the construction of which they were actually used. Materials manufactured and supplied in such circumstances are to be regarded as furnished, not as a manufacturer or dealer furnishes from his stock goods to a purchaser, without regard to their destination or the use to which ultimately they may be put by the purchaser, but for the purpose of being used in the particular building, the plans and specifications presumptively exclusively applicable to which were conformed with in their manufacture and preparation. The claimant could not well have supposed that the material and millwork he furnished were to be used otherwise than in the structure the plans and specifications for which were followed in their production. The conclusion is that he was entitled to the lien as claimed. Any other conclusion would hardly be consistent with the broad and liberal provisions of the law under which the claim of the right to a lien is made.

The petition is granted, the order of the court below is reversed, and the case is remanded for further proceedings in conformity with the conclusions above stated.

HUFF et al. v. BIDWELL et al.

MAYOR AND COUNCIL OF CITY OF MACON et al. v. HUFF et al.

(Circuit Court of Appeals, Fifth Circuit. October 27, 1914.)

No. 2533.

1. INSOLVENCY (§ 188*)—DISTRIBUTION OF ESTATE—COUNSEL FEES.

A court of equity has power to allow a fee to the solicitor of an insolvent defendant, whose estate is being administered, to be paid from the fund in court; but, if it appears on final distribution that the assets are sufficient to pay all debts and leave a surplus, it is not the province of the court either to fix the fee or to charge it upon the fund.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 309; Dec. Dig. § 188.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **INSOLVENCY (§ 109*)—DISTRIBUTION OF ESTATE—INTEREST.**

The rule that, in the administration of insolvent estates, interest is not allowed after the commencement of the proceedings, applies only as between creditors who stand upon an equal basis, and not to a creditor having a prior lien on specific property in favor of unsecured creditors, nor where the estate proves sufficient to pay all creditors, with interest.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. § 173; Dec. Dig. § 109.*]

3. **INSOLVENCY (§ 185*)—INVOLUNTARY PROCEEDINGS—COSTS.**

Where a temporary receiver was improvidently appointed in a proceeding in insolvency against the defendant, the costs of the receivership are properly taxable against the complainants who procured it.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. § 306; Dec. Dig. § 185.*]

4. **INSOLVENCY (§ 185*)—DISTRIBUTION OF ESTATE—COSTS OF COLLATERAL LITIGATION.**

Complainants in proceedings in insolvency against a debtor were justified in resisting payment of paving assessments against property of the defendant, where their validity was doubtful, and are not personally liable for the costs of such litigation, although they were unsuccessful; nor are they personally liable for such assessments because of a tender made by them, and not accepted, which was presumably made on behalf of the estate.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. § 306; Dec. Dig. § 185.*]

5. **INSOLVENCY (§ 185*)—ADMINISTRATION OF ESTATE—CLAIMS FOR TAXES.**

County and municipal taxes, assessed upon property being administered by a court in insolvency proceedings against the owner, are a part of the costs of administration, and cannot be required to contribute to the payment of solicitors' fees awarded the complainants, but are entitled to payment in full, with interest.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. § 306; Dec. Dig. § 185.*]

6. **INSOLVENCY (§ 188*)—DISTRIBUTION OF ESTATE—COSTS AND EXPENSES.**

Where a mortgagee, made a defendant in insolvency proceedings against the mortgagor, adopts such proceedings for the purpose of enforcing its lien, it may properly be required to contribute to the payment of a solicitor's fee awarded to the complainants from the fund in court.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. § 309; Dec. Dig. § 188.*]

Appeals from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit in equity by William L. Bidwell and others against William A. Huff and others. From the decree defendants, as well as the Mayor and Council of the City of Macon and the County of Bibb, as interveners, separately appeal. Reversed in part.

See, also, 151 Fed. 563, 81 C. C. A. 43; 176 Fed. 174.

Du Pont Guerrey and Thos. S. Felder, all of Macon, Ga., for appellants Huff and others.

Walter G. Smith, Andrew W. Lane, N. E. Harris, Walter A. Harris, T. E. Ryals, R. L. Anderson, Alexander Akerman, and J. E. Hall, all of Macon, Ga., opposed.

Before PARDEE, Circuit Judge, and CALL and GRUBB, District Judges.

GRUBB, District Judge. This is the fifth appeal in this case. The cause now comes before the court upon the appeal of a number of the parties from the decree of the court below distributing the proceeds of the various sales of the properties in the possession of the receiver, some made by consent of the parties, and some under the former decree of the court below, which was affirmed by this court upon a former appeal. The various appellants are the defendants, W. A. Huff, individually and as trustee for his children, Edison Huff and Mrs. Jennings, also Edison Huff and Mrs. Jennings, individually, the mayor and council of the city of Macon, the county of Bibb and its tax collectors, and the Scottish-American Mortgage Company, Limited. The grievances complained of by each appellant are different.

The defendants, W. A. Huff, Edison Huff, and Mrs. Jennings, present the following objections to the decree: (1) The defendant W. A. Huff complains of the allowance by the court below of a solicitor's fee to his former solicitor, Alexander Proudfit, out of the surplus, if any, coming to defendant W. A. Huff. (2) They all complain of the allowance by the court below of interest on the claims of the plaintiff, and the claims of the various interveners, including the claims for taxes and assessments. (3) They all complain that the decree failed to tax the costs of the temporary receivership against the plaintiffs, as directed by the opinion of this court on a former appeal. (4) They all complain that the costs accruing upon the contested paving assessment of the city of Macon were not taxed against the plaintiffs, wholly or partly. (5) They all complain that the plaintiffs were not required to pay the paving assessment, and not the fund, by reason of the tender made by plaintiffs upon the hearing of one of the former appeals in this court. (6) They all complain that the property known as the Armory property was not turned over to them, its sale having been determined not to be necessary to pay the defendant's debts. (7) The defendants Edison Huff and Mrs. Jennings complain that they were not accorded a hearing before the master or the court, in the court below, upon their claim to a seventh interest each in the proceeds of the sale of certain of the tracts of land sold under the former decree, and of a like interest in certain of the rents alleged to have been collected by the receivers from certain of the properties in their possession, in which the defendants Edison Huff and Mrs. Jennings each claimed an undivided interest.

The appellant the mayor and council of the city of Macon complains of the decree because by its terms the city was taxed with a proportionate part of the solicitor's fee allowed the plaintiffs by the court below, and because no interest was allowed upon the amount of its paving assessment beyond March 5, 1906, the date mentioned in the opinion of this court upon a former appeal.

The county of Bibb and its tax collectors complain of the decree because they were, by its terms, required to contribute their proportionate part to the solicitor's fee allowed to the plaintiff.

The Scottish-American Mortgage Company, as appellant, complains of the decree for the same reason.

[1] Considering first the first complaint of the defendant W. A. Huff, based upon the allowance of a counsel fee, fixed by the court

below and charged against the fund, to the former solicitor of the defendant:

The original bill of complaint was framed upon the theory that the defendant W. A. Huff was insolvent, and upon the consequent necessity of selling his assets for the purpose of paying his debts. We have no doubt of the power of a court of equity to protect the solicitor of an insolvent defendant, whose assets are being administered through the court, in the collection of a reasonable fee for the services to the insolvent, by charging it against the fund being administered. In the absence of such authority, the insolvent's solicitor would be without protection; the court having seized all the assets of the insolvent, and there being no other resort for the collection of the solicitor's fee than the fund in court. In this case it is not contended that the fee allowed was not reasonable. The property of the defendant sold for enough to pay the charges against him, by reason of its enhancement in value after the filing of the bill and after the determination of defendant's insolvency, so that there is an apparent surplus at the present time, which may be returned to the defendant, and out of which, if not consumed, he will be able to pay his solicitor. It is clear that the court would have no authority to fix and collect the fee of a solicitor out of a solvent defendant, with the ability to arrange payment therefor himself. In such a case the collection of the fee and its amount is a matter of voluntary contract between the defendant and his solicitor, with which the court will not interfere. As it is not necessary for the court to fix the fee of defendant's solicitor and make it a charge on the fund in court, until it is determined whether there will be a surplus to be returned to the defendant after the payment of all charges and costs, we do not think that the apparent insolvency of the defendant, at a previous stage of the proceedings, would justify the court's intervention in this respect, if, in fact, it turned out ultimately that there was a surplus for the defendant. In this case, if it turns out that there is a surplus coming to the defendant ample in amount to cover the fees of his solicitors, we think there should be no fee fixed by the court and charged against and collected from the fund. On the other hand, if upon the final distribution the apparent surplus now existing is exhausted, and the defendant is left without means to pay his solicitors, then we think the action of the court below in fixing a reasonable fee, and directing that it be charged against the fund, should be sustained.

[2] 2. The defendant W. A. Huff, individually and as trustee, also complains that interest was allowed by the court upon the claims, including the secured and unsecured claims, and those for taxes and paving, while the property of the defendant was held by the court for the purpose of being subjected to the payment of his debts, and especially after its sale and the deposit of the proceeds of the sales to the credit of the cause in depositories where they drew no interest.

It is true that in the settlement of insolvent estates, and as between creditors, who stand on an equal basis and none of whom will receive payment in full, as a matter of convenience, for the purpose of distribution, interest stops as to all upon the filing of the proceeding. But this principle does not prevail as against a creditor having a prior lien on specific property, in favor of one having no such lien. First Na-

tional Bank v. Ewing, 103 Fed. 168, 43 C. C. A. 150. Nor does it prevail where the estate of the alleged insolvent turns out to be ample to pay all his creditors in full of principal and interest. This is the holding of the Supreme Court in the recent case of American Iron & Steel Co. v. Seaboard R. R. Co., 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949, distinguishing such a case from that considered in the case of Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, cited and relied upon by the appellant. While the allowance of interest in favor of the creditors, while the fund out of which they might have been earlier paid, remained in the registry of the court drawing no interest, works a manifest hardship on the defendants, it is one to be attributed to a delay, partly at least, caused by the defendants, and is one which the court is without power to remedy. The former decree of sale of January 6, 1906, affirmed by this court, provided for the running of interest on some, if not all, of the claims, and is conclusive in that respect on the parties to the cause on this appeal. We think that interest was properly allowed on all the claims, including the tax claims and paving assessments, and should continue to run as against defendants until they are paid.

[3] 3. We think the plaintiffs should be taxed with the costs of the temporary receivership in this cause, which was held by us to have been improvidently granted, as was directed to be done in the opinion of this court upon the first appeal in the cause. Huff et al. v. Bidwell et al., 151 Fed. 563, 81 C. C. A. 43. While the mandate may have contained no specific direction as to these costs, concerning itself only with the costs in this court, we think the direction of the court contained in its opinion should have been followed in the court below, and that the amount of such costs, which have been separately ascertained, should be deducted from the amounts coming to the plaintiffs upon the final distribution.

[4] 4. The defendant W. A. Huff also complains that the costs, incurred in the litigation relating to the validity of the paving assessments of the city of Macon, were taxed against the fund, instead of wholly or partly against the plaintiffs. The contention in this respect is that the litigation was unsuccessful, that the plaintiffs tendered the amount of the assessment, after having litigated it at great expense, and without benefit to the defendants or their property.

We think the doubt concerning the validity of the assessment, in view of the then decisions of the Supreme Court of the United States with reference thereto, justified the plaintiffs in making the contest, though it turned out to be fruitless, and that the costs were properly charged against the fund. The duty of the plaintiffs to resist an illegal assessment is manifest.

5. The claim is also made, in this connection, that the tender by the plaintiffs of the amount of the paving assessment to the city of Macon in this court made it the duty of the plaintiffs to pay the amount personally and not out of the fund. The plaintiffs, in a sense, were the representatives of the fund being administered, and conducted the litigation with reference to the validity of the assessment in their representative capacity, and because of their duty to resist an illegal as-

essment, and in making the tender will be presumed to have intended to make it good out of the fund or property, for the benefit of which the litigation had been conducted by them. The opinion by this court upon appeal from the final decree of January 6, 1906, as we construe it, directs that it be so paid; the tender not having been accepted by the city of Macon. The court below properly charged the amount against the fund.

6. The defendants, W. A. Huff, Edison Huff, and Mrs. Jennings, also complain because the court failed to grant their application for the return of what is known as the Armory property; it having been reserved from sale because of the apparent sufficiency of the other property sold to pay the debts and charges without resort to it. This surplus, as found by the master, was approximately \$8,000, from which, at that time, was to be deducted only one-half of the master's fee, amounting to \$750. In view of the additional charges against the fund in the way of interest and costs, pending this appeal, and the possible further delay, and reduction of the fund due to it, and to any possible allowance out of it to the defendants Edison Huff and Mrs. Jennings for any interest they may establish in any of the lands sold, from which the fund was realized, we are not prepared to say that it clearly appears that the Armory property will not have to be resorted to in the future of the cause. It would seem to depend upon whether the parties proceed with the purpose of settling the few remaining questions economically and expeditiously, or in the way that seems to have been typical of the case up to this time. When, if at all, it does appear that any property seized by the court will not have to be resorted to for the purposes of the litigation, it should be promptly surrendered to the defendants by the court, leaving them to settle whatever interventions may then be pending with reference to the ownership of portions of the property in a forum of their selection, or that of the adverse claimants, who have intervened in this cause, to establish their claims.

7. The defendants Edison Huff and Mrs. Jennings also complain because they were not given a hearing either before the master or before the court upon their claim to an undivided two-sevenths interest in certain of the lands sold under the former decree of the court below. Before the decree of sale was passed, these defendants, who had been made parties defendant, either originally or theretofore, applied to the court for leave to file a cross-bill against their codefendant, the Scottish-American Mortgage Company, Limited, for the purpose of asserting a two-sevenths interest in certain of the lands, on which that company claimed a specific lien by a security deed, executed while the defendants were minors, and claimed to have been ratified by them on attaining their majority. The court below denied the defendants leave to file their cross-bill, in the same order expressly reserving their rights to assert their claim, if any they had, after sale, to the proceeds of the sale, in this language:

"It is further ordered that said respondents have leave to file appropriate proceedings and set up their rights, if any, to any portion of the fund, arising from the sale of the property, in which they claim an interest."

In his opinion, denying leave to file the cross-bill, the District Judge said:

"The court, perhaps, might be justified in holding that since, with full knowledge of their rights during the pendency of the main litigation, they failed by proper proceedings to seek the relief now claimed, they are barred from seeking it now. However, leave to file pleadings, appropriate to protect their alleged interests even after final decree, would seem under the circumstances within the discretionary power of a court of equity, and, as stated, such leave will be allowed."

In pursuance of this determination, the court below incorporated in the final decree a provision to the effect that:

"Nothing herein provided with reference to the payment of costs and expenses shall apply to the one-seventh interest to which Mattie J. C. Jennings, formerly Huff, and Edison Huff may be respectively entitled after the payment of the taxes against the properties in which they are respectively interested, and after the payment of any specific liens against such property; but the entire and unincumbered title to all of the properties shall be sold, and the said Mattie J. C. Jennings, formerly Huff, and the said Edison Huff, shall receive their respective shares of the proceeds without diminution, except for taxes and the payment of such specific liens as are chargeable against the properties in which they are interested."

In pursuance of this decree all the properties, except the Armory property, have been sold in their entirety and free from liens. No sales were made under the decree until the year 1909; it having been appealed from by the defendants. Prior to September 20, 1909, the defendants Edison Huff and Mrs. Jennings filed a petition for the allowance of a rule nisi, to be served on all parties to the cause, to show cause why the receivers should not be directed to pay to the defendants their respective interest in the funds in their hands. The application was denied by the court below on September 20, 1909, assigning as a reason that it should be postponed until the whole fund was ready for distribution. The bulk of the property was not sold until December, 1909. Again on June 24, 1911, the defendants Edison Huff and Mrs. Jennings filed another application to have paid to them their interest in the funds in the hands of the receivers, arising from the sales of lands and the rents, accruing to their claimed two-sevenths interests. On July 6, 1912, the said defendants filed with the master, to whom the matter of distribution had been referred for report, certain requests for the recognition of their two-sevenths interest in the funds in the hands of the receivers. The master's report allowed the defendants a two-sevenths interest in what is known as the Kimball House property and in two tracts of what is known as the Vinesville property, amounting to, after proper deductions for taxes, \$6,110.76, and reported to the court that under the then state of the pleadings there was no adjudication that Edison Huff and Mrs. Jennings were entitled to any further interest in the fund in court, assigning as a reason for his conclusion that the final decree, to which they were parties, recognized their two-sevenths interest in the proceeds of the Kimball House and two tracts of the Vinesville property, but disposed of all the other property of the defendant W. A. Huff, individually and as trustee, and the master also reported that the petition of Edison Huff and Mrs. Jennings for two-sevenths interest

was then pending before the court. The decree of distribution, from which the present appeal is taken, followed the master's report, and allowed the defendants Edison Huff and Mrs. Jennings an interest only in the Kimball House and the two tracts of the Vinesville property.

No reason is assigned in the decree of distribution for the court's decision. We do not think the effect of the final decree was to adjudicate that the defendants Edison Huff and Mrs. Jennings had no interest in any of the tracts sold, except the Kimball House and two Vinesville tracts. As we construe it, there was no adjudication that Edison Huff and Mrs. Jennings had any interest in any one of the tracts sold. That question was expressly reserved for determination until after the sale was had under the final decree both by the former orders of the court and by the provisions of the decree of sale itself, and defendants were given leave to then assert their claims to the proceeds of the sales. The final decree disposed of the interest of the defendants Edison Huff and Mrs. Jennings in the Kimball House and Vinesville properties, as well as it did in all the other tracts. Their interests in all the tracts were directed to be sold, without distinction, under that decree, and the proceeds to be distributed as directed. If the court should thereafter sustain the claims of the defendants Edison Huff and Mrs. Jennings as to any or all the tracts sold, the decree of sale reserved to them the right to be paid out of the proceeds of the sale. The adjudication of their interests in all the tracts, including the Kimball House and Vinesville tracts, was postponed for future determination. The lien of the plaintiff Bidwell was confined to a five-sevenths interest in the Kimball House tract, and, in directing the sale of this tract to satisfy Bidwell's lien, a five-sevenths interest only was directed to be sold, for the lien extended to no more. So with the two Vinesville tracts, a five-sevenths interest only in which were mortgaged to the defendant the Scottish-American Company. The order of sale to enforce the specific lien of the Scottish-American Company was limited to a five-sevenths interest, because the lien of that company covered no greater interest. When the decree came to order the sale for general distribution, it directed the sale of the entire interest in all the tracts, including the Kimball House and Vinesville tracts, and not merely an undivided five-sevenths interest in any. It was, therefore, neither an adjudication of a two-sevenths interest in the defendants Edison Huff and Mrs. Jennings to the Kimball House and Vinesville tracts, nor an adjudication of a lack of interest in those defendants in the remaining tracts, because they were by the decree of sale disposed of in their entirety. In fact, all the tracts were disposed of in their entirety, and in the absence of a clause reserving defendants' rights to assert their claim to the proceeds, they would have been concluded by it, as to their alleged interest in all the tracts, including the Kimball House and Vinesville tracts, an interest in which was allowed them by the court below.

The twentieth clause of the decree preserved their right to assert their interest in each tract sold, in spite of the sale, and, if established, to be paid their interest from the proceeds. Before and after the sale

they made application to the court and to the master for a hearing as to their interest in certain of the tracts, other than the three in which they were allowed an interest, and a hearing was denied them, both by the master and the court. If they have the interest they assert, it should not be subjected to pay the debts of their father, for which they are not responsible. Unless they are accorded an opportunity to establish their claim, it is clear this injustice may befall them. For this reason, we deem it imperative to remand the case, with directions to the court below to recommit to the master for the purpose of enabling the master to grant the defendants Edison Huff and Mrs. Jennings an opportunity to be heard upon the claims they assert to the fund in court. These same defendants, by virtue of their claimed two-sevenths interest in certain of the tracts sold, claim a like interest in the rents collected by the receivers from those tracts, and filed a petition for their allowance, and a request with the master to that effect. The master took no action upon their petition and request, and no allowance was made to the defendants on this account in the decree appealed from. The right of these defendants, arising from rents collected by the receivers, should be inquired into by the master also upon the recommittal of the case to him.

[5] Coming to the appeals of the appellants other than those already mentioned, their contention is that they were improperly made to contribute to the solicitor's fee allowed the plaintiffs; each being assessed for that purpose 10 per cent. of the amount of the claim. We think it clear that the claims for taxes and for the paving assessment should not have been made to contribute to this end. These claims were first liens on the respective tracts, and should have first been paid out of any available funds, as they currently accrued. We are unable to see how the tax claimants can be said to have benefited by the litigation. They did not stand on the basis of creditors, but, at least such as accrued after the filing of the bill, were part of the costs of the preservation of the property while in the custody of the court, and would have been properly treated as part of the costs of administration of the insolvent estate. We think they should all be paid, with interest from the time an execution could be legally issued for their collection, and until payment, and without deduction of any kind. We do not think that the recital of the amount due the city of Macon in the former opinion of this court, which included interest only till March 5, 1906, was intended to deprive the city of interest to the date of actual payment. It was undoubtedly contemplated by this court that the amount found due would be presently paid, as directed by the decree. As it has not yet been paid, we can see no reason for disallowing interest to the city, when it has been allowed to all other claimants, some of whose claims were subordinate to the city.

[8] Coming to the contention of the Scottish-American Mortgage Company that it should be relieved from contributing to the solicitor's fee allowed the plaintiffs, its original attitude in the litigation entitled it to such relief. It was brought into the litigation involuntarily, with the purpose of subjecting the equity of redemption in the lands on which it had a lien to the debts of the defendant W. A. Huff. Its lien

had been reduced to judgment in the state court, and the only thing left for it to do was to sell the property under execution issued upon its judgment. Its lien was prior to all other liens, except that for taxes. If this attitude had continued until the present stage of the litigation, it is clear that the involuntary contribution exacted of it would have been improper. Subsequently, however, it changed its involuntary attitude, and seems to have joined with the plaintiffs in seeking the redress prayed for in the bill of complaint. It was given relief on the final decree in the lower court, and on appeal from that decree to this court, while not made a party to the appeal, it was allowed to and did, through its solicitors, file a brief in support of the final decree and asking its affirmance. In this brief it was stated that it was "one of the principal parties to the cause, while pending in the Circuit Court," and "that it is vitally interested in upholding the decree rendered in the cause, having by far the largest interest in the subject-matter, and in the result of the litigation." It also recites that both appellants and itself were originally defendants in the cause, but that "in the course of the litigation appellants instituted a severe attack upon the Scottish-American Company, Limited, which was eventually determined against the appellants, and the issues raised were decreed in favor of the Scottish-American Mortgage Company, Limited." These recitals from its brief show an adoption, as its own, of the litigation into which it was originally brought unwillingly, perhaps, and the use of that litigation by it for its own benefit and purposes. It was benefited by the decree in two respects. It was enabled to convert its lien into money through it, without further proceedings in the state court, and it also was enabled to eliminate the claim of Edison Huff and Mrs. Jennings to an undivided two-sevenths interest in part of the lands upon which it had a lien. The extent of the benefit, as compared with that derived by the plaintiffs and other claimants and interveners, is difficult of determination; but, if reference is had to the brief referred to, its own estimate of that benefit would have justified the court below in calling upon it for at least an equal contribution with other parties to the litigation. Having adopted the litigation for its own purposes, we do not think the court was called upon to determine the amount of benefit derived, and so proportion the assessment, but might assume that it received an equal benefit with the other litigants.

The foregoing discussion disposes of the contentions of the various appellants. The conclusions reached by us require a reversal of the decree appealed from, for the purpose of allowing the defendants Edison Huff and Mrs. Jennings to assert their interests in the fund in court, arising out of their claims to undivided interests in some of the properties sold under the decree and in the rents collected therefrom by the receivers. A modification of the decree appealed from would have accomplished what we have decided, in other respects, and its affirmance, as modified. The reversal of the decree will necessarily cause a further delay in final distribution. The only remaining matter of contest, which requires the reversal of the decree and the remand of the cause, is largely one between the defendant W. A. Huff and his children, the defendants Edison Huff and Mrs. Jennings, who are rep-

resented on this appeal by the same counsel. This is true, at least, if, after allowance to the defendants Edison Huff and Mrs. Jennings, and after taking into consideration the Armory property, there still remains a surplus, after the payment of all debts and charges, equal to the undivided two-sevenths interest of the defendants Edison Huff and Mrs. Jennings. It would manifestly be to the interest of these two defendants, if this be the situation, not to insist upon the further litigation as to their claim to the two-sevenths interest, and thereby prevent the further delay and expense necessary in case of a remand of the case, and they would also thereby acquire the immediate possession of the Armory property. In that event the intervention of the representatives of Alexander Proudfit should be dismissed without prejudice and without costs, in view of the apparent insolvency of the defendant W. A. Huff when it was filed. The decree of distribution, on application to this court, could be modified in other respects in conformity with this opinion, and, as modified, affirmed, and the Armory property surrendered to the defendants, and the pending interventions affecting it dismissed, without prejudice to the rights of the interveners to assert their claims in independent proceedings, if so advised, and the surplus paid over to the defendants.

In order that the injury from the delay may be as little as possible, in the event the case is remanded, there should be a partial distribution of claims having priority, especially those for taxes and paving assessments and that of the Scottish-American Mortgage Company, Limited, as soon after the cause is remanded to the court below as is possible, and the cause should be promptly recommitted to the master to enable him to hear and to determine the claims of the defendants Edison Huff and Mrs. Jennings for their alleged interest in the corpus of certain of the properties, and in the rents thereof, and after such hearing, and the report of the master thereon, to be proceeded with by a decree distributing the remaining fund in conformity with the opinion of this court. The costs of this court, in view of the complicated situation presented by the many appeals from the decree and the discretion permitted the court in the matter of costs, to be taxed against the fund in the registry of the court, except those accruing upon the appeal of the Scottish-American Mortgage Company, Limited, which are to be taxed against the appellant; the decree appealed from having been affirmed, so far as affected by that appeal.

FITCH v. HUFF.

(Circuit Court of Appeals, Fourth Circuit. September 8, 1914.)

No. 1165.

1. COURTS (§ 307*) — JURISDICTION OF FEDERAL COURTS — DIVERSE CITIZENSHIP—CHANGE OF WIFE'S DOMICILE.

Where a citizen's wife has justifiably left him and removed to another state, with no intention of living elsewhere, she thereby acquires a domicile in such state, so that she may maintain an action in the federal courts against a citizen of the state in which her husband resides.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850-854; Dec. Dig. § 307.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. TRIAL (§ 260*)—REQUESTS TO CHARGE—INSTRUCTIONS GIVEN.

Refusal to submit instructions tendered is not error, where the charge given fairly and impartially states the law arising on the facts submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. ASSAULT AND BATTERY (§ 35*)—EVIDENCE.

In an action for assault and battery, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.*]

4. ASSAULT AND BATTERY (§ 42*)—ACTIONS—QUESTIONS FOR COURT AND JURY.

Where, in an action for injuries from assault, the evidence is such that reasonable men might reasonably differ as to the inferences to be drawn therefrom, it is the court's duty to submit the case to the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 56; Dec. Dig. § 42.*]

5. APPEAL AND ERROR (§ 1004*)—ALLOWANCE OF DAMAGES—REVIEW.

The Circuit Court of Appeals will not reverse a judgment for the trial court's refusal to grant a new trial because of alleged excessive damages, unless at first blush the damages appear to be outrageous and excessive, or it is apparent that some improper element was taken into account by the jury in determining the amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

6. ASSAULT AND BATTERY (§ 40*)—DAMAGES—EXCESSIVENESS.

Where a wife, estranged from her husband, went to his room at night, and after retiring was ordered to leave, and on her refusal was attacked by defendants, handcuffed, gagged, roughly handled, and finally carried, half-dressed, to jail, where she was further beaten and maltreated, a verdict allowing her \$6,000, which she voluntarily reduced to \$3,000, was not excessive.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.*]

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Action by Lillian M. Huff against R. L. Fitch and others. Judgment for plaintiff, and defendant Fitch brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Geo. S. Wallace, of Huntington, W. Va., for plaintiff in error.

H. C. Warth and J. W. Perry, both of Huntington, W. Va. (Warth & McCullough, of Huntington, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. Lillian M. Huff, plaintiff below, instituted suit in the District Court of the United States for the Southern District of West Virginia against Joe Wisener, R. L. Fitch, and O. MacAllister, defendants below, for the recovery of \$10,000. The declaration contains two counts; the first charge being assault, and the second one assault and false imprisonment.

A plea of not guilty was entered, the case tried before a jury, and a verdict rendered against Wisener and Fitch for \$6,000, and, before judgment was entered thereon, the plaintiff asked for a remitter and reduced the amount of said judgment to \$3,000, and upon said verdict, so reduced, a judgment was entered against the defendants, Wisener and Fitch, MacAllister not having been served with process, to which judgment defendants excepted, and the case comes here on writ of error.

Hereinafter the defendants in error will be referred to as plaintiff, and the plaintiff in error will be referred to as defendant; such being the respective positions the parties occupied in the court below.

The plaintiff was married at Columbus, Ohio, November 30, 1908. It appears from the testimony that her husband, some time prior to the institution of this action, had secured a divorce from his wife in the circuit court, but that the plaintiff had taken an appeal to the Supreme Court of West Virginia, which was pending at the commencement of this action. It also appears that the plaintiff and her husband were living separate and apart at the time the alleged injuries occurred, and that her husband was staying with one Bryant, in a room rented from the defendant Fitch. The plaintiff was introduced as a witness in the court below, and among other things testified as follows:

That her home was in Cleveland, Ohio, at the time of the institution of this suit; that she had lived there all her life, except the time she lived with her husband at Kimball; that the assault occurred in the lodging house owned by Mr. Fitch; that on the evening of September 25, 1910, she had gone to the room of her husband to see about getting a pass to Cleveland, and also to tell him that she was without proper clothing; that at times he would promise to grant her request, and then would refuse to do so; that he dragged her out in the hall by her feet, and told her that she could not stay there; that he said that she was crazy, and threatened her with a revolver, beat her with a brush, and again told her that she could not stay there; that he went out, saying that she could not stay there overnight; that while he was gone she undressed and went to bed, feeling that by so doing they would not put her out of the room; that she heard parties coming up the stairs, whereupon she pulled up the blanket and wrapped it around her, with her arms out; that her husband told her he would

throw her out anyway, and she was frightened and screamed, fearing that he would throw her out in her naked condition; that he went out and got Mr. Fitch, Joe Wisener, and Mr. MacAllister; that she had never seen Wisener; that she asked Mr. MacAllister if he were a policeman, and he said that he was not that day; that she asked them what right they had in there, telling them that she was undressed and in bed, and in her husband's room; that her husband said that he had rented it to another man, and upon inquiry Mr. Fitch said that her husband had rented the room from him, but that he had rented it in his name for another man, who occupied the room with him; that plaintiff replied that it was a trick, to which her husband responded, "I did it, so's to have a right here;" that they said they would put plaintiff out; that they picked her up and began to beat her; that Mr. Fitch held her by one hand and Wisener had her about the waist; that they pulled her out of bed, and bumped her up and down against the bed and the floor; that she ceased to struggle after that; that her husband became frightened when he saw how they treated her, and ran into the corner of the room; that MacAllister held her mouth shut with one hand and her nose with the other; that she said to them, "You know I've got a weak heart; do you want to kill me?" that she repeated this several times, but that they continued to beat her, during which time she continued to throw her head up in order to get fresh air; that Wisener laughed, and said that he thought it strange that she did not make a move to help herself; that then they got a towel and stuffed it in her mouth, and at last Wisener told some one to get a pair of handcuffs, and when they got them they handcuffed her arms behind her so far that they tore some of the tissue, and also tore all the cover off of her; that this was about 10 o'clock; that it was 8 o'clock when she went to her husband's room; that she begged them to let her go, telling them that if they would do so that she would dress and leave; that they said, "All right," but Mr. MacAllister said, "I will stay in the room," to which plaintiff replied, "No; I have nothing on but this blanket," whereupon MacAllister again said that he would stay, to which plaintiff responded, "Then I won't dress while you stay;" that MacAllister called her a bad name, and put the handcuffs back on her; that Mr. Fitch and Wisener helped hold her all the time; that MacAllister had her mouth shut when people, negroes and white men, were looking on; that they took her through the streets, with nothing but a sheet over her; that they said they were going to take her where she boarded, but instead of doing so they started to the jail with her; that she said to them, "I will certainly punish you for this if there is any law in West Virginia to do it; you can't treat a respectable woman like you are treating me;" that when they reached the jail Wisener threw her over into a corner; that he tried to assault her, whereupon she screamed, and went into hysterics, and called for her father; that she was nearly out of her mind; that she turned to Mr. Fitch and said to him, "Are you going to let these men do what they please?" to which he replied, "It's none of my business what they do;" that Fitch was with her all the time, and helped to beat her in the room; that they became fright-

ened when she began screaming again, and threw her in a cell; that in about 10 or 15 minutes she got the handcuffs off; that when they took the handcuffs off blood started out around where the chain pieces were placed; that she remained in jail until midnight, when they brought Mollie, the housekeeper where she was staying; that Mollie took her out and they went to the doctor's; that she was not screaming all the time, as it was possible to scream only once in a while, because they had her mouth shut. The witness further testified, in response to a question as to the effect to the treatment she had received, that:

"The tenth day I was suffering; even when I would move a finger, I could cry with the pain, I was so sore. Where Wisener had got hold of me, and pinched me so, the marks of his hands were on me."

George Whitt was called as a witness, and, among other things, testified as follows: That on the night in question he was standing at the west end of the telegraph office, and saw them carrying plaintiff down the street to the jail; could not tell who all were engaged in the effort of taking her to jail; that there were about four or five who had hold of her; that the plaintiff did not have any clothes on.

Mrs. Counts, wife of the assistant prosecuting attorney for the county of McDowell, testified that she made an examination of Mrs. Huff's body, and as a result found some bruises and blue marks, and "it seemed as though she had been handled rough"; that she was nervous and seemed to be sick.

Mrs. Mollie Price, another witness, testified that at the instance of her husband she went down to the jail, where she found Mrs. Huff in a nervous condition, crying and calling for witness; that at that time she did not have all her clothes on; that witness accompanied her to the doctor's office; that the next morning she saw the plaintiff's body; that it was bruised, and she saw prints of hands on her breast and shoulder.

The defense introduced F. H. Huff, husband of the plaintiff, who testified that he had been divorced by the circuit court, but that the case was still pending in the Supreme Court. The witness also testified that his wife came to the room that he was occupying and acted in a disorderly manner; that finally she pulled off her clothes and got in bed, and he told her that if she did not behave that he would have her arrested; that the officers came and put her clothes on her, and wrapped her in a sheet. Witness said that Mr. Fitch did not have anything to do with the matter; that after he had put her out in the hall she had tried to break the door down; and that in lunging against the door she injured one of her breasts.

Defendant Fitch was also introduced as a witness by the defense, and testified that he did not order the officers to arrest her, and that he had nothing to do with the arrest. He further testified that he did not aid them, either in the room or while on the way to the jail; that he at no time took hold of the plaintiff.

A number of other witnesses also testified as to the conduct of the plaintiff, stating, among other things, that she was screaming and acting in a violent manner. Some of these witnesses corroborated the

testimony of defendant Fitch to the effect that he did not assault the plaintiff or assist in taking her to the jail.

[1] There are several assignments of error, one of which is to the effect that the court below was without jurisdiction, in that the plaintiff's husband was a citizen and resident of the state of West Virginia at the time of the commencement of this action. The same question arose in the case of *Williamson v. Osenton*, 211 Fed. 1023, 127 C. C. A. 667, heard at the ——— term of this court. In that case the facts are almost identical with those of the case at bar. The question as to whether the court had jurisdiction in that case was certified to the Supreme Court of the United States, and the court answered the question propounded in the affirmative. 232 U. S. 619, 34 Sup. Ct. 442, 58 L. Ed. 758.

In view of the rule announced by the Supreme Court in that case, as well as the allegations contained in the complaint, we are of opinion that the lower court had jurisdiction to hear and determine the questions involved in this controversy.

[2] It is insisted by counsel for defendant that the court below erred in refusing to submit certain instructions to the jury. Even if the court erred in refusing to submit some of the instructions tendered, nevertheless the charge fairly and impartially states the law arising upon the facts submitted to the jury, and thus any error the court may have committed was harmless, and therefore not prejudicial to the rights of the defendants.

[3] It is also insisted that the judgment of the lower court should be reversed upon the theory that the verdict of the jury is against the weight of the evidence. There is doubt as to who was to blame for the controversy which arose between the plaintiff and her husband immediately preceding the time when the officers were called upon to arrest her, and while much of her conduct is not to be commended, yet at the same time we can understand how a nervous woman, who was being roughly treated by her husband, could become exasperated to such an extent as to render her incapable of acting in a sane manner. Even if she had been entirely responsible for the difficulty with her husband, still he would not have been justified in dragging her out of the room by the heels. He could have easily gone out of the room and left her alone, and this, it seems to us, is what one possessed of human feeling would have done under the circumstances. But, instead of doing so, he sent for the proprietor and the officers, which had the effect of attracting a number of people, many of whom became willing spectators to what, in our opinion, was one of the most disgraceful scenes ever enacted in a civilized community.

The conduct of the officers was simply inhuman and outrageous, and inexcusable from any viewpoint, and the fact that the defendant Fitch permitted them to take the plaintiff from his premises, at a time when she was in bed and doing nothing whatever to injure his property, clearly indicated that he was indifferent, to say the least of it, as to the treatment the plaintiff received at the hands of the officials.

The testimony of the plaintiff, if true, would entitle her to a verdict against the defendants. Her evidence is to the effect that the

defendant Fitch, not only ordered her to leave the room, but also aided the officers in committing the assault upon her, and assisted them in carrying her to jail. On the other hand, a number of the witnesses for the defendant, as we have stated, testified that Fitch did not take hold of plaintiff, or otherwise aid in removing her from the room occupied by her husband, thus corroborating the testimony of the defendant, Fitch.

[4] Thus it will be seen that there is a direct conflict of evidence; the evidence of the plaintiff tending to sustain the allegations of the complaint, while the evidence offered by the defendants tended to show that they were not guilty of the unlawful acts as alleged. It is well settled that where the evidence is such that reasonable men might reasonably differ as to the inferences to be drawn therefrom, it is the duty of the court to submit the same to the jury for its determination. In this instance, there being a conflict of evidence, the learned judge who heard the case in the court below submitted the same to the jury with proper instructions, and, the jury having found in favor of the plaintiff, we are of opinion that the assignment of error as respects this point is without merit.

[5] It is also insisted that the verdict in this instance is excessive. We do not deem it necessary to enter into an extended discussion of this phase of the case. The rule is well stated in the case of *Cleveland, etc., Railway Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1, wherein the court said:

"The general principle is well established that this court will not reverse the judgment of the court below in refusing to grant a new trial on the ground of excessive damages, unless, at first blush, the damages assessed appear to be outrageous and excessive, or it is apparent that some improper element was taken into account by the jury in determining the amount. *Michigan City v. Phillips* (1904) 163 Ind. 449, 71 N. E. 205; *Indianapolis St. R. Co. v. Schmidt* (1904) 163 Ind. 360, 71 N. E. 201; *Illinois Cent. R. Co. v. Cheek* (1899) 152 Ind. 663, 53 N. E. 641."

In the case of *Dimmey v. Railroad Co.*, 27 W. Va. 32, 55 Am. Rep. 292, the court of that state said:

If the jury is so satisfied, they are at liberty to allow "such damages as they shall deem a fair and just compensation" under the circumstances of each case. "They are not tied down to any precise rule."

Also the cases of *Southern Railway Co. v. Bennet*, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. 860, decided by the Supreme Court, Oct. Term, 1913, and *Herencia v. Guzman*, 219 U. S. 44, 31 Sup. Ct. 135, 55 L. Ed. 81, are to the same effect.

[6] In view of the evidence bearing upon the question of damages, we are of opinion that the verdict in this instance was not excessive, and the same should not, therefore, be disturbed.

For the reasons hereinbefore stated, the judgment of the lower court is affirmed.

Affirmed.

CHESAPEAKE & O. RY. CO. v. PROFFITT.

(Circuit Court of Appeals, Fourth Circuit. September 8, 1914.)

No. 1247.

1. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—ASSUMED RISK—RAILROADS.

Where plaintiff, while coupling the air hose between certain cars in the front of a freight train, which he had been ordered to assist in making up, was injured by the violent shoving or kicking of other cars against those left standing on the main track by a switching crew, in charge of an engine which was cutting out certain cars in the rear of the train in a negligent, noncustomary manner, plaintiff did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. APPEAL AND ERROR (§ 979*)—DAMAGES—EXCESSIVENESS—REVIEW.

The correction of an excessive verdict is a question for the trial court on a motion for a new trial, and will not be reviewed by the Circuit Court of Appeals on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by Claude L. Proffitt against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

David H. Leake, of Richmond, Va. (Walter Leake, of Richmond, Va., on the brief), for plaintiff in error.

C. V. Meredith and Hill Carter, both of Richmond, Va. (Meredith & Cocke, of Richmond, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action at law, instituted in the United States District Court for the Eastern District of Virginia by the defendant in error, plaintiff below, against plaintiff in error, defendant below, under the provisions of the "Employers' Liability Act" (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), for the recovery of \$20,000 damages on account of personal injuries sustained while the plaintiff below was endeavoring to couple the different sections of a train belonging to the defendant below. The jury returned a verdict in favor of the plaintiff for the sum of \$11,000, for which judgment was entered, and to which the plaintiff in error excepted, and the case comes here on writ of error.

Hereinafter the defendant in error will be referred to as plaintiff, and the plaintiff in error will be referred to as defendant; such being the respective positions these parties occupied in the court below.

It appears that in the nighttime of July 2, 1912, between 3 o'clock and half past 3, plaintiff, as a brakeman upon a train of the defendant, was required by the yardmaster of the defendant at the Gladstone yards

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to assist in making up a train to be started eastward. The train was a manifest train, or fast freight, and had come from some of the Western states. It was shown that when such a train reached Gladstone it was the custom, when necessary, to remove certain cars and to attach others. It was claimed by the defendant that, in taking out or pulling in cars which have to be taken out or put in, it was customary for the crew of such train to do such work on the front, and for the crew of the yard or switch engine to do the work needed on the other end of the train. It appears that the yardmaster thought that work was necessary on both ends of that train, and ordered the respective crews to do such work.

The train consisted of an engine and 35 or 40 cars. The yardmaster ordered the plaintiff to set out the second, third, and fourth cars from the engine and put them on track No. 6, and then to couple up to the train and they would be ready to go. The plaintiff, as ordered, cut out those cars and left them on track No. 6, and then came back upon the main track with the engine and the first car, which remained attached to the road engine. Then the engine and this car were backed to the other cars of the train left standing on the main track. The car attached to the engine and the first car left standing on the track were automatically coupled to each other, but it was necessary to couple the air hose by hand. To do that the plaintiff had to step within the tracks and attach the two ends of the air hose together. It appears from the testimony of plaintiff that before attempting to do that work he looked down the track, but saw no light nor any signal; that he was not aware of the fact that under the orders of the yardmaster the train had again been divided—that is, that 7 or 8 of the cars had been left standing still, and the rest, or 29 in number, had been carried away from them by a switch or yard engine, so that some other car or cars might be cut out; that he had no notice or warning that there was any danger of the cars which had been carried off by the switch engine being shoved or “kicked” by the yard engine against the cars left stationary on the track, and to which he had been ordered to couple the car attached to the road engine; that having no knowledge of such danger, and having looked down the track and seen no light nor signal, he stepped between the cars and hitched together the two ends of the air hose. While so at work he was struck by the car to which he had been ordered to couple the car attached to the engine; that he was knocked down and run over by the car which struck him, and his right arm was cut off close to the shoulder.

C. C. Perkins, a locomotive fireman for the defendant company, testified as a witness for plaintiff that he was on duty the morning plaintiff was hurt, that he was on the regular engine of the train, and that there were 2 or 3 cars between him and the place where plaintiff went in to connect the air hose. In response to a question as to the force of the impact, he said:

“The engine was backing and carrying 45 pounds and the injector was working. I was drinking a little coffee and eating lunch on the opposite side, and the lick was so severe it knocked me backward in the coal bin.”

He also testified that the engine was knocked forward a distance of 20 feet, and that it was as hard a lick as he had ever experienced on the

railroad; that the engine and tender had an independent brake, which was not on the cars; that this brake had a pressure of 45 pounds to the square inch; that it equalizes 70 pounds to the inch; that—

"the injector * * * was working at the time before the lick; that when the lick came it knocked the injector off and stopped it working; that he was leaning up against the cab of the engine in front of the coal bin, and was knocked across into the coal bin; that he stepped off the distance that the engine was knocked forward, after the lick; that he measured by the lantern and overalls on the rails and the distance the engine was standing, and that it was 20 feet; that he did not notice whether there were many cars behind him or not; that notwithstanding the brakes on the engine the engine was driven forward 20 feet."

C. J. Jackson, a witness for defendant, testified, among other things, that he had been a yard brakeman since 1890, and was acting as such at the time the plaintiff was injured; that when the cars were shoved in that he was standing on the head end—

"coming down to make the coupling; that he didn't make the coupling himself, but stayed there and saw it made; that the coupling was made automatically; that he didn't know how fast the cars were coming in there; that, when the cars got nearer together, they have a way of holding up the lamps to steady the engine by, and when they get still nearer they shut the engine off; and that was what they did that night."

W. C. Taylor, also a witness for defendant, who was yard conductor at the time of the accident, testified that he told plaintiff on the night the accident occurred to work on the rear, and also to do work at the head, and that he would work on the rear, so that they could get the work done. He also testified as follows:

"That 2 lumber cars had to be put out at the rear; that there were 29 or 30 cars pulled out by the people working under him; that they pulled out this cut of cars and threw out 1 or 2 local cars, and then shoved the remaining cars up, and coupled up the end car that was standing on another track; that there were 8 cars standing on the track; that Proffitt had taken out 3 from the front end and left 1 next to the engine, and that left 29; that the cars were shoved down very light, and the air working on them; that they were controlled by air; that the coupling as made was not a very hard lick, but about the same as usual; that he was with the yard engine doing work on the rear when they coupled up; that a man rode on the front end of the cut of cars that was coupled up; that his name was Charles Jackson, a colored brakeman, and that he had a lantern; that it was July; that it was not real dark, but that they had to work with a lantern to give the signals, and that signals could not be seen without a lamp; that the way it was done that night was customary then and now."

Upon being questioned as to whether he knew that the brakeman, Jackson, was on the front end of the car at the time the accident occurred, he said:

"I don't know it, but he got down and passed me ahead. We had to pull the cars back to do the shifting on the rear, and the front end started back; he got on the end car."

The testimony of this witness was contradicted by Carter, a witness for defendant, who testified that the first time he was apprised of the fact that anything had happened was after he went to get the caboose of the train. Further testifying as to the manner in which the train of cars was sent in, witness said:

"That the brakeman, Jackson, was on the engine; that McCoy had been following the engine all night, and he was the man supposed to follow the engine; that he didn't know where McCoy was at the time the switchman was acting in his place; that Charles Jackson was standing on the step, and that he or Conductor Taylor, one of them, gave the witness the signal for the slack for the pin, and he gave it and relieved his brake; that the cars started in at about 3 or 4 miles an hour; that Jackson pulled the pin, and Conductor Taylor was standing on the steps."

Counsel for defendant at this point stated to the court that witness had taken him by surprise, in that he had stated that Brakeman Jackson was on the engine. The witness then testified as follows:

"Q. Mr. Carter, you did not tell me that the other day, did you? A. I do not know that you asked me. Q. Mr. Carter, do you know who was on the front end of the train? A. On the front of the train, no, sir; I cut all the cars. Q. You do not know who was on the front? A. No, sir; I cannot tell. Q. He cut all the cars going down the track. You do not know whether McCoy was there, or not? A. No; I do not know whether he was. Q. You say it was Jackson on the engine? A. Mr. Leake, it was Jackson on the engine, and Conductor Taylor; where McCoy was I do not know. I want to give you all the information you want, and to do what is right."

J. A. Capell, a witness for defendant, among other things testified that:

"In shoving in a cut of cars, you come in so you can stop them with the engine; but kicking them in, if you started to do that, they come down. * * * In kicking cars, a man rides on the foremost car to control it with hand brakes."

There was other evidence offered by the plaintiff and defendant bearing upon the question as to whether the cars were moved in the customary manner on this occasion.

While such is the custom, it is insisted by counsel for plaintiff that the defendant failed to place a brakeman on the front end of the same, so as to control its speed and thus prevent what the evidence tends to show happened, to wit, the rear or detached portion of the train coming in contact with the stationary cars at such an unusual rate of speed as to cause the front cars and the engine to be pushed a distance of 20 feet, notwithstanding the fact that the engine brakes were applied with the maximum pressure.

While the colored brakeman, Jackson, testified that he rode on the front end of the cars that were being sent in, nevertheless he is contradicted by the witness Carter, also a witness for defendant, who says that the cars were not shoved in by the engine. He also testified that Jackson was on the steps of the pilot at the time the cars were kicked in, and therefore could not have been riding on the front end of the same at that time, as contended by defendant. This witness also contradicts the witness Taylor as to the manner in which the cars were sent in; Taylor having testified that the cars were pushed in by the engine. Thus it will be seen that there is a sharp conflict of evidence as to whether the cars were sent back in the customary way and at the usual rate of speed.

[1] It is earnestly insisted by counsel for defendant that the principal question is as to whether the rule in regard to what is known as "assumed risk" is applicable to the facts of this case. In other words, it is insisted that the plaintiff assumed the risk incident to his

employment, and that, therefore, he would not under the circumstances, be entitled to recover. It is well settled that, where one is employed as in this instance, he assumes the ordinary risk incident to the work in which he is engaged; but he does not assume such risk as may be due to the negligence of the defendant, its officers, agents or employes. The record filed in the Supreme Court in the case of *Pedersen v. Del., L., etc., R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, contained the charge of the court below, in which, among other things, that court, in referring to the question of assumed risks, said:

"Then there is another matter which has been called to my attention upon the part of the defendant company, namely a subject which is often properly called the assumption of risk upon the part of a servant. Without attempting to explain that at all in detail, I may perhaps give you one illustration, which will suffice to show what is meant by it. A servant undoubtedly takes the risk of his employment up to a certain point; and the more dangerous the employment, of course, the more risk he takes. The illustration I have in mind, which I think may be sufficient to explain it, is one of these structural iron workers. We know what a dangerous work that is. There are certain risks to that business which are obvious. It is an occupation that requires the greatest precautions. There is a risk of his foot slipping, there is risk that he may not catch hold properly, or with sufficient accuracy to maintain himself in a dangerous place, and there are many other dangers; but that will suffice. Now, he takes those risks; they are incident to his business, and he cannot carry on his business without them. He must take those risks or he cannot do the work, and therefore, when a man accepts employment as a worker upon that sort of a building, he necessarily takes the risk upon himself that he may be injured by some such action as that; but he does not take the risk of the negligence of his employer. Neither, in the case which we now have in hand, did the plaintiff, in accepting the employment in which he was engaged, take the risk that his employer, the railroad company, would be negligent in the duty which it owed to him. Therefore, as the only claim in this case with regard to injury is that it arose from the negligence of the employer, you can lay aside the subject of the assumption of risk on the part of the plaintiff. In my judgment, it has nothing to do with the present case."

While counsel for plaintiff concede that one assumes the ordinary risk incident to his employment, nevertheless they contend that in view of the evidence in the case at bar the question of "assumed risk" is not involved. It is also conceded that the detaching and attaching of cars in the manner adopted by the defendant, to wit, in working on both ends of the train in making it up, was customary at the point where this accident occurred; but it is contended that, had the care and caution ordinarily exercised by the company been used on the occasion in question, the accident would not have occurred, and that, therefore, the injuries sustained were due to the negligent and careless manner in which the cars were pushed or kicked against those that were being coupled by the plaintiff.

It is contended by counsel for defendant that the doctrine of "assumed risk" as applicable to common carriers has not been changed by the Employers' Liability Act, except in the one case—

"where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of an employe."

This question, according to our view, is not at issue in this controversy. It is not alleged in the declaration that the method employed by the defendant company of working a crew at each end of the train

was an act of negligence, nor is it alleged that the custom as respects the shoving together of cars at a reasonable rate of speed amounts to negligence on the part of the defendant. On the other hand, it is alleged that the cars were being—

“carelessly, negligently, and without giving him any notice, or warning, and without taking any precautions, backed by its engines * * * with great force and violence and at a great and improper speed.”

This is the question that was submitted to the jury with proper instructions as to the law bearing upon the same, and after due consideration the jury returned a verdict in favor of the plaintiff. This verdict implies that the customary manner of shoving or kicking the cars together was not observed on this occasion, and the establishment of this fact clearly distinguishes the case at bar from the cases relied upon by the defendant, wherein it is held that where one is employed he assumes the usual and ordinary risk incident to such employment. Such being the case, we do not deem it necessary to enter into a discussion of the effect of section 4 of the Employers' Liability Act.

[2] It is further insisted that the court erred in denying a motion to set aside the verdict, based upon the ground that it was excessive. In the case of *North Pacific R. R. Co. v. Charless*, 51 Fed. 562, 2 C. C. A. 380, syllabus 7 is in the following language:

“The correction of an excessive verdict is a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the federal appellate courts.”

The cases of *Erie R. R. Co. v. Winter*, 143 U. S. 61, 12 Sup. Ct. 356, 36 L. Ed. 71, and of *Fitch v. Huff*, 218 Fed. 17, 134 C. C. A. 31, decided at this term of the court, and the cases cited therein, are to the same effect.

However, it is insisted that the court below erred in not giving certain instructions that were tendered by the defendant. A careful consideration of the assignments of error which relate to the judge's charge, in view of the facts of this particular case, impels us to the conclusion that the case was fairly and impartially submitted to the jury, thus affording them an opportunity to pass upon the real question upon which this case turns, and they, after weighing the evidence, as we have stated, reached the conclusion that the cars were negligently and carelessly pushed or kicked in at an unusual and higher rate of speed than is customary in such cases.

For the reasons stated, we are of opinion that the judgment of the lower court should be affirmed.

Affirmed.

HECKERT v. CENTRAL DISTRICT & PRINTING TELEGRAPH CO.

(Circuit Court of Appeals, Fourth Circuit. September 8, 1914.)

No. 1243.

1. MASTER AND SERVANT (§ 264*) — INJURIES TO SERVANT — NEGLIGENCE — PLEADING—VARIANCE.

Where, in an action for injuries to a lineman by coming in contact with a charged span wire leading from a pole, the declaration alleged that defendant negligently permitted the span wire to be attached to the pole "without a proper circuit breaker, or breakers, thereon," the negligence alleged presented two aspects, to wit, that the span wire was not equipped with a circuit breaker, and that it was not equipped with a proper circuit breaker; and there being evidence to sustain both of such allegations, the court erred in directing a verdict for defendant on the ground that the declaration charged that there was no current breaker and that the evidence showed the contrary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—NEGLIGENCE—ISSUES AND PROOF.

In an action for injuries to a servant, plaintiff is only required to substantially show that the defendant has been guilty of the negligence alleged in the declaration, and is not required to prove that the negligent conduct was precisely as alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

3. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMED RISK.

Where, in an action for injuries to a lineman by coming in contact with a charged span wire, it was shown that defendant had failed to furnish plaintiff with a suitable place to work, but permitted the span wire to remain in close contact with a telephone wire, so as to render it liable to be heavily charged with a high voltage current, thus rendering it almost a physical impossibility for one to perform the services required of plaintiff without being seriously injured, and that to one looking at the pole from the ground the insulation appeared good, plaintiff did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Action by Ernest C. Heckert against the Central District & Printing Telegraph Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 206 Fed. 653, 124 C. C. A. 441.

Hugh Warder, of Grafton, W. Va. (Warder & Robinson, of Grafton, W. Va., on the brief), for plaintiff in error.

W. S. Meredith, of Fairmont, W. Va., for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action at law, instituted by Ernest C. Heckert, plaintiff in error, hereinafter designated as plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff, against the Central District & Printing Telegraph Company, defendant in error, hereinafter designated as defendant, in the District Court of the United States for the Northern District of West Virginia. The defendant demurred to the declaration, and the District Court sustained the demurrer, dismissed the action, and rendered judgment against the plaintiff. The plaintiff excepted to the ruling of the lower court, and the case came here on writ of error, and on July 11, 1913, this court reversed the judgment of the District Court, and remanded the cause for further proceedings in accordance with the views expressed in the opinion filed by the court at that time.

After the case had been remanded, the defendant entered the plea of the general issue "not guilty," and issue was joined thereon. A jury trial was had, and after the evidence on behalf of both parties had been introduced the plaintiff requested the court to give the jury five several instructions, each of which the court refused, and the plaintiff excepted. Thereupon the defendant requested the jury to return a verdict for defendant, which motion was granted, and to which the plaintiff excepted, and the case comes here on writ of error.

The facts upon which this action is based are to be found in the opinion of this court when the case was heard before. 206 Fed. 653, 124 C. C. A. 441.

[1] The first question that arises is as to whether the court below erred in directing the verdict in favor of the defendant. The learned judge who tried this case in the court below held that there was a variance between the declaration and the evidence, in that the declaration charged that there was no current breaker, and that the evidence showed that there was a current breaker. It should be borne in mind that the declaration charges that the defendant carelessly and negligently permitted the span wire to be attached to the said pole *without a proper circuit breaker, or breakers, thereon*. Among other things, it is charged in the declaration:

"That it was then and there the duty of said defendant to render said telephone pole a safe place upon which to work, by removing, or causing to be removed, said span wire from said telephone pole, or by having proper circuit breaker, or breakers, installed upon said span wire from said telephone pole, or by having proper circuit breaker, or breakers, installed upon said span wire between the said telephone pole of said defendant company and the point where said span wire was crossed by said wires of said Grafton Gas & Electric Light Company, which latter wires were conveying high currents of electricity, dangerous to human life; that the said defendant company wholly disregarded its duty in that behalf, and it then and there suffered and permitted, and for a great space of time before that, to wit, for the space of about nine months, did suffer and permit said span wire to remain attached to said telephone pole in said condition as aforesaid."

And further:

"In consequence of the negligence and carelessness of the defendant in permitting said span wire to be so attached to said pole, or to be attached without proper circuit breaker or breakers, thereon, as aforesaid, he, the plaintiff, came in contact with said span wire," etc.

Thus it will be seen that it was not only alleged in the declaration that the span wire was not equipped with a circuit breaker, but it is also alleged that it was not equipped with a *proper circuit breaker*.

Therefore the negligence as alleged is presented in two aspects, to wit: (a) That the span wire was not equipped with a circuit breaker; (b) that it was not equipped with a proper circuit breaker. There was evidence tending to show that no circuit breaker was attached to the span wire, while other witnesses testified that a circuit breaker or insulator was attached thereto. The fact that the plaintiff was injured by a wire which was heavily charged with electricity would justify the inference that sufficient means had not been employed for the purpose of properly insulating the span wire—the only means by which the accident could have been avoided.

The plaintiff, testifying in his own behalf, among other things, stated that he was injured in the course of his employment and while engaged in the general running of wires, splicing wires, making installations, installing 'phones, stringing wires, etc.; that on the occasion in question he started up the pole, but never thought of any danger; that he caught hold of a "messenger" and his foot came in contact with the span wire and that was all he knew; that the pole was classed as a 45-foot pole, and was perhaps 4 or 5 feet in the ground; that the telephone wires were strung at the top of the pole and the span wire with which his foot came in contact must have been 4 or 5 feet below the top, below the telephone wires and the messenger wire; that the span wire was no part of the telephone system, its object being to support an arc light belonging to the city of Grafton, which maintains its own electric lights; it led across to another city pole, which was practically opposite on the other side of the street, in a northwesterly direction from the telephone pole; that the telephone pole belonged to the defendant, and at the top there were cross-arms on which were fastened wires belonging to the defendant; that he never saw any circuit breaker on the span wire; that if there was one he did not see it. He also testified as to the various operations performed upon himself in consequence of the injury he sustained.

The witness further testified that as a lineman he was required to do all the work hereinbefore mentioned, and to do any other kind of work connected with the business; that he climbed the pole in question in the same manner that he had always performed similar work, and that he supposed that he was perfectly safe, inasmuch as he was performing the work in the usual manner; that he had no knowledge whatever of the fact that the span wire was charged with electricity, nor did he have any knowledge of a defect in the insulation of the span wire.

The witness Woodward, also a lineman for the defendant company, testified that he and the plaintiff were working together on the day plaintiff was injured. Among other things he stated that he had no knowledge that the wire of the Grafton Gas & Electric Company was in contact with the span wire at the time plaintiff was injured; that he did not observe the condition of the wire until after the accident had happened; that he did not see any circuit breaker on the span wire; that the usual method for protecting employes or others in climbing a pole would have been a circuit breaker attached to the span wire at a distance of from 2½ to 3 feet from the pole; that after plaintiff was injured he went to his rescue, and discovered that the wire was touch-

ing the service wire of the Grafton Gas & Electric Light Company, and that it was that which had caused plaintiff to be injured. The witness, being recalled, stated that when he started up the telephone pole he observed smoke coming from plaintiff's hands; that the span wire was charged around the bolt that went through the pole at the point where plaintiff was standing, and that he noticed this after the span wire had been removed.

F. A. Ross, a witness for plaintiff and superintendent of water and lights of the city of Grafton, testified that he and others put up the span wire; that they placed the pole in front of the fruit stand, and then went up the pole a distance of 15 or 20 feet, and drilled a hole in the same; that they had "a temporary insulation—I suppose the bolt in it was 20 inches long, from 18 to 20 inches long, and there was a flat piece of iron made perfectly square, and we had to loop the rope through—goes through the insulator and makes what we call a tie, and we put one of them in each pole, but that was only a temporary arrangement." Being further cross-examined, witness, in response to the question as to whether it was temporary or not, and as to whether there was an insulator on the span wire, said that it was an awful large pole, and he did not suppose that it would throw it out over 3 or 4 inches from the pole; that the insulator on the span wire was not much farther than 3 or 4 inches away from the pole. Witness further testified that the instrument put there was "a circuit breaker in a way. It would have kept any electricity from going through and burning that pole, only it wasn't out—"

At this point counsel for defendant interposed an objection, and insisted that under the pleadings plaintiff was not entitled to show that it was an improper circuit breaker. Counsel for plaintiff also asked if it would have protected a lineman in going up the pole, to which counsel for defendant objected, whereupon the court said:

"I will sustain the objection. An allegation of the declaration is that there was no circuit breaker."

Witness Warder was introduced, and, among other things, stated that he was a lamp cleaner for the city of Grafton; that he had been in the employ of the city since 1910; that the span wire had been installed about a year, or perhaps about two years, before the accident occurred. Counsel for defendant, among other things, asked the witness as to whether he had installed a circuit breaker on the span wire, and the witness in response said:

"Yes; there was a circuit breaker or insulator. I don't know which you would term it."

The court then stated that it would modify its ruling and permit defendant to inquire as to the character of the circuit breaker, whereupon witness Ross was recalled and testified as follows:

"Q. Was this circuit breaker calculated under any ordinary conditions to protect that line from being charged? A. You mean the span wire? Q. Yes; I mean the span wire. A. Why, no; it was only put there to protect the pole against burning, in case of the wire becoming charged. Q. Well, would it prevent the line itself from being charged? A. No, sir. Q. Why not? A. Because for the distance between the two, if any live wire would get on the span wire, it would charge it anyway. Q. You mean to say that if a live

wire would strike this line anywhere except on this circuit breaker it would charge it? A. Yes, sir. Q. Then the circuit breaker was wholly useless? A. It is not a circuit breaker. It is simply an insulator, and it was put in there—the insulator was put in there—to protect that pole from being burned in case the line would happen to touch this span wire and charge it.”

Thus it will be seen that the evidence tended to show that the span wire *was not equipped with a proper circuit breaker*, if indeed a circuit breaker was attached thereto.

While the evidence of other witnesses tended to show that an insulator, or what they called a “circuit breaker,” was attached, yet there was also evidence tending to show that, even if a circuit breaker had been attached at the point where it is shown that this insulator or circuit breaker was attached, it would not have been sufficient to have protected the span wire, and thus to have rendered it incapable of injuring the plaintiff.

[2] As we have already stated, the court based its action in directing a verdict for the defendant upon the ground that there was a fatal variance between the evidence and the allegation contained in the declaration, to wit: That there was “no circuit breaker.” We are of opinion that the plaintiff was only required to substantially show that the defendant was guilty of the acts of negligence alleged in the declaration, and that he was not required to show that the negligent conduct of the defendant was precisely as alleged in the declaration.

In the case of *Deputy v. Kimmell*, 80 S. E. 920, recently decided by the Supreme Court of West Virginia, the court, among other things, said:

“In order to recover, it is unnecessary for plaintiff to prove literally the acts of negligence averred in the declaration. If the allegations are substantially proved, this is sufficient. Hence an instruction, in any action of case for personal injury, which tells the jury that it cannot find for plaintiff, unless it believes from the evidence that the defendant was negligent in the very manner set out in the declaration, is erroneous, and should be refused.”

However, as we have stated, the evidence as to whether there was a circuit breaker is conflicting. The plaintiff says that he saw no circuit breaker, and in this respect he is corroborated by witnesses Woodward and McFarland. The witness Ross, whose testimony we have quoted at some length, states positively that there was no circuit breaker, and that he only put in an insulator so as to protect the pole in the event that the line should happen to touch the span wire.

While it may be properly said that the evidence of the plaintiff is negative in its character, yet the witness Ross, who assisted in attaching the instrument to the wire, stated that it was not a circuit breaker. Witness Bennett testified that there was either a circuit breaker or an insulator. However, the evidence of this witness was excluded by the court upon the theory that he had not qualified as an expert, which would render his testimony as to whether there was a proper circuit breaker of little value, to say the least of it.

The witness Charles Morgina, who testified on behalf of the defendant, did not say that there was a circuit breaker; he described it as a porcelain knob attached 3 or 4 inches distant from the pole.

There was evidence tending to show that an instrument of this kind

attached 3 or 4 inches from the pole was practically worthless; that it was attached simply for the purpose of keeping the pole from burning. Therefore there was a direct conflict of evidence as to whether there was a circuit breaker, while, on the other hand, the evidence that there was not a "proper circuit breaker" tends strongly to establish the contention of the plaintiff.

As we have already said, it follows that upon the pleadings and the evidence there were two questions of fact, to wit: (1) As to whether there was a circuit breaker; and (2) as to whether there was a proper circuit breaker—and it was the province of the jury to determine as to whether the plaintiff was correct in his contention as to either of those questions.

It is well settled that where the pleadings and evidence are such that more than one inference may be drawn therefrom, and about which reasonable men might reasonably differ, it is the duty of the court to submit the same to the jury for their determination. Therefore the action of the court in refusing to grant the prayers for instructions which relate to this point was erroneous.

The court below also held that under the circumstances of this case the plaintiff assumed the risks incident to his employment, and was negligent in climbing the pole "and in coming in contact with the live wire, charged by contact with the other company's wire, and which contact, apparent to any one, could have been seen by the exercise of ordinary care." The evidence, as we have already stated, tends to show that the plaintiff had no knowledge whatever of the fact that the span wire was charged with electricity. It further appears that he was engaged in the performance of a duty which must necessarily have been performed in the manner in which he attempted to perform it on this occasion, and the plaintiff is sustained as to this contention by the testimony of other witnesses who were acquainted with the situation at the time he was injured.

[3] It was the duty of the defendant to furnish a safe and suitable place for the plaintiff in which to work. It is obvious that to permit a span wire to remain in close contact with the telephone wire, as in this instance, would render the same liable to be heavily charged with an electric current, thus rendering it almost a physical impossibility for one to perform such services as were required of plaintiff without being seriously injured; therefore, as was stated in a former opinion of this court, if the defendant carelessly and negligently failed to perform the duty he owed plaintiff in this respect, that he could not be deemed to have assumed such risk, inasmuch as the same would be due to the negligence of the defendant. *Chesapeake & Ohio Railway Co. v. Proffitt*, 218 Fed. 23, 134 C. C. A. 37, decided at this term of the court, and the case therein cited. Of course, if the danger was open and obvious, and was known to the plaintiff, or could have been known by the exercise of due diligence, then he would not be entitled to recover.

The learned judge who heard this case in the court below, in the language which we have just quoted, stated that the "contact was apparent to any one, and could have been seen by the exercise of due diligence." We fail to find any evidence which shows that the dangerous condition of the wire was open and obvious. It further appears, from the testi-

mony offered by the defendant, that to one looking at the pole from the ground the insulation appeared to be good. In the case of *Humphreys v. Raleigh Coal & Coke Co.*, 80 S. E. 805, the Supreme Court of Appeals of West Virginia very aptly said:

"The silent, latent, deadly electrical power of a live wire, giving no warning of its presence through hearing, sight, or other faculty, renders it so highly dangerous that its use carries an extremely high degree of care. It is the concealment of its force inherent in its very nature that makes it so dangerous. Its presence is undiscoverable by any of the five senses, other than that of feeling, and to discover by that is to place yourself within the deadly power of the thing itself, and suffer the injury, for there is a seizure in the very instant of contact. Therefore to use it at all by means of an un-insulated wire or other appliance, where the user knows any person may for any reason come in contact with it, without knowledge of the use to which the appliance is devoted, is tantamount to the placing of a deadly mine or trap, however free the user may be from wrongful intent. *Runyan v. Water & Light Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Thornburg v. Railroad Co.*, 65 W. Va. 379, 64 S. E. 358; *Bice v. Electrical Co.*, 62 W. Va. 685, 59 S. E. 626; *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217; *Snyder v. Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922."

The evidence bearing upon this point also raised a question which should have been presented to the jury. In the case of *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849, 24 L. R. A. 717, 44 Am. St. Rep. 945, the court in discussing this phase of the question said:

"Where there is any doubt whether the employé was acquainted, or ought to have been acquainted, with the risk, the determination of the question is necessarily with the jury."

Also in the case of *Southern Bell, etc., Co. v. Clements*, 98 Va. 1, 34 S. E. 951, the Supreme Court of that state said:

"Whether a lineman is guilty of contributory negligence in climbing a [telephone] pole which has been condemned and is plainly so marked, but the dangerous condition of which is not obvious, is a question of fact, to be determined by the jury from all the circumstances of the particular case, under proper instructions from the court."

Also in the case of *Settle v. St. Louis & S. R. R. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633, the court said:

"Unless the defect" in machinery or apparatus "is so manifestly and glaringly hazardous that the court could declare, as a matter of law, that a person of ordinary prudence would not use it," the question should be submitted to the jury.

The court having failed to submit this question, as well as the other questions to which we have referred, to the jury for its consideration, it follows that the judgment of the lower court should be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

Reversed.

LOUIE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 16, 1914.)

No. 2403.

1. CRIMINAL LAW (§ 200*)—FORMER ACQUITTAL—IDENTITY OF OFFENSES—CONSPIRACY—AIDING AND ABETTING.

By a prior indictment, on which accused was acquitted, he was charged with conspiring with R. to import opium into the United States for smoking; the indictment charging as an overt act that R., after the formation of the conspiracy and during its continuance, to effect the object thereof, on March 5, 1913, did have in possession, conceal, and fraudulently transport into the United States 64 five-tael tins of opium prepared for smoking, contrary to law, etc. By a subsequent indictment against accused, it was charged that on March 5, 1913, R. committed the offense of receiving, concealing, buying, selling, and facilitating the transportation of the same 64 five-tael tins of opium for smoking after the same had been imported into the United States contrary to law, which in effect was the same overt act charged against R. in the first indictment, and then alleged that accused aided and abetted R. in the commission of that offense. *Held*, that there was no identity between the offenses charged in the two indictments, and hence that accused's acquittal under the former indictment was no bar to his conviction under the latter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 347, 386-409; Dec. Dig. § 200.*]

2. CRIMINAL LAW (§ 772*)—INSTRUCTIONS—PRIOR ACQUITTAL.

Accused having previously been acquitted of conspiracy to import opium into the United States contrary to law, on the trial of an indictment for aiding and abetting another to import the same opium into the United States, the court charged that the jury should separate any plan or combination of the men that was charged in the indictment for conspiracy, of which accused had been acquitted, from the charge in question, that accused had aided R. in receiving the opium, and that unless accused's conversations with R. amounted to more than a general keeping in touch with him, or a general agreement, and unless accused knowingly gave him knowledge of where he could get opium, then the jury should not consider it, and if they had a reasonable doubt they should not consider it as supporting the charge of aiding, because he, having been acquitted, was entitled to that reasonable doubt, was too favorable to accused, and not objectionable by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812-1814, 1816, 1817; Dec. Dig. § 772.*]

3. CRIMINAL LAW (§ 384*)—APPEAL—RULINGS ON EVIDENCE—REVIEW.

Where a criminal prosecution rests, in part at least, on circumstantial evidence, the court's rulings admitting offered evidence of that character will be sustained, if it tends even remotely to establish the ultimate fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.*]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Charlie Louie was indicted for violating Act Cong. Feb. 9, 1909, c. 100, 35 Stat. 614 (Comp. St. 1913, § 8801), entitled "An act to prohibit the importation and use of opium for other than medicinal purposes." Defendant having interposed a plea of former acquittal to certain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

counts of the indictment, including the second, the United States demurred to the plea, and, the demurrer being sustained, he was found guilty on count 2, and he brings error. Affirmed.

By an indictment filed in the court below on April 2, 1913, the defendant and one James A. Ralston were jointly charged with a violation of section 5440 of the Revised Statutes of the United States (section 37 of the Criminal Code; Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]). That section provides as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be liable to penalty of not less than one thousand dollars and not more than ten thousand dollars, or imprisonment not more than two years."

It was alleged in the indictment that on the 1st day of September, 1912, the defendants conspired to commit an offense against the United States, "by corruptly, willfully, knowingly, and fraudulently agreeing together fraudulently and knowingly to import and bring into the United States, as aforesaid, opium prepared for smoking, and to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such opium, knowing the same to have been fraudulently imported, contrary to law as aforesaid." The offense which it was charged the defendants conspired to commit was a violation of section 3082 of the Revised Statutes (Comp. St. 1913, § 5785), which provides as follows: "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The subject-matter of the conspiracy, the objects thereof, and the means by which such objects were to be effected were fully set forth in the indictment. From the allegations thereof it appeared that the principal object of the conspiracy was that the defendant Ralston should go into the Dominion of Canada and there receive opium for smoking purposes; that he should bring such opium into the United States, and that the defendant Louie should receive it, and should conceal, transport, and sell the same; that the defendant Louie should furnish Ralston with money with which to pay the expenses of the trip into Canada, and with which to purchase the opium; and that the defendant Louie should pay to Ralston certain sums of money as his reward and compensation from the proceeds arising from the sale of the opium, the balance of such proceeds to be retained by Louie. It was further alleged in the indictment that after the formation of the conspiracy, and during its continuance, to wit, on March 5, 1913, to further effect the object of the conspiracy, Ralston had in his possession and concealed in the city of Seattle, Wash., and fraudulently and knowingly transported and facilitated in the transportation, and aided and assisted in transporting, 64 five-*tael* tins of opium prepared for smoking; Ralston then and there well knowing that such opium had theretofore been imported and brought into the United States contrary to law. This last charge is the overt act required by the statute to complete the offense of conspiracy. Various other acts on the part of the defendant Louie and Ralston, alleged to have been performed in furtherance of the conspiracy, were set forth in the indictment. They are immaterial to any issue in the present case. Upon the trial of the case the defendant Louie was found not guilty by the jury, and the judgment of the court entered thereon has not been reversed, and is still in full force and effect.

On September 12, 1913, a second indictment was filed in the court below against the defendant Louie and James A. Ralston for violation of the act of February 6, 1909, entitled "An act to prohibit the importation and use of opium for other than medicinal purposes." 35 Stat. 614. The indictment was in eight counts. The second count, which is the only one with which we are concerned, was as follows: "On or about the 5th day of March, 1913, one James A. Ralston, within the Northern division of the Western district of Washington, and within the jurisdiction of this court, did willfully, knowingly, unlawfully, and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of certain merchandise of foreign manufacture, to wit, sixty-four (64) five-*tael* tins of opium, prepared for smoking, after said opium had been imported into the United States contrary to law, and the said opium, prior to the time when the said James A. Ralston did receive, buy, sell, and facilitate the transportation, concealment, and sale thereof, as aforesaid, had been willfully, knowingly, unlawfully, and feloniously imported into the United States, into the Northern division of the Western district of Washington, contrary to law, from some foreign country to the grand jurors unknown, by some person or persons to the grand jurors unknown, he, the said James A. Ralston, then and there well knowing that the same had been imported as aforesaid into the United States contrary to law; * * * that Charlie Louie did then and there, on or about said 5th day of March, 1913, willfully, knowingly, unlawfully, and feloniously aid, abet, counsel, command, induce and procure the said James A. Ralston, as aforesaid, willfully, knowingly, unlawfully, and feloniously to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of said opium, prepared as aforesaid, after the same had been imported contrary to law, as aforesaid, they, the said James A. Ralston and said Charlie Louie, then and there well knowing that the same had been imported, as aforesaid, into the United States contrary to law. * * *"

The charge that the defendant Louie aided, abetted, counseled, commanded, induced, and procured Ralston to commit the offense charged against him is based upon section 332 of the Criminal Code, approved March 4, 1909 (35 Stat. 1152, c. 321 [Comp. St. 1913, § 10506]), which provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The defendant Louie interposed a plea of former acquittal to certain counts of the indictment, including the second count, based upon the indictment filed against him on April 2, 1913, and the subsequent acquittal by the jury thereunder. The United States demurred to the plea of former acquittal, and the demurrer was sustained. Louie was found guilty of count 2, and not guilty of the other counts.

Vanderveer & Cummings, of Seattle, Wash., for plaintiff in error.
Clay Allen, U. S. Atty., and Albert Moodie, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. It is assigned as error that the court sustained the demurrer to the defendant's plea of former acquittal. The objection to the order of the court presents the question whether upon the face of the record it appears as matter of law that the offense charged in the second count of the second indictment, upon which the plaintiff in error was tried and convicted, was the same offense as that charged in the first indictment, upon which he had been previously tried and acquitted. The contention is that the offense which it was charged the defendants Louie and Ralston conspired to commit, as set forth in the first indict-

ment, is identical in substance and effect with the offense which it is charged Louie aided and abetted Ralston to commit as set forth in the second count of the second indictment.

The question has two aspects. It is charged in the first indictment that in September, 1912, Ralston and Louie conspired, combined, and confederated together to import and bring into the United States opium prepared for smoking, and to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such opium, knowing the same to have been fraudulently imported contrary to law; and as an overt act entering into that conspiracy it is charged that the defendant Ralston, after the formation of the conspiracy and during its continuance, and to effect the object thereof, did, on the 5th day of March, 1913, have in possession and conceal, and fraudulently and knowingly transport and facilitate the transportation of 64 five-tael tins of opium prepared for smoking, knowing that such opium had been fraudulently and knowingly imported and brought into the United States contrary to law. In the second count of the second indictment it is charged that on the 5th day of March, 1913 (the date of the overt act in the first indictment), the defendant Ralston committed the offense of receiving, concealing, buying, selling, and facilitating the transportation of 64 five-tael tins of opium prepared for smoking, after the same had been imported into the United States contrary to law. This is in effect the overt act charged against Ralston in the first indictment. It is further charged that the defendant Louie aided and abetted Ralston in the commission of the offense. In the first indictment, Louie is not charged as an actor in the commission of the offense constituting the overt act. That act is charged in the indictment to have been committed by Ralston alone; while in the second indictment Louie is charged with having aided and abetted Ralston in committing the offense.

There is plainly a lack of identity in the two indictments with respect to this charge as against the defendant Louie. But plaintiff in error contends, further, that the charge that Louie aided and abetted Ralston to commit the offense described in the second indictment is equivalent to the charge that the defendants Ralston and Louie conspired to commit the offense charged in the first indictment; that the charge of conspiring to commit an offense involved the co-operation, association, and union of two or more persons to commit the offense; and that the charge that one person aided and abetted another to commit the offense involved the same character of co-operation, association, and union. But Congress has provided that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable. Congress has also provided that whoever aids or abets another in the commission of an offense against the United States is a principal in the commission of the offense. These are separate and distinct offenses, and the courts are not authorized to hold as matter of law that one who aids and abets another in the commission of the offense is a conspirator, and may plead an acquittal of a conspiracy charge in bar of a prosecution for the other offense. It is the province of Congress to specify

what acts shall be offenses against the United States, and not the courts. As said by Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95 (5 L. Ed. 37):

"It is the Legislature, not the court, which is to define a crime, and ordain its punishment."

In *Carter v. McClaughry*, 183 U. S. 365, 394, 22 Sup. Ct. 181, 193 (46 L. Ed. 236), Captain Oberlin M. Carter had been tried and convicted by a general court-martial of the United States on four charges. The first and second charges were as follows:

"Charge I: Conspiring to defraud the United States, in violation of the 60th article of war."

"Charge II: Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

The two charges related to the same transaction, and it was contended on behalf of the defendant that the charges were the same, and that the defendant was being twice punished for the same offense. With respect to this feature of the case the Supreme Court said:

"The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference."

We are of opinion that the acquittal of the defendant of the conspiracy charge cannot, as matter of law, be held to be a sufficient plea in bar to a charge of aiding and abetting another to commit an offense. Whether the evidence necessary to sustain the charge in the last case would have sustained the charge in the first case is mainly a question of fact, which we cannot consider, as the evidence is not in the record in either case; but it appears to have been determined in this case by the jury adversely to the contention of the defendant. The jury was advised of the acquittal of the defendant of the charge of conspiracy in the first case, and the court, to limit and restrict the evidence in the present case to the charge against the defendant of aiding and abetting Ralston in committing the offense charged against him, instructed the jury specifically upon that question as follows:

"I instruct you that the defendant has heretofore been accused, tried by a jury, and acquitted of the charge of conspiring, confederating, and agreeing with the said James Ralston to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of this same opium. Under the law no man can be twice put in jeopardy for the same offense. Whether you agree with it or not, the judgment of this court in the case I have referred to, in which the defendant was so acquitted, is final and conclusive; and, in your consideration of the case now before you, you will assume that the defendant was not guilty of conspiring, confederating, and agreeing with the said James Ralston, or of advising, counseling, commanding, inducing, or procuring the said James Ralston to receive, conceal, buy, sell, or facilitate the transportation, concealment, or sale of said opium, and will consider merely the question whether the defendant did some physical act by which he aided or assisted said James Ralston in a physical and material way in receiving, concealing, buying, selling, or facilitating the transportation, concealment, or sale of such opium. Unless you find beyond a reasonable doubt that the

defendant did such an act, you will find a verdict of not guilty upon the second count of this indictment."

The foregoing instruction is numbered 7 in the record, and no exception was taken to it. It must be presumed, therefore, that the question whether as a matter of fact the defendant had been acquitted of the offense charged in the second indictment was properly before the court, and that it was fairly presented to the jury upon the evidence. The verdict of the jury disposes of the question as a question of fact.

[2] We do not overlook the exception taken to the subsequent part of the instruction which the plaintiff in error designates as No. 8. The instruction was manifestly in favor of the defendant in limiting the inquiry of the jury as to the character of the act that would constitute aiding and abetting as distinguished from the previous charge of conspiracy. The court said:

"So I hope that you will be able to separate any plan or combination of these two men that was charged in the indictment for conspiracy, of which this defendant has been acquitted, from this charge that the government has made here that he aided Ralston in receiving this opium; but unless these conversations or this telephone message that has been told about was something more than a general keeping in touch with one another or general agreement, unless it was knowingly giving him knowledge of where he could get opium, then you will not consider it. If you have a reasonable doubt about it, you will not consider it as supporting this charge of aiding, because he, having been acquitted, is entitled to that reasonable doubt."

The objection is that this instruction was an erroneous statement of the law, and erroneously instructed the jury that they might consider any act of counseling and advising, if they believed it was of assistance to Ralston in concealing and transporting the opium. The further objection was made that it was in conflict with the previous instruction. The only objection we discover in this instruction is that as a matter of law it was more favorable to the defendant than he was entitled to have given. *Carter v. McClaughry*, supra. We do not find that it was in conflict with the previous instruction.

This disposes of the entire question of law and fact involved in the plea in bar.

[3] 2. The remaining assignments of error relate to the introduction in evidence over the objection of the defendant of certain letters alleged to have been in a trunk in the residence of the defendant, and also the testimony of certain witnesses called on behalf of the government. We think it unnecessary to consider specifically the objections with respect to either the letters or the testimony. We have carefully considered the questions presented, and are of opinion that no error was committed by the court below, either in the introduction of the letters and testimony or in the charge to the jury relating thereto. All of the testimony in the case is not before us; but it does appear, however, that the government's case rested in part, at least, upon circumstantial evidence. It is familiar law that, where a case rests upon that character of evidence, much discretion is left to the trial court, and its rulings will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact. *Clune v.*

United States, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269; Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Thiede v. Utah Territory, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237.

The judgment of the court below is affirmed.

COOPER GROCERY CO. v. PARK.†

(Circuit Court of Appeals, Fifth Circuit. November 30, 1914.)

No. 2580.

BANKRUPTCY (§ 188*)—LIENS—DEED OF TRUST—FAILURE TO FILE AND RECORD—TRUSTEE—RIGHTS—STATUTES—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), provides that a bankrupt's trustee, as to all property in the custody or coming into the custody of a bankruptcy court, shall be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and section 67a declares that claims which, for want of record or any other reason, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate. Rev. St. Tex. 1911, art. 6824, provides that all deeds of trust shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk to be recorded as required by law. *Held* that, since a bankrupt's trustee does not take as an ordinary voluntary purchaser, but as the representative of the rights of creditors with a lien acquired by legal or equitable proceedings, and subject only to such liens and rights as would be valid against such creditors, a deed of trust executed by a bankrupt on certain of his assets, but neither filed nor recorded, did not create a lien enforceable against the bankrupt's trustee, though disclosed in the bankrupt's voluntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

Petition for Revision of Order of the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Petition by the Cooper Grocery Company to superintend and revise an order denying petitioner's right to a lien on certain of the assets of McKinney & Erskine, bankrupts, under a deed of trust not filed or recorded, to which claim of lien M. C. H. Park, trustee of the bankrupts, filed objections. Petition denied.

John W. Davis, of Waco, Tex., for petitioner.

J. D. Williamson, of Waco, Texas, for respondent.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

CALL, District Judge. In this cause a motion to dismiss the proceedings because of the failure of the petitioner to comply with rule 24 of the Circuit Court of Appeals Rules, was filed, and was argued and submitted together with the main case. In considering the mat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 4, 1915.

ter the court is of the opinion that while the rule has not been complied with, it would be for the best interests of all parties concerned that the court should proceed to examine the whole case. The motion to dismiss will therefore be denied.

In this case McKinney & Erskine on the 9th of January, 1913, filed a voluntary petition in bankruptcy, and were on such petition adjudged bankrupts. The Cooper Grocery Company filed their claim, with various securities attached, among them being a deed of trust, dated January 4, 1913, on a certain house and land situated in Stranger, Falls county, Tex., which house was the store building of the bankrupts. This deed of trust, securing an indebtedness due the Cooper Grocery Company from the bankrupts, was not recorded prior to the filing of the voluntary petition in bankruptcy. The Cooper Grocery Company's claim was allowed as an unsecured claim and the security of the deed of trust was disallowed, and the property went into the hands of the trustee in bankruptcy and was administered as a part of the estate.

The question presented in this petition for revision is whether or not the District Judge erred, under these circumstances, in sustaining the referee's finding that said claim should not be allowed as a secured claim in so far as this deed of trust is concerned. The Texas statute (article 6824 of the Revised Statutes of Texas) provides, among other things, as follows:

"And all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall nevertheless be valid and binding."

Section 67a of the Bankruptcy Act provides that:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And section 47a (2), as amended by the act of 1910, provides:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon," etc.

The petitioners in this case claim that the trustee takes this property subject to the lien of the deed of trust by reason of the fact that said security was mentioned in the voluntary petition of bankruptcy, and therefore, although the deed of trust was not recorded as required by the statute of Texas, the trustee takes it with notice of the lien, and therefore subject to it.

To decide this question it is necessary to consider in what capacity the trustee in bankruptcy takes the property. Does he take it as an ordinary voluntary purchaser, or does he take it as representing the rights of the creditors with a lien acquired by legal or equitable means, and subject only to such liens and rights as would be valid against such creditors? The provision of the amendment of 1910, read in connection with section 67a, would seem to settle this question against

the contention of the petitioners in this case. The case of *Pacific State Bank v. Coats*, reported in 205 Fed. at page 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, is a case decided by the Circuit Court of Appeals for the Ninth Circuit, subsequent to the passage of the amendment of 1910 to section 47a, cl. 2, and this pertinent language on page 622 of 205 Fed., page 638 of 123 C. C. A. (Ann. Cas. 1913E, 846), in said report is used:

"The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. 'The class of cases unprovided for by the original act, and intended to be reached by the amendment,' says Mr. Collier in his work on Bankruptcy (9th Ed., page 659), 'was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens.' 'This provision of the Bankruptcy Act,' says Witmer, Judge, in *Re Hartdagen* (D. C.) 189 Fed. 546, 'puts the trustee, in so far as the assets of the estate is concerned, in the position of a lien creditor.'"

It would seem plain from the words of the act as amended, and the construction given the same since the amendment, that it places the trustee in a far different position from that of the voluntary purchaser. The words of the Texas statute are explicit that unless such liens are recorded they shall be invalid as against claims of creditors. The provision in the Bankruptcy Act, that the trustee shall take the property with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereunder, would seem to leave no doubt of the proper position of the trustee in bankruptcy in cases of this kind. He represents the creditors, and is vested with all the rights of such creditors as if a lien had been acquired upon the property by legal or equitable means without notice of the unrecorded deed of trust. There could be no question in this case, if one or more of the creditors of McKinney & Erskine had acquired an attachment lien on the 9th of January against the property of the bankrupt without notice of said deed of trust, that this unrecorded deed of trust, of which no notice was had, that said deed of trust could not have been asserted as a lien to defeat the lien of the attaching creditor. This being so, under the Bankruptcy Act the trustee takes the property as though such lien had been acquired by the creditor, and takes it free of the deed of trust.

It is therefore our opinion that there was no error committed by the District Judge in affirming the findings of the referee herein.

The petition for revision will be denied; the petitioner to pay the costs of this proceeding.

WALKER, Circuit Judge (concurring). I concur in the result announced in the foregoing opinion, and do not dissent from any of the views expressed therein. It does not, however, seem to me that the record in the case is such as to require a decision of the principal question passed on in that opinion.

There is nothing in the record to show that the existence of the deed of trust was disclosed otherwise than by a mention of it in the bank-

rupt's schedule. The schedule is not required to be looked to for information as to an incumbrance on property or for a claim to it otherwise undisclosed. So it did not give constructive notice of the incumbrance. Indeed, there is no claim that the mention of the deed in the schedule gave constructive notice to any one of its existence. And it is not made to appear by the record that the trustee actually knew of this part of the contents of the bankrupt's schedule, or that in fact he ever saw or examined the schedule, or, at any rate, that part of it which mentioned the deed of trust. The trustee, no more than a creditor, is to be presumed to have knowledge or notice of a fact shown only in an instrument at which he is not required to look for information as to the state of the title. There is no more reason for assuming that he in fact learned of the existence of the deed of trust by an examination of the schedule than there would be to assume that he learned of its existence from a record with notice of which the law did not charge him. *Pacific State Bank v. Coats*, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846.

So, assuming that the trustee's knowledge of the existence of the deed of trust would have made it effective as against the bankrupt estate and its creditors represented by him, the court below properly ruled that it was not so effective because the record failed to show that the trustee had either constructive notice of it or actual knowledge or notice of it. It seems to me that the principal question passed on in the opinion is not presented, because of the absence of any evidence in the record tending to prove that the trustee had any actual knowledge or notice of the fact that such a deed of trust had been made.

MARNET OIL & GAS CO. v. STALEY et al.†

(Circuit Court of Appeals, Fifth Circuit. November 30, 1914.)

No. 2610.

1. PARTNERSHIP (§ 5*)—FORMATION—CONTINUANCE OF BUSINESS.

Where complainant corporation was formed and acquired the interest of one of the partners of a firm, and thereafter the corporation and defendant, who had charge of and had been the managing partner of the previous firm, continued to carry on the business, both defendant and the corporation contributing property or the use of it to the joint enterprise, and it being understood that each should share in the profits and losses, and each recognized and treated the other as a partner, a partnership resulted, whether there was an express partnership agreement between them or not.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*

Power of corporation to form partnership, see note to *Wallerstein v. Ervin*, 50 C. C. A. 131.]

2. PARTNERSHIP (§ 273*)—DISSOLUTION—ACCOUNTING—RIGHTS OF PARTNER.

Where no period was fixed for the continuance of a partnership between complainant corporation and defendant, and it appeared that defendant had been guilty of misconduct which had seriously prejudiced the business, and that complainant had advanced a large amount more than its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied, January 5, 1915.

share of the money required for the operation of the business, complainant was entitled to a dissolution of the firm, and, after payment of firm debts, to an equitable lien on the firm's assets for what was due it from the firm, and also on defendant's interest in those assets for the amount of such overadvancement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 620; Dec. Dig. § 273.*]

3. BANKRUPTCY (§ 149*)—PARTNERSHIP—ADJUDICATION AGAINST ONE PARTNER—ADMINISTRATION OF PARTNERSHIP AFFAIRS.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, § 5, subsec. "h," 30 Stat. 548 (Comp. St. 1913, § 9589), where only one partner of a firm is adjudged a bankrupt, the bankruptcy court does not draw to itself the administration of the partnership estate, except by consent of the solvent partner, who, in the absence of such consent, is entitled to administer the partnership business, being required only to account to the bankrupt's trustee for the bankrupt's interest in the business as finally determined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

4. BANKRUPTCY (§ 149*)—PARTNERSHIP—ADJUDICATION AGAINST PARTNER—ADMINISTRATION OF PARTNERSHIP PROPERTY.

Where, on an adjudication of bankruptcy against a partner, the solvent partner did not consent to administration of the partnership property in the bankruptcy proceeding, nor waive its right to itself administer such property, the jurisdiction of the bankruptcy court was not enlarged, so as to cover the property of the firm, by the act of the bankrupt in surrendering to his trustee property belonging to the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the Marnet Oil & Gas Company against William H. Staley and others. From a judgment dismissing the bill without prejudice to complainant's right to file its claim by intervention in bankruptcy proceedings pending against defendant Staley, plaintiff appeals. Reversed and remanded.

Wm. J. McKie, of Corsicana, Tex., and Eugene Mackey, of New York City, for appellant.

George C. Greer, Frances Marion Etheridge, Joseph Manson McCormick, and Henri L. Bromberg, all of Dallas, Tex., and Richard Mays, L. B. Cobb, and Robert E. Prince, all of Corsicana, Tex., for appellees.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

WALKER, Circuit Judge. The averments of the bill, as it was amended, show the following among other facts: In or about the year 1898, the defendant Staley and one Barnsdall formed a partnership for the mining of oil and gas mining lands, thereafter actively conducting and carrying on such partnership business, acquiring oil and gas lands, leases, and leaseholds, their respective interests in the several properties acquired not always being equal, and mining, developing, and operating the same in the firm name of Staley & Barnsdall;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Staley all along having exclusive charge of and running and managing the partnership business, buying all material and incurring in the firm name the expenses of operating the business. While the management of that business continued so to be in the hands of Staley, the plaintiff, a corporation of the state of Delaware, having by the terms of its charter the power "of entering into partnership with persons, firms and other corporations for operating any of its oil and gas properties or pipe lines," acquired the interest of Barnsdall in the partnership property. After such acquisition by the plaintiff, Staley continued in the management of the business, accounted to the plaintiff for its share of the oil produced from the partnership property, and received from the plaintiff sums of money for use by him in the conduct of the partnership business, with the result that a large balance will be due to the plaintiff on a settlement of the partnership accounts. The bill alleges sundry acts of Staley in violation of the plaintiff's rights as partner, and seeks a dissolution and winding up of the partnership, the appointment of a receiver of the partnership property, and a decree ascertaining the balance due to the plaintiff on an accounting of the partnership business, and the declaration and enforcement of a lien for such balance on Staley's interest in the partnership property, and that such lien be declared superior to any rights acquired by the defendants Edens and the Corsicana Petroleum Company; each of them being shown by the averments of the bill to claim some interest in the partnership property. After the bill was filed, the defendant Staley was adjudged a bankrupt, and a trustee of his estate in bankruptcy was appointed, who took charge of some or all of the property of which Staley had had control as managing partner. By an amendment of the bill the trustee in bankruptcy was made a party defendant to it. Thereafter, on the motion of the defendants Corsicana Petroleum Company, J. N. Edens, and the trustee of Staley's bankrupt estate, to dismiss the bill, it was "dismissed without prejudice to complainant's right to file its claim by intervention or otherwise in the proceeding in bankruptcy, In re W. H. Staley, pending before the Honorable Eugene Marshall, one of the referees of this court, with costs to the defendant to be taxed." The plaintiff appealed from that decree, and seeks a reversal of it.

[1] It is not doubted that the averments of the bill as to the dealings between the plaintiff and Staley following the former's acquisition of an interest in the property which the latter theretofore had had charge of as the managing partner of a firm previously existing showed the existence of a partnership relation between them; each of them contributing property or the use of it to a joint enterprise, in the profits and losses of which each of them was to share, and each of them recognizing and treating the other as a partner. A partnership resulted from the carrying on of the business in such circumstances as clearly manifested an understanding between the parties concerned in it that there was to be a community of profits and losses among them, whether there was or was not an express agreement between them for the formation of a partnership. *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022; *Paul v. Cullum*, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430;

Hatchett v. Blanton, 72 Ala. 423; Meaher v. Cox, Brainard & Co., 37 Ala. 201; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; 30 Cyc. 352. This conclusion does not require for its support a resort to any rule peculiarly applicable to mining partnerships, but certainly is not impaired by the circumstance that the joint venture which was engaged in was in fact one of that kind. Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. Ed. 126; Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578.

[2] It is not less free from doubt that the averments of the bill disclosed a case entitling the plaintiff to equitable relief, in that, without regard to other features of the state of facts disclosed, it was made to appear that the plaintiff was entitled to a dissolution of the partnership, because no fixed period for the duration of it had been agreed on, and also because of alleged misconduct of Staley which was seriously prejudicial to the business, and in that, by reason of the plaintiff's advancement of greatly more than its share of the money required for the operation of the business, it was entitled, after the payment of the firm debts, to an equitable lien on the firm assets for what was due to it from the firm, and also on Staley's interest in those assets for the amount of such overadvancement made by it; one of the objects of the bill being the enforcement of such asserted lien. Hoyt v. Sprague, 103 U. S. 613, 624, 26 L. Ed. 585; Donelson's Adm'r v. Posey, 13 Ala. 752; 30 Cyc. 700; Thornton on Oil & Gas Law (2d Ed.) § 323.

[3] As above indicated, it was after the jurisdiction of the District Court as a court of equity had been invoked by the filing of the bill in this case, and while this suit was pending, that Staley, the defendant partner, was adjudged bankrupt. There was no adjudication of bankruptcy against the partnership, or any member of it, other than Staley. The situation brought about by one member only of the partnership being adjudged bankrupt was one contemplated by subsection "h" of section 5 of the Bankruptcy Act, which is as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

The plain language of this provision negatives the existence of a right of the court as a court of bankruptcy to draw to itself the administration of the partnership estate when only one of the partners has been adjudged bankrupt, except in the event of the partner or partners not adjudged bankrupt consenting to its doing so. The right in such a case of a solvent partner to have the partnership business administered elsewhere than in bankruptcy is absolute unless waived by him. Collier on Bankruptcy (8th Ed.) 137. The provision by no means excludes the power of the bankruptcy court over the interest in the partnership property of the bankrupt member of the firm, after that interest, if any, shall have been ascertained and set aside. In the instant case the solvent partner did not waive its right to keep the administration of the partnership property out of the bankruptcy proceeding. On the contrary, prior to the institution of that proceeding

against one partner, the solvent partner had filed its bill for a dissolution of the partnership and a final accounting and settlement of the partnership affairs, and after the partner, who was a defendant in that suit, was adjudged bankrupt, continued the prosecution of that suit, thus plainly manifesting the purpose to have the partnership property administered elsewhere than in the bankruptcy proceeding, and at the time of the dismissal of its bill was actively invoking the aid of the court as a court of equity for the accomplishment of this purpose. The absence of the consent which was requisite to the existence of a right to administer the partnership property in the bankruptcy proceeding could not well have been more clearly manifested.

[4] The jurisdiction of the court as a court of bankruptcy was not enlarged by the act of the bankrupt in surrendering to the trustee in bankruptcy partnership property, theretofore in the bankrupt's charge as managing partner, which, without the consent of his solvent partner, the plaintiff in this suit, was not subject to be administered in the bankruptcy proceeding. And the court as a court of equity could not properly refuse the exercise of its equitable powers when duly and properly invoked, and constrain the party who so invoked the exercise of that jurisdiction to forego any relief at the hands of the court, unless it was sought by an intervention in a bankruptcy proceeding in which the partnership property which was the subject of the relief prayed for was not subject to administration, except by such party's consent. The effect of the action of the court which is complained of was to deny the plaintiff the relief to which its bill showed that it was entitled and to force it to forego any judicial assertion of its rights in the premises, except by intervening in a proceeding in which those rights were not subject to adjudication except by its consent. The result of this action was improperly to deprive the plaintiff of the right to have the partnership property administered otherwise than in the bankruptcy proceeding.

The contention has been made in argument that the decree appealed from finds support in the ruling made in the case of *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055. That case did not involve the question of the right secured to a solvent partner by the above-quoted provision of the statute. The matter dealt with in the part of the opinion in that case which is relied on was a suit against a trustee in bankruptcy, the purpose of which was to control the disposition of a fund in his possession, admittedly belonging to the bankrupt's estate, and unquestionably subject to administration in the bankruptcy proceeding, and to determine to what extent and in what order the several creditors should participate therein. Plainly, it does not follow, from the decision that that claim should have been asserted in the bankruptcy proceeding, that such a claim as that asserted by the plaintiff in this case, relating, as it did, to the administration of partnership property, which, without the plaintiff's consent, was beyond the reach of the bankruptcy proceeding, could properly be required to be asserted nowhere except in that proceeding. An effect of the statute was to forbid the court so to attempt to draw into the bankruptcy proceeding the administration

of partnership property not subject to administration in that proceeding, the consent requisite to that property becoming a subject of administration in that proceeding not having been given.

The decree appealed from is reversed, and the case is remanded for further proceedings not inconsistent with the conclusions above stated.

In re BENZ.

MARINE NAT. BANK et al. v. McCREERY & CO. et al.

(Circuit Court of Appeals, Third Circuit. December 7, 1914.)

No. 1879.

1. BANKRUPTCY (§ 353*)—CLAIMS—PRIORITY—VALUE OF PROPERTY.

The property of a bankrupt hotel keeper being offered as a whole, a bid of \$12,100 was made, which the receiver declined to accept, and, the property being offered again, B. bid \$7,600 for the whole, whereupon it was offered separately, and B. bid \$7,500, proportioned \$3,600 for the goods and chattels on the premises, \$3,700 for the leasehold, and \$200 for all the other property, including the good will and right to apply for a license. These bids were rejected, and at a subsequent sale B. purchased the whole amount on an unapportioned bid of \$16,010. *Held*, that where certain claimants had liens on different portions of the property, the landlord on the tangible chattels and a bank on the leasehold, and there was no other evidence of value, the referee, in determining the amounts to which each claimant was entitled out of the whole amount received, properly treated the prior separate bids as evidence of the value of the different parts of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541-544; Dec. Dig. § 353.*]

2. BANKRUPTCY (§ 151*)—TITLE OF TRUSTEE—PROPERTY FRAUDULENTLY CONVEYED.

A bankrupt's mother, being sued by M. & Co. in February, 1912, transferred all her real estate to the bankrupt for a nominal consideration, and following the transfer the bankrupt agreed to buy the leasehold, personal property, etc., of a hotel from K. in part payment of the price. M. & Co., having recovered a judgment against the bankrupt's mother, in January, 1913, instituted a suit in equity against the bankrupt and his mother to set aside the transfer of the real estate, and in the following October obtained a decree finding that the transfer was fraudulent, and that property of the mother, equal to \$13,700, had passed into the hotel, which M. & Co. were entitled to have applied on their claim against the mother, shortly after which the son was adjudged a bankrupt, and all the property of the hotel was sold for a lump sum; the proceeds, however, being subject to a lien in favor of the landlord on the furniture, fixtures, etc., and in favor of a bank on the unexpired leasehold. *Held* that, the proceeds of the mother's realty fraudulently conveyed to the bankrupt having been traced into the proceeds of the sale of the hotel property, M. & Co. were entitled to the balance remaining after satisfying the liens of the landlord and the bank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 151.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. BANKRUPTCY (§ 143*)—PROPERTY VESTING IN TRUSTEE—LICENSES—SALE.

Though no lien can be obtained by levying an execution on a license to sell liquor, the license is nevertheless a valuable species of property, which may be sold in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. § 143.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of bankruptcy proceedings of Landelin J. Benz. From an order establishing the priority of certain claimants as to a fund derived from the sale of certain of the bankrupt's assets, the Marine National Bank and William Arrowsmith, as executor of Penelope McCrea, appeal. Affirmed.

Hill Burgwin, of Pittsburgh, Pa., for appellants.

Marcus W. Acheson, Jr., of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. Landelin J. Benz, the bankrupt, was a hotel keeper in the city of Pittsburgh. He occupied the building under a lease that had several years to run, and owned the furniture, fixtures, and movable chattels on the premises, enjoying also the privilege of a liquor license and the good will of the combined business. These three classes of property—the unexpired term, the tangible chattels, and the intangible license and good will—were so related to each other as apparently to satisfy the District Court that they would probably bring a higher price if they were sold as a whole than if they were sold separately; and accordingly the receiver in bankruptcy was authorized to sell them as a whole, but, of course, only if a larger sum could be realized thereby. Moreover, as the property was burdened by certain liens or equities (presently to be considered), the court ordered the sale to be made discharged thereof; but provided that the owners of these claims might—

"* * * assert whatever liens, priorities, or equities they may have in the personal property and leaseholds to be sold by the receiver against the fund arising from the proceeds of said sale: Provided, that they or any of them shall have no lien on any particular portion of the interests and property sold by reason of said property being sold as a whole, other than they would have in said particular portion of the property according to law."

This order was made on December 23, 1913, and on December 29 the property was offered as a whole and a bid of \$12,100 was made. The receiver declined to accept it, and adjourned the sale until December 30, when the property was again offered as a whole, and a bid of \$7,600 was offered by Martin P. Brown. Thereupon the property was offered separately, and Brown offered \$7,500, apportioned as follows:

"Goods and chattels on premises, \$3,600.

"Leaseholds, \$3,700.

"All other property, including good will and the right to apply for license, \$200."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These bids also were declined, and on January 6 the property was again offered as a whole, and was sold to Brown for \$16,010; this sale being confirmed by the court. The lienholders objected to the original order, and objected also at each sale to the receiver's selling the property as a whole, objecting finally to the confirmation; but they took no appeal, and are not now seeking to set aside either the order of sale or the sale itself. On the contrary, they appeared before the referee and presented their claims on the fund, and the only dispute before us concerns the order of distribution that was made by the referee and afterwards approved by the court.

This brings us to the respective rights of the three claimants among whom the fund was divided. They are Penelope McCrea's executor, who represents the landlord, the Marine National Bank, which is the pledgee of the unexpired term as collateral security for certain notes, and McCreery & Co., whose claim will be described in a moment. It is conceded that the first two claimants are entitled to priority—the landlord upon the proceeds of the furniture and of the other tangible chattels on the premises, and the bank upon the proceeds of the unexpired term; the only question being how much they are entitled to receive. The landlord's claim is for \$7,651.27, and the claim of the bank is for \$7,900; but the referee awarded them only \$3,600 and \$3,700, respectively, awarding the remainder to McCreery & Co. The landlord and the bank have each appealed, and the question to be settled is whether the referee was right in restricting their claims to the sums just stated.

[1] He rested his ruling on the ground that neither claimant had a lien on the whole of the property sold, but only on a certain portion thereof—the landlord, on the tangible chattels; and the bank, on the unexpired term of the leasehold—and that the only satisfactory evidence before him of the value of these portions, respectively, was the sums that were bid for them on December 30. The question is not without some difficulty, but we do not see our way to a different conclusion. The amounts bid were the only direct evidence on the subject, and the only other evidence is the increased amount for which the property was finally sold as a whole. The referee reports that he "afforded counsel full opportunity to offer any further evidence they might wish as to the value of the said parcels," and it appears from the record that counsel for both the landlord and the bank stated "that he does not desire further time to prove the value of the different items sold as a whole, being satisfied to rest the question of the value upon the evidence shown by the record." Under these circumstances we think the referee was right in relying on the decision of this court in *Carroll v. Young*, 9 Am. Bankr. Rep. 643, 119 Fed. 576, 56 C. C. A. 380, a closely analogous case, and in accepting the bids referred to as sufficient evidence of value. We do not know definitely why the same bidder was willing to pay \$16,010 on January 6, although he had offered no more than \$7,600 a week before; but we gather from the brief of appellants' counsel that he had more competition on the later occasion than on the earlier. The small separate bid for the license and good will is readily explained; for, if he secured the leasehold, no one else could use the license, since the Pennsylvania law permits such a privilege to be grant-

ed only to the occupier of the premises. It seems to be a reasonable *prima facie* inference that the tangible chattels and the lease were a negligible factor in the increased price, especially when we take into consideration the facts that on January 6 the purchaser was obliged to buy the whole property or none, and that competitors were then bidding against each other.

[2] The claim of McCreery & Co. remains to be considered. Benz was adjudicated a voluntary bankrupt on November 12, 1913, and on that date the title to all his property passed by law to the trustee, but subject to the three claims before us; the landlord's claim being entitled to priority out of the furniture, fixtures, etc., and the bank's claim being entitled to priority out of the proceeds of the unexpired term. McCreery & Co.'s claim grows out of a fraudulent transfer of real estate that had formerly belonged to Anna Benz, the bankrupt's mother, and had been transferred by her to him, and used by him in part payment for the property that produced the fund before us. But the real estate was no longer hers, for the following reasons: She had owed several thousand dollars to McCreery & Co. for some time, and on February 23, 1912, McCreery & Co. had sued her to recover the debt, obtaining judgment in the following June. A few weeks after the suit was brought she transferred all her real estate to the bankrupt for a nominal consideration, and in the spring of 1912 the bankrupt—who had agreed to buy the leasehold, personal property, etc., from Anthony Kramer, the person then keeping the hotel—conveyed the real estate to Kramer in part payment of the purchase price. In January, 1913, McCreery & Co. brought a bill in equity against the bankrupt and his mother, and on October 2, 1913, the District Court decided that her deed to him was a fraudulent transaction, participated in by both, and decreed:

"That there is the sum of \$13,700 belonging to the defendant Anna Benz, which is represented to that extent by the Commercial Hotel, located on Sixth street, in the city of Pittsburgh, the title to which is in Landelin J. Benz, and that such sum, with interest from April 25, 1912, should be applied in payment of the debts of the said Anna Benz." (It is agreed that "the Commercial Hotel" does not mean the building, but the lease, the personal property, etc.)

"That Justus Mulert, of the city of Pittsburgh, be and is hereby appointed receiver of the said Commercial Hotel, the good will, leases, stock, and furnishment, in the hands of the defendant Landelin J. Benz, for the benefit of the creditors of Anna Benz, to the end that the receiver may, under the direction of the court, realize upon said assets and pay the debts of Anna Benz to the amount, with interest, above mentioned, having due regard, of course, to the equities of all other persons in the premises. * * *

On November 12, Landelin J. Benz was adjudicated bankrupt, and his property was sold in the proceedings to which we have already referred.

Now it is evident, and the District Court has decided, that the real estate formerly belonging to Anna Benz was directly employed as part of the purchase money of the very property that produced the fund now for distribution; and that McCreery & Co. had obtained an equitable lien thereon—namely, the right to follow this property and to apply it to the payment of their judgment—before the adjudication was en-

tered. In fact, a receiver in equity had actually been appointed for this purpose, but apparently all the parties in interest have been content to abandon that proceeding and to settle the whole controversy in the bankruptcy court.

[3] Under these facts we think the right of McCreery & Co. to receive the remainder of the fund in controversy cannot be successfully denied. No question of preference could arise in any event, for the bill in equity was filed more than four months before November, 1913, and as this was a creditors' bill a lien was obtained at the time of filing similar to a lien obtained by issuing an execution against the bankrupt's property. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. It is true that a lien cannot be obtained by issuing execution against a license to sell liquor (23 Cyc. 155, par. 4, and note); but a license is nevertheless a valuable species of property, which may be sold in bankruptcy (*Black, Bankruptcy*, § 336; *Collier* [9th Ed.] 1011), and we think McCreery & Co. acquired a right to follow its proceeds whenever it should be converted into money.

The bankrupt was not using his own property when he fraudulently transformed his mother's real estate into the several kinds of property that he bought from Kramer, but he was using what belonged in equity to McCreery & Co., and therefore they may follow it or its proceeds as long as either can be definitely traced, or until superior equities intervene. The money that he borrowed from other persons to complete the transaction with Kramer became his own money, and he might lawfully use it as he pleased; but he never became the owner of McCreery & Co.'s equitable interest in his mother's real estate, and he had no right to apply that interest for his own advantage. His other creditors have the right to share in the proceeds of his own property (subject, of course, to lawful priorities); but they can have no claim, legal or equitable, on the proceeds of property that belonged in equity to McCreery & Co. and never belonged to the bankrupt at all. *Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Railroad Co. v. Dial*, 140 Fed. 689, 72 C. C. A. 183; *Re Larkin* (D. C.) 202 Fed. 577; *Re Hamilton Furniture Co.* (D. C.) 117 Fed. 776. As there can be no doubt that Anna Benz's real estate has been followed directly and inextricably into the leasehold, furniture, license, and good will, the proceeds of this mass must respond to such claims as might lawfully be urged against the mass itself. Under the facts stated the trustee had no higher right than the bankrupt himself.

It follows, therefore, that as the landlord and the bank have received all they have shown themselves entitled to receive, the remainder of the fund was properly awarded to McCreery & Co.

In each case the decree appealed from is affirmed.

GEORGIA S. & F. RY. CO. et al. v. EINSTEIN et al.

(Circuit Court of Appeals, Fifth Circuit November 3, 1914.)

No. 2666.

1. COURTS (§ 308*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.

In a suit in a federal court by the trustees of an insolvent to recover assets, where one of the trustees refuses to join as a complainant, he may be made a defendant, and the fact that he is a citizen of the same state as another defendant does not deprive the court of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.*]

Diverse citizenship as a ground of federal jurisdiction, see note to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

2. RAILROADS (§ 152*)—BONDS—TRANSFER PENDING FORECLOSURE—RIGHTS OF PURCHASER.

Complainants were owners of bonds of a railroad company, the mortgage securing which was being foreclosed. The bonds were guaranteed by another railroad company, against which a foreclosure suit was also pending. A bondholders' committee of the latter company, in order to obtain a release of the guaranty to facilitate the foreclosure and reorganization of their company, made an agreement with a committee of the holders of the guaranteed bonds to deliver to it a certain amount of the stock of the reorganized company. Pending the carrying out of this agreement, complainants sold their bonds. *Held* that, in the absence of any express agreement on the subject, the sale of the bonds carried with it to the purchasers the right to receive the stock apportionable to such bonds under the agreement in lieu of the guaranty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 465, 466; Dec. Dig. § 152.*]

3. EQUITY (§ 427*)—DECREE—CONFORMITY TO ISSUES.

In a suit in equity to recover stock of a railroad company, the company was made a defendant; but the only relief prayed against it was that it be required to transfer the stock to complainants on its books. It answered, disclaiming any interest in the suit, and offering to perform the decree of the court. *Held*, that a prayer for general relief in the bill did not authorize a money decree against the company for dividends paid to the holders of the stock pending the suit, which was not within the issues.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

4. EQUITY (§ 427*)—DECREE—CONFORMITY TO PLEADINGS.

In general, a prayer for general relief in a bill cannot authorize the granting of relief outside of the case made by the allegations of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

Appeal from the District Court of the United States for the Western Division of the Southern District of Georgia; Emory Speer, Judge.

Suit in equity by Benjamin F. Einstein and Henry Rice, trustees, and others, against Birney C. Parsons and Francis M. Edwards, partners as Parsons & Edwards, the Georgia Southern & Florida Railway Company, and others. Decree for complainants, and certain defendants appeal. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Alex C. King, of Atlanta, Ga., and J. Elsworth Hall, of Macon, Ga., for appellants.

Marion Erwin, of New York City, for appellees.

Before PARDEE, Circuit Judge, and GRUBB and CALL, District Judges.

CALL, District Judge. This is an appeal by the Georgia Southern & Florida Railway Company, a corporation organized under the laws of the state of Georgia, having its principal place of business at Macon, in said state, and Birney C. Parsons and Francis M. Edwards, citizens of the state of Massachusetts, doing business as Parsons & Edwards, from a decree rendered in the United States District Court for the Western Division of the Southern District of Georgia, entered February 7, 1914, in a suit in which they were defendants.

The bill of complaint was filed on May 31, 1900, by Benjamin F. Einstein, as assignee of Abraham Backer, and Benjamin F. Einstein and Henry Rice, trustees of Abraham Backer, all citizens of the state of New York, and Rice, Stix & Co., a firm composed of Henry Rice, a citizen of New York, William Stix, Jonathan Rice, Benjamin Eisman, David Eisman, and Elias Mitchael, all citizens of the state of Missouri, in behalf of themselves, and all persons entitled to stock in the Georgia Southern & Florida Railway Company similarly situated to them, against the Georgia Southern & Florida Railway Company, the appellant herein, the Mercantile Trust & Deposit Company of Baltimore, Md., a corporation, a citizen of Maryland, Christian Devries, a citizen of Maryland, the firm of Parsons & Edwards, appellants, the Southern Railway Company, a corporation and citizen of Virginia, and Herman Myers, a citizen of Georgia. The bill of complaint alleges substantially as follows:

The Macon Construction Company was the builder of and holder of all the stock in the Georgia Southern & Florida Railroad Company and the Macon & Birmingham Railroad Company, and, becoming insolvent, was, together with the Georgia Southern & Florida Railroad Company and the Macon & Birmingham Railroad Company, placed in the hands of a receiver by the Bibb county superior court. The Macon Construction Company was indebted to one Abraham Backer in a large sum, and a judgment obtained against it for the amount due. Backer was also holder of some 410 bonds of the Macon & Birmingham Railroad Company, of the face value of \$1,000 each. Rice, Stix & Co. were also the holders of 50 of these bonds. The bonds of the Macon & Birmingham Railroad Company had upon each a guaranty by the Georgia Southern & Florida Railroad Company properly executed by said last-named company. The trustees for the bonds of each of the railroads intervened in the Bibb county superior court to foreclose the deeds of trust securing the bond issues. Pools were formed of the bonds of each of the roads, and committees appointed to guard the interests of the bondholders; a very large majority of the bonds being represented, although not all.

The litigation dragged, and the bondholders of the Georgia Southern & Florida Railroad, being desirous to overcome the opposition of

the bondholders of the Macon & Birmingham Railroad Company to the foreclosure proceedings, negotiated with the bondholders' committee of the last-mentioned railroad, and it was finally agreed by the two committees that, in consideration of the withdrawal of opposition to foreclosure and the assistance of the committee, the committee of the Georgia Southern & Florida Railroad Company would, upon the sale of said road and the reorganization of its properties, deliver to said Macon & Birmingham committee certain shares of its second preferred and common stock, and said Macon & Birmingham committee agreed to receive these shares in full satisfaction of the guaranty on the bonds, and to withdraw opposition to the foreclosure proceedings. It was also agreed that the Macon & Birmingham committee should assign to the Georgia Southern & Florida committee judgments against the Macon Construction Company held by some of the bondholders upon request so to do. The failure of the Macon Construction Company caused Backer to fail, and Einstein, Rice, and Myers were made trustees of his property for the benefit of creditors.

In the spring of 1895 the Georgia Southern & Florida Railroad was sold under the foreclosure proceedings, and bought in by the bondholders' committee, and a new corporation, the Georgia Southern & Florida Railway Company was formed, and the properties of the old Georgia Southern & Florida Railroad Company conveyed to the new corporation in consideration of the delivery to the committee of the stock and bonds of the new corporation. Upon this being done the committee of bondholders of the Georgia Southern & Florida Railroad Company notified the committee of the Macon & Birmingham Railroad bondholders that they had the stock as per agreement for delivery, but requiring that the last-named committee should first enforce the judgments against the property of the Macon Construction Company, and deed said property to them for the new corporation, the appellant in this case. This was in June of 1895. In November of 1895 the Macon & Birmingham committee by resolution repudiated the claim of the Georgia Southern committee, and insisted that the contract between them be carried out.

This condition of affairs continued until January, 1896, when the stock of the new corporation was finally delivered in accordance with the contracts between the parties. While negotiations were pending between the two committees as to delivery of the stock, the bonds of the trustees and those of Rice, Stix & Co. were withdrawn from the committee, and sold to Parsons & Edwards, 460 bonds, of the face value of \$1000 each, for the sum of \$46,000. On June 15, 1896, the Macon & Birmingham committee delivered the pro rata share of the stock in the Georgia Southern & Florida Railway Company to Parsons & Edwards as the owners of the bonds.

The bill also alleges demand on the committee by the trustees for the bonds and refusal, and that Myers, the cotrustee, refused to join in the suit, and was therefore made a party defendant. The bill then prays "that they have transferred to them as their property on the books * * * shares of stock," also that Parsons & Edwards, in the event they have converted said stock, account for the value thereof, and then the prayer for general relief.

[1] Some of the defendants raised the question of the jurisdiction of the court because Myers, one of the trustees, was a citizen of Georgia, and should have been joined as complainant, and the Georgia Southern & Florida Railway Company, one of the defendants, being also a citizen of Georgia, there was not the diverse citizenship required to give the court jurisdiction. This question was raised first by demurrer, which being overruled, was set up by answer. We think there is no question but that the District Court had jurisdiction under the allegations of the bill, and the proofs adduced in support thereof. *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; rule 22 of Old Chancery Rules. There are many other cases that might be cited, but we do not deem it essential.

The answer also pleaded the Georgia statute of four years' prescription as to the title of personal property. The railway company answered that the stock had been delivered to the bonding committee, and it had no interest in the matter.

The cause was referred to a master, to take the testimony and report it, with his findings of fact and law, to the court. The testimony was taken, and the master made his report, and finding of facts and law. He found that the bonds were transferred to Parsons & Edwards without reserve or restriction, and the sale was a complete transfer of said bonds, and all that were appurtenant to them, to wit, both sources to which the holder of the bonds could look for payment, the agreement with the committee of bondholders of the Georgia Southern bonds and the proceeds of the sale of the Macon & Birmingham Railroad, and that Parsons & Edwards, when they bought the bonds, had full notice of all the facts in the case. The master finds against the contention that the claim was barred by the statute of limitations of Georgia, and in conclusion finds the merits against the complainants.

Upon exceptions to this report, the District Judge entered a final decree, sustaining exceptions to said report, challenging the finding of the master that complainants were not entitled to the relief sought, and awarded to the complainants the shares of stock claimed, and further requiring the payment by Parsons & Edwards of a considerable sum received as dividends, and decreeing a lien on all the other stock held by Parsons & Edwards in the Georgia Southern & Florida Railway Company for the payment of said money decree. The decree further requires the railway company to transfer on its books the number of shares claimed, and further requires the payment by the said railway to the complainants of all sums paid as dividends on said stock after the filing of said suit. This portion of the decree makes the railway company jointly with Parsons & Edwards accountable for dividends paid them after the commencement of this suit. It is from this decree that this appeal is taken.

[2] The most serious question to be decided is the effect of the transfer of the bonds to Parsons & Edwards. It was admitted in argument before us that if the bonds were transferred with the guaranty of the Georgia Southern & Florida Railroad Company indorsed upon

them before said guaranty was satisfied and extinguished, without a reservation of the rights under such guaranty, the transfer of the obligation carried the security. At least a majority of the court are of opinion that the transfer was made before the guaranty was extinguished, and had this effect in the instant case. Had the holders of the Backer and Rice, Stix & Co. bonds desired to retain in themselves the right to receive the stock apportioned to said bonds by the agreement between the two bond-holding committees, they should certainly have so stated in the instrument of transfer. This was not done, but, on the contrary, an unconditional transfer was made, and that at a time when it was problematical whether the agreement would be carried out—when it looked probable that, if any stock was received, it would be only after a litigation between the committees. Under the circumstances shown in this record we cannot affirm that the guaranty of the Georgia Southern & Florida Railroad Company was executed and functus officio, and, unless it was, the transfer of the bonds carried with them to the purchaser any securities given for their payment.

[3] We cannot agree with the District Court in that portion of the decree which contains a money decree against the Georgia Southern & Florida Railway Company for the dividends paid on the stock after suit brought. The only relief prayed against it in the bill of complaint was to have the stock claimed transferred on the books; no prayer to restrain it from paying any further dividends, etc. The prayer for general relief must be construed in connection with the prayer for special relief, and the case made by the bill of complaint. The whole frame of the bill and its allegations treated the defendant railway company as having no interest in the controversy between the parties as to the ownership of its stock. The stock had been issued and delivered in payment for the properties conveyed to it, and there its interest terminated. It set up in its answer that it had no interest in the controversy, and alleged its readiness to perform any decree of the court to effectuate a transfer of said stock. This view seems to have been accepted by the parties to this suit up to the making of the final decree herein, as is clearly shown by the preamble, as it were, to the answer of the corporation found on page 105 of the record filed in this court. The corporation was a proper and necessary party to effectuate the transfer of the stock on its books, should that be decreed, and it was this fact that gave the court jurisdiction of this case, and was made a party defendant for that purpose, and that alone, as shown by the allegations of the bill of complaint and the prayer. Under such circumstances the prayer for general relief has never been, so far as our investigation has gone, construed to warrant a money decree, as was entered in this case.

[4] This court cannot agree with the District Court in that part of the decree seeking to declare a lien on stock of the appellants, Parsons & Edwards, other than the particular shares claimed by the complainants. The special prayers of the bill have heretofore been set out, as well as the general frame of the bill. There are no allegations of fact contained in said bill upon which any such relief could be predicated, even if the complainants would be entitled to such relief,

and this point we do not decide. And there being no special prayer, and the allegations of the bill making no case for it, the prayer for general relief cannot aid it.

We wish to observe that in our opinion the complainants have not made a case, either by their bill or proofs, that appeals to the conscience of the chancellor. The claim is based upon an agreement not to interpose objections to a foreclosure proceeding, which objections could not have been meritorious. The bonds seeking payment under the deed of trust sought to be foreclosed were a first lien on the property of the railroad. The guaranty of the bonds of the Macon & Birmingham road was junior to said lien, and the only effect of the opposition of the Macon & Birmingham committee was to delay sale, and this seemed to be recognized by the parties making the agreement. The result of the agreement, and the object of the parties to the agreement, was to buy off this opposition by giving the stock in question; and a court of equity and conscience might well leave the parties in the condition in which it finds them.

While the master found, and we think the proofs sustain such finding, that the plea of the statute of limitations was not sustained, yet the proofs show that the stock was delivered to Devries on June 9, 1895, and delivered to appellant on the 15th of the same month. This bill was not filed until May 31, 1900, and no excuse for such delay offered. In the meantime, according to the allegations in the bill, the value of the stock had increased from \$30,000 to \$100,000. This would seem to us such gross laches as, had it been properly pleaded, would have prevented a recovery in this case by the complainants.

It is our judgment that the decree of the District Court be reversed, and the cause remanded, with directions to overrule exceptions to the master's report and dismiss the cause, at the costs of the complainants in the original bill. The costs of this appeal to be taxed against the appellees.

BOROUGH OF DU BOIS v. PANCOAST.

(Circuit Court of Appeals, Third Circuit. November 12, 1914.)

No. 1887.

1. MUNICIPAL CORPORATIONS (§ 817*)—TORTS—EVIDENCE OF NEGLIGENCE.

In an action against a municipal corporation to recover for an injury to plaintiff, caused by the giving way of the anchorage of a banner which had been stretched across a street by third persons, the doctrine of *res ipsa loquitur* cannot be invoked as against the defendant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1725; Dec. Dig. § 817.*]

2. MUNICIPAL CORPORATIONS (§ 819*)—ACTION FOR INJURY TO PERSON ON STREET—SUFFICIENCY OF EVIDENCE.

When plaintiff was passing along a street in defendant borough on a day when there was an unusually strong wind, a chimney on a four-story building, to which the end of a cable, from which a political banner was hung over the street, was attached, fell, and plaintiff was injured by falling bricks. The banner was erected by third persons, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there was no evidence that defendant or its officers had any knowledge of the manner in which the cable was anchored, and it could not be seen from the street. *Held* that, in the absence of any local regulation prohibiting it, the banner was a lawful structure, and defendant was not liable because it did not make an inspection to determine the security of the fastenings.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

3. MUNICIPAL CORPORATIONS (§ 788*)—DEFECTS OR OBSTRUCTIONS IN STREETS —DUTY OF INSPECTION.

A municipality is not required to look for defects or dangers in its streets, but the measure of its duty is only to observe such as a reasonable supervision would disclose.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; William H. Hunt, Judge.

Action at law by Vernon W. Pancoast against the Borough of Du Bois. Judgment for plaintiff, and defendant brings error. Reversed.

H. Fred Mercer, of Pittsburgh, Pa., for plaintiff in error.

A. L. Cole, of Clearfield, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. Federal jurisdiction over this controversy depends wholly on diverse citizenship, and the writ of error raises the question whether the plaintiff was a citizen of New York or of Pennsylvania when the suit was brought. The point was distinctly made at the trial and is raised by one of the assignments; although indeed we would be bound to take notice of it on our own motion. *Neel v. Penna. Co.*, 157 U. S. 153, 15 Sup. Ct. 589, 39 L. Ed. 654; *Newcomb v. Burbank* (C. C. A. 2d Cir.) 181 Fed. 334, 104 C. C. A. 164; *Taylor v. Weir* (C. C. A. 3d Cir.) 171 Fed. 636, 96 C. C. A. 438. As the case must go back for other reasons, we need say no more than this: If another trial should take place, and if the evidence then should be substantially the same as the evidence now before us, the question of the plaintiff's citizenship ought to be submitted to a jury with appropriate instructions.

Turning to the merits, we may say at once that in our opinion a binding instruction should have been given in favor of the borough. The evidence tended to prove the following facts:

In October, 1912, a banner of a political party was stretched across one of the principal streets in the borough of Du Bois. One end of the supporting cable was fastened to a chimney that extended above the roof of the Commercial Hotel, a four-story brick building abutting on the street. The plaintiff's case against the borough is thus set forth in the statement of claim:

"That it was under the law [the] duty of said defendant to keep said street in a safe condition, so that persons might pass and repass thereon without danger to life or limb and without harm or hindrance.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"That, notwithstanding the duty of said defendant borough, on the said 12th day of October, 1912, the said defendant permitted said street to become and be in a dangerous condition, and permitted a structure in the form of a large structural banner, composed of ropes, cloth, and painting, to be put up and erected over said street, and to be fastened to an insecure fastening in the shape of a brick chimney that stood on the wall of the Commercial Hotel, which fastening was insecure and unsafe and dangerous, and that when said plaintiff was passing along said street, and under said banner, the same fell and the bricks from said chimney were scattered upon said public street or highway, and about and upon said plaintiff," etc.—thus doing the injury complained of.

The banner—which was of considerable size, was made of rope mesh, and carried a portrait on cloth of one of the candidates for president—had been stretched across the street only a few days before October 12th. It was suspended from a wire rope or cable, and one end of the cable was fastened to the chimney in question. The chimney was an extension of the hotel wall, and was about 21 inches square and probably from 3 to 4 feet in height. The roof of the building was nearly flat, and a cornice extended beyond the chimney about 3 feet, overhanging the sidewalk to this extent. Two turns were taken about the base of the chimney, and a loop was formed by clamping the end to the body of the cable. Witnesses testified that on the day in question the weather was "very stormy," and described the wind as "pretty strong" and as "unusual." Whatever may have been the cause of the accident, the chimney broke about 6 or 8 inches above the roof, and the loop probably slipped upward off the chimney, thus letting the banner down. The plaintiff was injured, not by the banner, but by one or more of the falling bricks.

The evidence did not disclose by whose direction the banner was put up. The actual work appears to have been done by employes of the electric company. A short time before the accident the burgess and the chief of police, in passing along the street, saw the banner in place; but they could not see where or how the cable was fastened. The borough did not give permission to erect the banner, but (so far as the evidence showed) the erection of similar objects was not forbidden, either by ordinance or other regulation. No official of the borough inspected the fastening around the chimney. The cable did not break, and the loop did not pull out of the clamp.

In this condition of the evidence, we think the plaintiff was not entitled to recover. We may first observe that the erection of the banner was not in itself unlawful. The practice is common throughout the country, and we are not acquainted with any general rule of law that forbids it. Thousands of banners and flags are displayed over public highways—many from heavy projecting poles—not only in every political campaign, but also on many anniversaries and holidays, and (if it be assumed that a municipality has the power to forbid the use of the streets for this purpose) the custom is not unlawful where no such prohibition exists. But, of course, if the use of the streets by vehicles or pedestrians is rendered unsafe by the carelessness of those who put or maintain these objects in place, they will be liable as in other cases of negligence. But the primary liability is upon them, and

not upon the municipality, and they are liable, not simply because they have erected a banner or a flag, but because they have been guilty of some negligence in so doing that has resulted in the injury complained of. The liability of the municipality, where it exists at all, is secondary; or perhaps it is more accurate to say the liability rests upon a different kind of negligence, the neglect of a different duty.

[1] But, no matter upon whom a person injured seeks to fasten liability—whether upon the person erecting the banner, or upon the municipality—in either event he must prove negligence in putting up the structure, or in maintaining or in taking care of it afterwards. There is no presumption of such negligence where the suit is against the municipality, and in the case before us we may further observe that there was no evidence of negligence, either in putting up or in taking care of the banner, unless negligence should be inferred from the happening of the accident itself. The question was submitted whether the act of God, the high wind, was the efficient cause of the accident; but otherwise the charge assumed that the fall of the bricks was due to some one's negligence, and this could not have been assumed, except by a conscious or unconscious application of the doctrine of *res ipsa loquitur*. Now, whether that doctrine would have been applicable or inapplicable, if the suit had been against the person who was primarily liable for the erection, it was improperly applied in this action. As the borough took no part, direct or indirect, in putting the banner up, and did not have the custody of it afterwards, it is plain that liability in this suit can only be supported upon proof that the borough had actual or constructive notice of a dangerous structure over a public street, and failed to take the proper steps thereafter. If, therefore, the structure was not dangerous, the borough owed no duty, and for this reason the plaintiff was bound to offer affirmative evidence of danger. The only danger asserted was the use of the chimney as an anchorage for the cable, and we have already said that no affirmative evidence was offered that there was negligence in using the chimney for this purpose. No witness testified concerning the weight of the banner or of the cable, or concerning the strength of the chimney, or concerning its patent or latent defects, if any such existed; but the charge of the court assumes, not only that the chimney was insufficient, but that there was negligence in selecting it as an anchorage for the cable, evidently basing the assumption upon the single fact that the accident happened, in spite of the instruction that negligence was not to be presumed from the happening of the accident itself. This can only refer to the negligence of the borough, for there is a necessary assumption that the accident was due primarily to the negligence of some one else, and, as we have said, the doctrine of *res ipsa loquitur* could not be properly applied in this action.

[2] But, if we accept the assumption that there was negligence in anchoring the cable to the chimney, the question still remains: What was the borough's duty under the circumstances? If we sustained the argument for the plaintiff, we should be obliged to assent to the proposition that whenever a municipality has notice that a banner or a flag overhangs a public street its supports must be immediately inspected, under penalty of liability if they should be insecure and if injury to

a passer-by should result therefrom. The jury received no instruction on this subject, except the brief submission, whether—

"the borough ought reasonably to have exercised inspection and supervision with respect to that banner and the fastenings of it as they existed at the time that Mr. Pancoast was injured."

[3] Now there was nothing whatever to call the borough's attention to any defects in the anchorage of the banner. The anchorage itself could not be seen from the street, and, unless the mere presence of the banner raised an immediate duty of inspection, there was no evidence to support the assertion that such a duty had been violated. The plaintiff's position is extreme, and we find no authority to support it. Indeed, such a burden could not be borne; if the supports of the numerous banners and flags that are lawfully displayed many times a year must be presumed to be unsafe and to require immediate examination, the task of inspection could not possibly be performed. The unreasonableness of such a rule is a legitimate argument against its existence; but there is ample authority against it to be found in the decisions on the general subject of a municipality's duty in regard to defects or dangers in its highways. An elaborate collection of cases will be found in a note to *Elam v. Sterling*, 20 L. R. A. (N. S.) 725. In Pennsylvania numerous cases decide that a municipality is not liable for a defect in the highway arising without its fault or negligence, unless it has express notice, or the defect be so notorious as to be evident to passers-by. A municipality is not obliged to look for defects, the measure of its duty being merely to observe such as a reasonable supervision might disclose. *Lohr v. Philipsburg*, 165 Pa. 109, 30 Atl. 822; *Burns v. Bradford*, 137 Pa. 361, 20 Atl. 997, 11 L. R. A. 726; *Kost v. Ashland*, 236 Pa. 164, 84 Atl. 691; *Yeager v. Berwick*, 218 Pa. 265, 67 Atl. 347; *Dalton v. Towanda*, 215 Pa. 402, 64 Atl. 547; *Duncan v. Philadelphia*, 173 Pa. 550, 34 Atl. 235, 51 Am. St. Rep. 780; *Rapho v. Moore*, 68 Pa. 404, 8 Am. Rep. 202.

Without prolonging the discussion, we are of opinion that upon the evidence contained in this record the jury ought to have been directed to find for the defendant.

The judgment is reversed, and a new venire is awarded.

CHUNG KIN TOW v. FLYNN.

(Circuit Court of Appeals, First Circuit. November 19, 1914.)

No. 1088.

1. HABEAS CORPUS (§ 92*)—SCOPE OF REVIEW—GOVERNOR'S WARRANT—PRIMA FACIE EVIDENCE.

On review of extradition proceedings by a petition for habeas corpus, the warrant of the Governor of the asylum state is prima facie evidence that all necessary legal prerequisites have been complied with; and if the proceedings before and by the Governor so appear to be regular, it is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

evidence of the right to remove the prisoner to the state from which he fled.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

Scope of review on habeas corpus to procure release of person sought to be extradited, see note to *Bruce v. Rayner*, 62 C. C. A. 506.]

2. HABEAS CORPUS (§ 92*)—PROCEEDINGS—ACTION OF GOVERNOR—CONCLUSIVENESS.

Where it appeared that the Governor of the asylum state in extradition proceedings acted, not only on the report of his Attorney General, which by the statutes of his state he was entitled to require, but also on the extradition papers from the demanding state, the reference to the report of the Attorney General was ineffective, since, while the Governor was entitled to demand the Attorney General's report, he was under no obligation to rely exclusively on it.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

3. EXTRADITION (§ 34*)—AFFIDAVITS—AUTHENTICATION BY GOVERNOR—CONCLUSIVENESS.

Where affidavits forming a part of the papers in an extradition proceeding were sworn to before the clerk of an inferior court in the demanding state, but the Governor of that state authenticated the affidavits, they were sufficiently authenticated for all the purposes of extradition.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 35-38; Dec. Dig. § 34.*]

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Habeas corpus by Chung Kin Tow against Frederick F. Flynn to obtain petitioner's release from an extradition warrant issued by the Governor of Massachusetts, directing petitioner's removal to the state of Illinois to answer a complaint charging him with murder. From a decree denying the writ, petitioner appeals. Affirmed.

Herbert Parker, of Boston, Mass. (Thomas J. Barry and Herbert F. Callahan, both of Boston, Mass., on the brief), for appellant.

Leon R. Eyges, of Boston, Mass. (Thomas J. Boynton, of Boston, Mass., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This is an appeal from the decree of the United States District Court, denying a writ of habeas corpus, applied for by Tow, against a warrant of the Governor of Massachusetts directing the removal of the appellant to answer a complaint charging murder, pending in the county of Cook and state of Illinois. The observations of the counsel for the appellant are wholesome and carefully expressed, but they are mainly of a general character. There are few propositions requiring our attention.

The proceedings before the Governor of Massachusetts were very protracted. It is apparent that the principal question was one of the identity of the appellant, who now appears under the name of Chung Kin Tow. The requisition of the Governor of Illinois was for Harry Eng Hong. The common controversy which so often puzzles the courts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with reference to the identity of Chinamen was, in some of the stages before the Governor of Massachusetts, troublesome; but it is now all out of the way by the appellant's admission.

[1] Also it is now admitted as follows:

"The appellant concedes, upon review by petition for habeas corpus, that the warrant of the Governor is *prima facie* evidence that all necessary legal prerequisites have been complied with, and, if the proceedings before and by the Governor so appear to be regular, it is conclusive evidence of the right to remove the prisoner to the state wherefrom he has fled."

This is a proper and wholesome admission, which is in accordance with the practice in extradition cases. Indeed, the proceedings upon extradition cases are summary, and, for the most part, very simple, and extensive conflicts with reference thereto should cease. As in this case the warrant of the Governor of Massachusetts shows on its face that all the necessary legal prerequisites have been complied with, as stated in the admission, this is conclusive, as further stated in the admission, unless the proceedings before the Governor appear not to have been regular.

[2] This attempted reservation probably has reference to the claim that the Governor of Massachusetts acted on the extradition papers from the demanding state, and on a report made by the Attorney General of Massachusetts. If it had appeared that the Governor of Massachusetts acted only on the report of the Attorney General, this might have required us to investigate what was, in fact, reported by the Attorney General; but, as it is admitted that the Governor of Massachusetts also had acted on the extradition papers from the demanding state, this reference to the report of the Attorney General of Massachusetts is ineffective. The Governor had the right, of course, to demand the opinion of the Attorney General of Massachusetts, but he was under no obligation to rely exclusively on that report; and also the proceedings which accompanied the papers from the demanding state were unusually voluminous, and covered every point in the case.

It is true that the petitioner, appellant, cites to us the Revised Laws of Massachusetts, c. 217, § 11, to the effect that the requisition should be "accompanied by affidavits to the facts constituting the crime charged by persons who have actual knowledge thereof"; and in this connection the petitioner alleges that the facts averred in the requisition record "would only *prima facie* constitute the crime of an assault, or, at the most, manslaughter," and fail to set out the facts indicating malice and premeditation. However, even if this provision of the Massachusetts statute is effectual, the requisition record alleges sufficient, in connection with the common-law presumption that certain facts, unexplained, constitute murder, to meet the demands of this statute, in view, particularly, of the fact that extradition looks always to summary proceedings, and not to technical details or strict rules of criminal practice or pleading, as is stated in *Munsey v. Clough*, 196 U. S. 364, 372, 25 Sup. Ct. 282, 49 L. Ed. 515.

[3] A criticism is made that the affidavits were taken before a clerk of some inferior court of the state of Illinois, but that his authority to attest them is not shown. It is not necessary for us to examine the laws of the state of Illinois as to the authority of the clerk in question

to take the affidavits to which we refer, because the Governor of Massachusetts in his warrant has certified that the Governor of Illinois has authenticated the affidavits, so that they are sufficiently authenticated for all the purposes of extradition. It has been always held, with reference to authentications required by the statutes of the United States, that the authentications by the respective Governors are sufficient. Moore on Extradition, vol. 2, §§ 558 to 561, and especially Kingsbury's Case, 106 Mass. 223, 226. The rule which reaches authentications to whatever is especially required by the statute is broad enough, according to principal and practice, to reach all authentications made use of in extradition. According to the late advances by the Supreme Court towards simplifications in matters of extradition, when we have the authentications of the Governors, we are not required to look into the intricacies of local legislation.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

UNITED STATES, for Use of T. H. KESSLER & CO., v. TITLE
GUARANTY & SURETY CO.†

(Circuit Court of Appeals, Fifth Circuit. December 4, 1914.)

No. 2626.

APPEAL AND ERROR (§ 1010*)—FINDINGS—REVIEW.

Where, in an action on a federal contractor's bond, there was evidence to support a finding that the action was not instituted within a year from the date of final settlement between the contractor and the government, as required by Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), which was a fatal defect, the finding was conclusive on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by the United States, for the use of T. H. Kessler & Co., against the Title Guaranty & Surety Company, in which Joseph Netzer and others intervened. Judgment for defendant, and the use plaintiffs and interveners bring error. Affirmed.

Samuel B. Dabney, of Houston, Tex., for plaintiffs in error.

Charles C. McRae and Lewis R. Bryan, both of Houston, Tex., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. This is an action brought against the defendant in error as surety on a certain bond dated July 14, 1905, given in conformity to the act of Congress of February 24, 1905 (33 Statutes at Large, c. 778, p. 811), for the performance of a contract for the erection of certain public buildings in Laredo, Tex., for which said Kessler

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 5, 1915.

& Co. furnished material used in the prosecution of the work. Suit was filed in the court below the 14th day of September, 1909, followed by a first amended original petition filed July 2, 1911, and thereafter by other pleadings not necessary to specify. After issue joined a jury was waived by stipulation in writing.

The record shows no reversible error in the rulings of the judge as to the admission or rejection of evidence. On submission of the case general and specific findings were made as to various issues presented by the pleadings and the evidence, and in conclusion the court specifically found as follows:

"(6) That the date of final settlement between the United States and the General Supply & Construction Company was on or about the 5th day of August, 1909, and that, as neither the plaintiff herein, T. H. Kessler & Co., nor any of the interveners herein, Joseph Netzer, Oscar Staben, and John O. Buenz, filed their suits against the Title Guaranty & Surety Company within one year from said date of final settlement as aforesaid, they are thereby precluded under the act of Congress of February 24, 1905, from recovering in this action, because their said suits were not begun within the time limited as provided in said act"

—and thereupon entered judgment that the plaintiffs and interveners take nothing in the suit and that the Title Guaranty & Surety Company go hence without day.

The record shows that there was evidence tending to support the finding above made, and the same is conclusive in this court. See *St. Louis v. Rutz*, 138 U. S. 226, 241, 11 Sup. Ct. 337, 34 L. Ed. 941; *Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Runkle v. Burnham*, 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694. Under the facts as found, the case is controlled by *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893.

The judgment of the District Court is affirmed, with costs.

PRINCESS FURNACE CO. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court of Appeals, Fourth Circuit. September 8, 1914.)

(No. 1196.)

APPEAL AND ERROR (§ 1073*)—REVIEW—HARMLESS ERROR.

The inclusion of interest in a directed verdict for damages for breach of contract *held* without prejudice, where the court might properly have directed a verdict for a larger sum under a stipulation for damages in the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

On petition by defendant for rehearing. Denied.
For former opinion, see 215 Fed. 329.

PER CURIAM. We are constrained to deny the petition for a rehearing in this case on the ground that the plaintiff in error was not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prejudiced by the inclusion of interest in the directed verdict, because we are of opinion that the trial court might properly have directed a verdict for the full amount of the stipulated damages named in the contract on which this suit was brought. See *Sun, etc., Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366.

Petition denied.

WASHINGTON TIN PLATE CO. v. TALIAFERRO et al.

(Circuit Court of Appeals, Third Circuit. November 16, 1914. Rehearing Denied December 16, 1914.)

No. 1858.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TIN PLATE CLEANING MACHINE.

The Taliaferro and Reynard patent, No. 709,184, for a tin plate cleaning machine, *held* not anticipated, valid and infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by John C. Taliaferro and Edwin Norton against the Washington Tin Plate Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 214 Fed. 583.

Francis T. Chambers, of Philadelphia, Pa., and V. H. Lockwood, of Indianapolis, Ind., for appellant.

C. L. Sturtevant and Eugene G. Mason, both of Washington, D. C., and Joseph C. Fraley, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. In a suit in equity brought by John C. Taliaferro and Edwin Norton against the Washington Tin Plate Company in the United States District Court for the Western District of Pennsylvania, praying that the defendant, the Washington Tin Plate Company, be enjoined from infringing United States letters patent No. 709,184, for a tin plate cleaning machine, granted September 16, 1902, to Taliaferro and Reynard, and owned by the complainants, the District Judge held the patent valid, and claims 1, 2, 3, 4, 5, 6, 10, and 13 of the letters patent infringed by the device of the defendant, and a decree was entered against the defendant for an injunction and a reference for an accounting. This is an appeal from that decree.

The questions raised by the pleadings involve, first, the validity of the patent, or its invalidity for lack of novelty and invention; and, second, its infringement or noninfringement.

In the manufacture of tin plates, the two sides of metal plates are coated with tin and then subjected to a bath of hot palm oil, which leaves upon the freshly tinned plates a coating of grease. Before the plates are ready for commercial use, it is necessary to remove the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

grease, and this has been done, as shown by the history of the industry, by taking the plates from the hot oil bath and putting them through a cleansing machine of one of the various patterns and types that have been used in the art. Of such machines, those now most generally in use in this country are the machines made by the Anderson Foundry & Machine Company and used by the defendant, and the machines of the complainants made under the patent in suit, which for convenience will hereafter be referred to respectively as the Anderson machine and the Taliaferro machine.

In the main features of their construction these two machines are similar, the difference between them, if any, being in the method of their operation and the manner in which they attain the result intended.

In construction and in function, the Taliaferro machine is in harmony with the mentioned claims and specification of the Taliaferro patent. It is clear that the Anderson machine substantially follows the same claims and specification of the Taliaferro patent, except in one or two particulars, which, it is claimed, distinguish it from the Taliaferro machine and save it from the charge of infringement.

In view of the very narrow point in controversy, we deem it unnecessary to indulge in a consideration of the claims and specification of the patent in this opinion at the length which such a consideration would entail. Therefore a brief statement of the construction and function of the two machines will be sufficient to present the point in controversy.

The Taliaferro machine comprises a box in which are arranged in pairs fibrous-covered rolls, so adjusted that they revolve at different speeds, and so set that they are separate and not in contact, either with one another or with the plates as they pass between them, and so operated as to cause the bran in which they are enveloped to be compressed into and passed through the opening between them in such a fashion and at such a speed as to cause the bran (not the rolls) to hold or grip the plates and feed or pass them between the rolls, and at the same time cleanse them of grease, all of which is effected by the variation of the speed of the rolls and of the different speed and agitation of the bran.

In construction, the Anderson machine is similar to the Taliaferro machine in all substantial respects save one, and that is, the fibrous-covered rolls, being likewise arranged in pairs, and being likewise adjusted to revolve at different speeds, and being likewise enveloped in bran, are not set apart, but, as it is alleged, are in contact one with the other; and based upon this difference, it is claimed that the operation of the Anderson machine is different from that of the Taliaferro machine, in that the rolls themselves grip and feed the plates and at the same time rub and cleanse the plates with the aid of such of the bran as may adhere to their surfaces. From this it is apparent that the controversy in this case is contracted to what happens between the rolls of the two machines. If the rolls of the Anderson machine are in contact, and if the function of the Anderson machine is not to feed and cleanse the plate by moving layers of bran between the sides of the plate and the rolls, but to feed and cleanse the plate

by the motion and rubbing of the rolls themselves, then the Anderson machine does not infringe the claims of the patent in suit; while, on the contrary, if the rolls of the Anderson machine are not pressed in contact one with the other, but are apart, and the plate is not fed by the rolls, and is not cleansed by being rubbed by them, but these results are accomplished by the propulsion and the rubbing of layers of bran moved by the rolls along the upper and lower surfaces of the plate, then the Anderson machine is identical in function, as it is similar in construction, with the Taliaferro machine, and the defendant has infringed the patent. Stating the case conversely, if the machine of the patent in suit operates in feeding and in cleansing the plate by rolls in contact with the plate, and not by causing to flow layers of bran which by their own motion feed and cleanse the plate, then the patent is void, because anticipated, and the defendant is not guilty of infringement.

The defendant claims that the patent of the plaintiffs is void because their invention was anticipated, evidence of which was adduced by the defendant in the form of earlier patents, all of which were relied upon, but two of which were especially urged. Theses two patents are British patents, and are known as the Jenkins patent and the Player and Mainwaring patent.

The British patent to Jenkins, No. 1,892 of 1877, is more akin in the principle of its operation to that of Taliaferro than any other cited. The principle of this patent is different from the principle of the patent in suit at least in the respect that it fails altogether to perform one of its functions. Instead of being a box in which is buried or enveloped in bran successive pairs of rolls horizontally arranged, running at different speeds and so separated that through the space between them the plate may be carried along by contact with layers of moving bran, the rollers of the machine of the Jenkins patent are buried in boxes of bran and are vertically arranged, and consist of two vertical rolls separated one from the other sufficiently to allow the ingress of bran and the coating of the rolls with bran, forming on them a tire or jacket; the cleansing and polishing of the plate being accomplished by contact of the bran coated rolls with the plate, thereby cleansing the plate in a way close in theory with that of the patent in suit. But in the machine of the Jenkins patent the rolls move at equal speed and do not contemplate the feeding or cleansing of the plate by the action of the moving bran, nor does it perform the double function of feeding and cleansing the plate by the one set of rolls, the plate under this patent being propelled and its movement regulated by machinery or by hand outside of and beyond the cleansing machinery, and the polishing or cleansing being to some extent necessarily effected and controlled by the same means.

The Player and Mainwaring English patent, No. 16,108 of 1893, is for an invention consisting of an arrangement of rolls in pairs, not buried in bran. The two rolls of each pair, like the rolls of the machine of the patent in suit, revolve at different speeds. The plate is delivered to the first pair, and unlike the machine of the Jenkins type, and like the machine of the patent in suit, it "is by them passed on to

the next without the intervention of carrying rolls." The cleansing of the plate is effected in the machine of this patent by the differentiation in the speed of the rolls. Both "surfaces of the sheet are *rubbed* alternately by the top and bottom rollers of the successive pairs. * * * Each pair of rollers *is in contact*, but kept from undue friction by means of springs." Great reliance is placed by the defendant upon this patent to show that the invention claimed by the patent in suit was anticipated by Player and Mainwaring.

The machine of this patent is distinguished from the machine of the patent in suit, we think, in several respects:

There is nothing to suggest that the rolls are buried in bran. On the contrary, the language of the patent is that the rolls are "fed" with bran.

While the Player and Mainwaring patent states that the "rolls are kept apart at the proper distance by springs inserted between the bearings," yet the other language of the patent calls for the rolls to be "in contact" and the polishing to be done by rubbing, not by layers of bran, but by the rolls. This is about, if not precisely, what the infringing machine is claimed to do, but is wholly different from what is claimed by the patent in suit.

The twofold use to which the bran is put in the Taliaferro machine, namely, feeding as well as rubbing the plate, we do not find in any machine of the prior art, nor does any one of the machines cited as representing the prior art contain a structural or mechanical organization which would without substantial alteration permit the essential principle of the operation of the Taliaferro machine to be realized.

In the case below, and in the argument on appeal, considerable stress was laid by the defendant in support of its claim that the rolls of the Taliaferro machine were not in fact adjusted so that they would remain apart, but that they were adjusted, like its own machine, to cause the rolls to be in contact. This we do not find to be the case. We find a contrivance in the patented machine by which the rolls are held in place, but not necessarily held rigidly separate one from another. The specifications of the patent in this particular allude to a device for holding the rolls "yieldingly separated," which result is either effected or assisted by the use of a spring between the portions of the machine holding the shafts and controlling the position of the rolls. We do not think that the patent requires, in the face of its term holding the rolls "yieldingly separated," that the rolls must be rigidly adjusted, for by the aid of the springs between the shafts of the ends of the rolls certain play was intended.

The defendant's theory that the rolls in the patented machine are held rigidly together, and not yieldingly separated, contradicts not only the express language of the specification, but renders the springs found in the patented machine superfluous and purposeless. It seems to us the very purpose of providing and using the spring mountings of the patent in suit is to allow a separation of the rolls, and to permit that separation to yield or accommodate itself to the work. The springs are *between* the shafts and press the rolls apart. If the springs were

above and below the shafts, they would then press the rolls together, and the defendant's claim of contact of the rolls in the Taliaferro machine would then be supported.

We do not find the rolls in the patented machine so adjusted as either to create contact or avoid separation, and we concur with the court below that the extent of separation of the rolls—that is, the exact measure of distance from one roll to the other—is unimportant, so long as there is a separation between the rolls sufficient to permit the passage between them of layers of bran which grip, drag, and clean the plate in transit.

We have already said the controversy in this case is narrowed to what happens between the rolls of the two machines. The defendant admits, as it must admit to avoid the charge of infringement, that its rolls are in contact, and the plate is gripped and cleansed by the motion of the rolls, aided by such quantity of bran as may adhere to their fibrous surfaces, and the defendant charges, as it must charge to establish the invalidity of the Taliaferro patent on the ground of anticipation, that the Taliaferro rolls do precisely the same thing, and that the plate is not gripped and cleansed by layers of bran driven in between separated rolls. Upon this issue there is conflict, but from the testimony we are satisfied that the rolls of the Taliaferro machine are adjusted apart, and the gripping and cleansing function of the Taliaferro machine is performed in the way claimed by the patent; and although it is vigorously asserted by the defendant that the rolls of the Anderson machine are operated in contact, and that the plates in the Anderson machine are gripped and cleansed by the direct operation of the rolls, we are equally satisfied that the rolls of the Anderson machine are so yieldingly adjusted as to permit bran to pass between the plates and the rolls, and thus effect the same functional result which was first disclosed in Taliaferro's patent. While we arrive at this conclusion after a careful consideration of all the testimony, we will here restrict ourselves to quoting the testimony of but one witness.

Arthur S. Brown, a witness called on behalf of the complainant, testified that he had seen nine Anderson machines in operation at the factory of the defendant, the Washington Tin Plate Company, and that—
“in every instance in those machines, when the tin plate passed through here, passed through the bran box as the plate emerged at the discharge end of the bran box, it always came out with a very thick covering of bran, and also, when another plate is passing through, there is always a thick layer of bran being fed out from the final pair of rollers. Also on one occasion I had one of the rollers removed from one of the machines—in the first instance, had the upper roll at the discharge end of the bran box removed, and on that occasion the sheet was left in the machine, and on removing this upper discharge end roller there was a thick layer of bran covering the tin plate, and on lifting the edge of the tin plate up there was seen to be a layer of bran between the under side of the tin plate and this layer here; also on that occasion the next pair of rollers in that machine were so far apart that an ordinary lead pencil could be thrust in between the rollers. On the second occasion I had the next to the last of the upper rollers of the bran box removed with no plate in and that showed a layer of bran covering and concealing the plate beneath, and a lead pencil could be readily thrust between the next pair of rollers.”

While the yielding surfaces of the rolls might readily enable a lead pencil to be thrust between them, and such an experiment might be a doubtful test of the relation of the rolls to one another, yet the layers of bran upon the tin plate necessarily show that in the Anderson machine the rolls are not in contact, but are separated so as to enable layers of bran to pass through with the plate precisely as in the Taliaferro patent.

The decree of the court below is affirmed.

In re PALMER.

(District Court, N. D. New York. November 10, 1914.)

BANKRUPTCY (§ 184*)—VALIDITY OF CHATTEL MORTGAGE—FAILURE TO RECORD.

Bankrupt and his brother entered into a mercantile partnership, and claimant, who was his brother's wife, furnished the money with which certain fixtures were purchased by the firm. Later bankrupt bought his brother's interest, and as part payment gave his note to claimant for the amount advanced by her, reciting that it was secured on all of the property in his store. This note was not filed for record until eight months after its execution and one month prior to the bankruptcy. *Held*, that the instrument was a chattel mortgage, and under the law of New York, while valid as against the bankrupt, was void as against his creditors whose claims antedated its filing, and therefore, under Bankr. Act July 1, 1898, § 67a, c. 541, 30 Stat. 564 (Comp. St. 1913, § 9651), also as against his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of Floyd L. Palmer, bankrupt. Proceeding by Julia Palmer to determine the right to the proceeds of certain property. Finding against claimant.

R. F. Bieber, of Binghamton, N. Y., for trustee.

H. C. & V. D. Stratton, of Oxford, N. Y., for claimant.

RAY, District Judge. About May 18, 1914, Floyd L. Palmer was duly adjudicated a bankrupt. He had been running a grocery business, and in the store were certain so-called fixtures, consisting of a large safe or cooler, etc. The trustee claimed that the bankrupt owned same free of valid liens or incumbrance, but Julia Palmer claimed that she was entitled thereto, as they were paid for with her money, and that she had and holds a property note in the nature of a mortgage thereon to secure the payment to her of such money. The fixtures were sold, and the money placed on deposit to take the place thereof.

Julia Palmer, the claimant, is the wife of Luther F. Palmer, who is a brother of Floyd L. Palmer, the bankrupt. July 31, 1912, said Floyd L. Palmer and Luther F. Palmer entered into a copartnership, by written agreement, in the business of buying and selling butter, eggs, etc., in the city of Binghamton, N. Y. Floyd L. Palmer contributed \$200, and Luther F. Palmer contributed \$250, which sum

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had been given to Julia Palmer, his wife, by her aunt; but Julia turned it over to her husband, Luther F. Palmer, to put into such partnership, and it was used for the purchase of the said fixtures. Julia Palmer took no note or security at the time of any one. There was no contract or agreement that she should own or have a lien on the property purchased with such money. The bills for such property were made out by the seller to the firm. Quite an amount of indebtedness was contracted by the firm, some of which is still unpaid.

On the 25th day of August, 1913, Luther F. Palmer sold out his entire interest in the firm and firm property to said Floyd L. Palmer, now bankrupt. Floyd L. assumed the payment of all firm debts and paid Luther some small consideration over and above the sum represented by the note in question, and in consideration of the fact that Julia had given to Luther the \$250 which went into the purchase of the said so-called fixtures, and that he was getting title thereto by purchasing the entire interest in the firm and firm property, gave to said Julia Palmer the following instrument, duly signed by him, viz.:

"\$250.

Binghamton, N. Y., August 25, 1913.

"One year after date I promise to pay to the order of Mrs. Julia Palmer two hundred and fifty $\frac{00}{100}$ dollars at ———, value received, with 6% interest. Until this note is paid I give as security my entire stock and fixtures in my store at 137 Court St., Binghamton, N. Y.

"No. ———. Due Aug. 25, 1914.

Floyd L. Palmer."

This instrument was not filed until April 24, 1914, 1:45 p. m., about one month before the petition in bankruptcy was filed against said Floyd L. Palmer, and some eight months subsequent to its execution. At the time of the bankruptcy said Floyd L. Palmer was owing to the creditors many hundreds of dollars over and above the fair value of all his assets.

On the face of this paper (note in the nature of a chattel mortgage) it is a chattel mortgage. It recognizes that the title to the so-called fixtures had passed to and was in Floyd L. Palmer, now bankrupt. It is not a conditional sale note, as neither the title to nor the possession of the fixtures mentioned was ever in Julia Palmer. They were not purchased for her, and she did not sell them to Floyd L. Palmer. Julia never took possession under her chattel mortgage note. July 7, 1914, proof of claim was filed, which sets out a copy of the note and calls it a chattel mortgage security. The instrument does, of course, recognize a debt to Julia Palmer and that she was entitled to \$250 of the consideration paid, or to be paid, by Floyd L. when he bought out the interest of his brother in the copartnership property. It recognized, not in terms, but in view of all the facts, that she had let her husband have the \$250, and that he had used it to pay for such fixtures, that he owed Julia that sum, and that Floyd's assumption of the debt in the manner mentioned released Luther from liability to his wife.

The equities of Julia Palmer are, of course, very strong; but the rights of the creditors of the firm, those who are unpaid, and the rights of the creditors of Floyd L. Palmer, who had apparent and actual ownership of such fixtures, cannot be ignored. As to these fixtures the relation between Floyd L. Palmer and Julia Palmer was

that of mortgagor and mortgagee, and as between Julia and the creditors of Floyd L. Palmer and his trustee in bankruptcy she occupies the position of mortgagee with a chattel mortgage which, while given for a valuable and a full consideration and more than four months prior to the filing of the petition in bankruptcy, was kept from the records or files for some eight months. This was an unreasonable and an unnecessary delay in filing, and makes the mortgage void as to the trustee in bankruptcy. *Skilton v. Codington*, 185 N. Y. 80, 88, 89, 77 N. E. 790, 113 Am. St. Rep. 885. In this case it is held:

"2. Chattel Mortgage—Rights of Creditors Whose Claims Accrued Before Filing of a Chattel Mortgage—Trustee in Bankruptcy. A chattel mortgage, unfiled for a term of five years, is void as against creditors of the mortgagor whose claims accrued prior to such filing; and although creditors cannot, under the general rule, attack it until after the recovery of a judgment and issue of an execution, this rule is simply one of procedure and does not affect the right; and therefore, where the recovery of a judgment is impracticable, it is not an indispensable requisite to enforcing the rights of the creditor; hence a trustee in bankruptcy may, for the benefit of creditors, attack such mortgage, though if a creditor seeks that relief in his own name it would be necessary that his claim be first put in judgment.

"3. Same—When Chattel Mortgage Valid Between Parties may be Attacked by Trustee in Bankruptcy—Bankruptcy Law, § 67. Notwithstanding the fact that an unfiled chattel mortgage is valid as between the parties, and that a trustee in bankruptcy succeeds only to the rights of his bankrupt, he is not thereby precluded from attacking a mortgage made by his bankrupt for default in filing, since by section 67 of the Bankruptcy Act it is expressly provided that 'claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.'"

These quotations from this case, which is the law of the state of New York, demonstrate that this mortgage is void. The most, if not all, of the debts owing by Floyd L. Palmer were incurred prior to the filing of the mortgage note. The claimant here has cited *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816, which held that a nonfiled chattel mortgage, which is valid as between parties, cannot be taken advantage of by the trustee in bankruptcy, who succeeds only to the rights of the bankrupt. This case is cited in *Skilton v. Codington*, 185 N. Y. at pages 87 and 88, 77 N. E. 790, 113 Am. St. Rep. 885, and it is pointed out that this was the law under the Bankrupt Act of 1868, but that section 67 of the present Bankrupt Act changes the rule.

Attention has been called to *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. That case as is pointed out in *Skilton v. Codington*, arose under section 112 of the Lien Law, which provides that reservations of title in contracts for the conditional sale of goods and chattels are void unless filed as against subsequent purchasers, pledgees, or mortgagees in good faith. It does not provide that nonfiling makes the conditional sale contract void for nonfiling as against creditors.

In *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the force of the laws of the state of Ohio was under consideration, and it was held that the trustee in bankruptcy takes the property of the bankrupt subject to the lien of an unfiled contract of conditional sale, which in that state is void as against creditors as

well as subsequent purchasers. Under the laws of the state of Ohio, as interpreted by its courts in reference to chattel mortgages, a conditional contract is void only as against those creditors who before the contract or mortgage is filed, or before the vendor or mortgagee obtains possession, seize the property on execution or attachment. Hence the decision in the York Manufacturing Case.

The court in *Skilton v. Codington*, supra, points out that this is not the law of the state of New York. Here the mortgage is void as to simple contract creditors, but such creditors cannot attack it until the recovery of a judgment and the issue of an execution. This goes to the question of remedy simply, and not to the question whether the unfiled chattel mortgage is void.

And here in the case now before this court, as in *Skilton v. Codington*, while Floyd L. Palmer could not have taken advantage of the nonfiling of the mortgage note, his trustee in bankruptcy can. As said by the court, a trustee in bankruptcy may for the benefit of creditors attack such (unfiled) mortgage, though if a creditor seeks that relief in his own name it would be necessary that his claim be first put in judgment. By section 67 of the present Bankrupt Act it is provided that:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

It follows from this that, as the chattel mortgage was not filed until some eight months after its execution and delivery, it was void for nonfiling as against the creditors of the bankrupt, not as against him, and hence, in the language of the Bankrupt Act, it is one of those claims which "shall not be liens against his estate," meaning the estate of the bankrupt.

Skilton v. Codington has been cited and approved by the Supreme Court of the United States, in *Frank v. Vollkommer*, 205 U. S. 529, 27 Sup. Ct. 596, 51 L. Ed. 911, and in *Murphy v. John Hofman Co.*, 211 U. S. 570, 29 Sup. Ct. 154, 53 L. Ed. 327. In *Zartman v. First National Bank*, 189 N. Y. 267, 274, 82 N. E. 127, 129 (12 L. R. A. [N. S.] 1083) the court said:

"The plaintiff, as trustee in bankruptcy of the mortgagor, has the same rights as a creditor armed with an attachment or execution"—and cited *Skilton v. Codington*, supra.

In *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 210, 100 N. E. 806, *Skilton v. Codington* is cited and followed, and the distinction between it and cases decided under the former Bankruptcy Act are pointed out.

It must be regarded as the settled law of the state of New York, recognized by the Supreme Court of the United States as to chattel mortgages, that an unfiled chattel mortgage is void as to the creditors of the bankrupt, especially those whose claims arose prior to the filing, and that the trustee in bankruptcy may take advantage of such nonfiling, even though the mortgagor himself could not have done so. Such a mortgage must be filed within a reasonable time, which means

so soon as would be demanded in the exercise of reasonable diligence. It is not validated as to the trustee in bankruptcy by a filing a short time prior to the filing of the petition in bankruptcy.

It follows that it must be held that the trustee in bankruptcy is entitled to an order decreeing that he, as such trustee, is entitled to hold the money derived from the sale of the fixtures mentioned as against the claimant, Julia Palmer.

ANDERSON v. WESTERN UNION TELEGRAPH CO.

(District Court, E. D. Arkansas, Jonesboro Division. November 27, 1914.)

1. REMOVAL OF CAUSES (§ 76*)—RIGHT TO REMOVE—DETERMINATION.

Right of removal of a cause from the state to the federal court must be determined from the facts as they appear from the pleadings at the time the petition and bond are filed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 133; Dec. Dig. § 76.*]

2. REMOVAL OF CAUSES (§ 76*) — PROCEEDINGS — FEDERAL JURISDICTION — AMOUNT IN CONTROVERSY—AMENDMENT OF COMPLAINT.

Where plaintiff, having filed a complaint against defendant to recover \$5,000 damages, on being served with notice of defendant's intention to remove the cause to the federal court, before the petition and bond for removal were filed, and before the time to answer had expired, or an answer had been filed, amended his complaint by interlineation, reducing his claim below \$3,000, as authorized by Kirby's Dig. Ark. § 6143, the cause was no longer within the jurisdiction of the federal court, and was therefore not removable, though plaintiff reduced his ad damnum for the express purpose of preventing the removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 133; Dec. Dig. § 76.*]

At Law. Action by W. M. Anderson against the Western Union Telegraph Company. On motion to remand. Sustained.

This action was instituted in a state court to recover damages in the sum of \$5,000; the writ being returnable to the fall term of that court, which began on the 19th day of October, 1914. The statutes of the state of Arkansas require a defendant, when served with process 10 days before the commencement of the term, to plead on or before the third day of that term. On the 17th day of October, 1914, the defendant, a nonresident corporation (the plaintiff being a citizen of the state of Arkansas), served notice in writing on the attorney for the plaintiff that on the 19th day of October, 1914, it would file its petition and bond for removal of the cause to the United States District Court for the district in which the cause was then pending, and of which plaintiff was a resident. After service of this notice, but on the same day, and before the petition and bond for removal were filed, and before the defendant had filed its answer, plaintiff, without notice to the defendant, amended his complaint by interlineation, reducing his claim to below \$3,000.

Section 6143, Kirby's Digest of the Statutes of Arkansas, provides: "The plaintiff may amend his complaint without leave at any time before an answer is filed, and without prejudice to the proceedings already had."

On the day specified in the notice, and which was within the time the defendant was, under the laws of the state, required to plead, but after the amendment had been made, it filed in the state court its petition and bond for removal, which are in proper form, showing the necessary diversity of citizenship, and that the amount involved was \$5,000, disregarding the amend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment which reduced the claim. The state court, against the objections of the plaintiff, granted the petition, and, the record having been filed in this court within the time prescribed by section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. 1913, § 1011]), the plaintiff has moved to remand the cause, upon the ground that at the time the petition and bond for removal were filed the amount involved in the action did not exceed in value the sum of \$3,000, exclusive of interest and costs.

L. Hunter and J. W. Brawner, both of Piggott, Ark., for plaintiff.
R. E. L. Johnson, of Paragould, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). As this question has never been determined by any court in a published opinion, no notice of the intention to ask for a removal of a cause having been required before the enactment of the Judicial Code, it is deemed proper, for the guidance of attorneys in this district, until the appellate courts have authoritatively settled it, to file an opinion.

[1] The law as uniformly declared is that the right of removal has to be determined from the facts as they appear from the pleadings at the time the petition and bond are filed (*Chicago, B. & Q. Ry. Co. v. Williard*, 220 U. S. 413, 426, 31 Sup. Ct. 460, 55 L. Ed. 521), and, if in proper form, the jurisdiction of the state court ceases immediately, except for the purpose of making the order of removal. All subsequent proceedings in the cause by the state court are *coram non judge* and absolutely void. *Flint v. Coffin*, 176 Fed. 872, 100 C. C. A. 342; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 653, 68 C. C. A. 288, 291, and authorities there cited (approved in *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 373, 29 Sup. Ct. 366, 53 L. Ed. 551).

[2] In the case at bar it appears from the complaint, after it had been amended, that at the time of the filing of the petition and bond for removal the amount involved was not sufficient to confer jurisdiction on a national court. It is claimed on behalf of the defendant that, as the amendment was made after the service of the notice of the intended application for removal, it was for the sole purpose of preventing a removal; that this was a fraud on the defendant, for the purpose of depriving it of a right granted by the laws of the United States; and for this reason the court should disregard the amendment and treat the cause as it appeared from the complaint at the time the notice of the intention to remove it was served on counsel for the plaintiff.

Ordinarily it cannot be doubted that it is for the plaintiff to determine what damages he thinks he is entitled to, and if he sees proper to be satisfied with a smaller sum than he originally thought he should recover he has a right to reduce his claim, provided it was before the state court had lost jurisdiction of the cause. The fact that his object in reducing his claim was to prevent a removal is immaterial, unless he has lost control of his action after notice of the defendant's intention to remove the cause to the national court. It has been uniformly held that a party may change his citizenship for the sole purpose of enabling him to maintain an action in a national court, provided the change is actually made. The motive is immaterial. *Cheever v. Wilson*, 9 Wall. 108, 123, 19 L. Ed. 604; *Dickerman v. North-*

ern Trust Co., 176 U. S. 181, 192, 20 Sup. Ct. 311, 44 L. Ed. 423; Williamson v. Osenton, 232 U. S. 619, 625, 34 Sup. Ct. 442, 58 L. Ed. 758.

In *Blair v. Chicago*, 201 U. S. 400, 448, 26 Sup. Ct. 427, 434 (50 L. Ed. 801), it was sought to deprive a national court of jurisdiction upon the ground that there was a conspiracy to get the case into a national court; but the court, in disposing of that contention, said:

"As to the conspiracy to get the case into the federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the federal courts, and in such cases the motive of the creditor in seeking federal jurisdiction is immaterial."

It has been frequently held that if the plaintiff has a cause of action which is joint, and has elected to sue both tort-feasors in one action, even if it was for the purpose of preventing a removal to the national court, his motive in doing so is of no importance. *Chicago, R. I. & P. Ry. Co. v. Dowell*, 229 U. S. 102, 114, 33 Sup. Ct. 684, 57 L. Ed. 1090, and cases cited there.

While decisions of the Supreme Court affecting its jurisdiction on error to the Circuit or District Courts are not exactly in point, they are at least helpful. Prior to the enactment of the Circuit Court of Appeals Act (26 Stat. 824) the jurisdiction of the Supreme Court was limited, with some exceptions which are immaterial so far as the issues in this case are concerned, to final judgments exceeding in value the sum of \$5,000, exclusive of costs, and it was uniformly held that, although the judgment exceeded that amount, the judgment creditor had a right to remit all in excess of \$5,000, even if his motive was to prevent an appeal, and after such remittitur the Supreme Court was without jurisdiction. *Thompson v. Butler*, 95 U. S. 694, 24 L. Ed. 540; *Alabama Gold Life Ins. Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. 120, 27 L. Ed. 915; *Pacific Postal Tel. Co. v. O'Connor*, 128 U. S. 394, 9 Sup. Ct. 112, 32 L. Ed. 488; *Texas & Pacific Ry. Co. v. Horn*, 151 U. S. 110, 14 Sup. Ct. 259, 38 L. Ed. 91.

While in the first case cited the court had only decided that the remittitur could be made after verdict and before judgment on the verdict had been entered, in the other cases it was expressly held that the remittitur, even if made after entry of judgment on the verdict, would deprive the Supreme Court of jurisdiction.

In *Peterson v. Chicago, M. & St. P. Ry. Co. (C. C.)* 108 Fed. 561, Judge Philips held that an amendment of the complaint made in vacation, without notice, and before the petition for removal was filed, reducing the amount claimed below the sum necessary to invest the national court with jurisdiction, was ineffectual. But that case is clearly distinguishable from the case at bar. The statute of Missouri, from a court of which state that cause was removed, required notice of the filing of an amendment to a pleading in vacation to the adverse party, and "until such notice is duly served such adverse party shall not be deemed to have notice thereof for the purpose of pleading,"

and the learned judge held that, the amendment having been made in vacation without notice, it was under the statute of Missouri a nullity. But under the statutes of the state of Arkansas, and the uniform practice in the courts of that state, an amended pleading may be filed before answer in vacation, without notice to the adverse party, with the same effect as if made in term time.

As the complaint, at the time the petition and bond for removal were filed, showed the amount in the controversy did not exceed \$3,000, the cause was not removable, and the motion to remand is sustained.

THE BADGER.

(District Court, E. D. Virginia. November 11, 1914.)

1. SEAMEN (§ 11*)—INJURY IN SERVICE—RIGHT TO MEDICAL TREATMENT.

Where a seaman on a barge, while in the performance of his duties, was seriously burned about the face and eyes by steam escaping from an exhaust pipe while the barge was lying in the harbor of Boston, it was the duty of the master, in view of the delicate nature of the injury, to have the same treated before leaving the port, and for the consequences of his failure to do so the barge and owner are liable.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39-44, 187; Dec. Dig. § 11.*]

2. SEAMEN (§ 29*)—PERSONAL INJURIES—UNSAFE APPLIANCES.

Libellant, a seaman on a barge, was injured by steam and hot water escaping from an exhaust pipe on the barge, which, as located, was an unsafe appliance and was unknown to libellant. *Held*, that he was entitled to recover for the injury, and was not deprived of that right because he and the master of the barge were fellow servants.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

In Admiralty. Suit by Charles Taylor against the barge Badger. Decree for libellant.

Allan D. Jones, of Newport News, Va., and Bowden & Heard, of Norfolk, Va., for libellant.

Hughes & Vandeventer, of Norfolk, Va., for respondent.

WADDILL, District Judge. On the morning of the 8th of May, 1914, the barge Badger, from Bangor, Me., to Boston, Mass., dropped anchor in the latter port about 6 o'clock, at a point in the upper harbor about four miles from the city, and the libellant, a seaman, at the time in the after house of the barge, was ordered by the master to come to the forward house, where the master then was. The libellant proceeded up to the starboard side of the forward house, when, without warning or knowledge of its existence, he was suddenly struck in the face by a jet of steam and hot water, emitted from an exhaust pipe, the mouth of which was some seven feet above the main deck of the barge, and projecting from the starboard side of the forward house a few inches, at a downward angle of about 45 degrees, painfully and severely burning him about the face and eyes. The libellant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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charges that the injuries were caused by the negligent failure of the barge to keep her appliances in a reasonably safe and seaworthy condition, and that said exhaust pipe's construction was a dangerous appliance, of which he had no knowledge; that he requested the master of the barge to send him to a hospital to have the injuries he had sustained attended to, but that the latter refused to do so, and libelant was kept on board without medical treatment until its arrival at Newport News, Va., about 4 o'clock in the evening of May 11, 1914, when he voluntarily left the barge and secured medical treatment. Libelant claims that as a result of the accident he suffered great pain and anguish of body and mind, that he was badly scarred, his eyes injured, and his sight perhaps permanently impaired, causing a serious diminution in his earning capacity, and that he expended large sums of money in attempting his cure.

Respondent contends that, while libelant received the injuries complained of, they were the result of his own negligence, by his going forward on the starboard side of the house, instead of on the port side, where a safe passageway was provided for the purpose; that libelant saw the steam from the exhaust pipe, and attempted to pass through the same; that the emission of steam was an act incident to the navigation of the vessel; and that the master of the barge and libelant were fellow servants at the time of the accident. Respondent further says that the injuries received by libelant were very slight, that all proper and necessary medical attention was given or tendered him, and that, when respondent offered medical assistance in the port of Boston, libelant declined same, saying he did not need it, and voluntarily continued on the voyage to Newport News, Va.

From this statement, two questions are presented: (1) Whether the libelant is entitled to be paid for the failure of the respondent to seasonably furnish necessary medical treatment for the injuries sustained by the libelant while in its employ; and (2) whether, under the law, libelant can recover because of the injury received by the escaping steam from the exhaust pipe referred to in his libel, and in that connection whether the doctrine of fellow servant is applicable, and disentitles him to recover because of his and the barge's master's relation as coemployés.

The right of seamen to be paid for injury arising from the failure of a ship to furnish medical attention is well settled (*The Luckenbach* [D. C.] 174 Fed. 265); and the sole question here is whether, under the circumstances of this case, the barge's master properly discharged his duty to libelant in failing to furnish such treatment before leaving the port of Boston.

[1, 2] The conclusion reached by the court, upon full consideration of the evidence is: (1) That while there was much justification for the action of the master, still, having regard to the visible and delicate character of the injury sustained, the master should have sent the seaman ashore before leaving Boston. (2) As to the liability for the injuries received from the escaping steam, there is a sharp conflict in the testimony as to the suitability of the location of the pipe, the necessity for libelant's encountering the steam escaping therefrom by

which he was injured, and whether he did not know of, and had not been warned against, the danger thereof; and the court finds that the exhaust pipe was an unsafe appliance, its existence unknown to the libelant, and for the injuries arising therefrom, sustained in the lawful discharge of his duty, he is entitled to recover, and is not deprived of such right under any application of the doctrine of fellow servant, since the respondent cannot avail itself of that defense where the injury occurred as a result of the defective appliance.

The libelant is entitled to recover upon both of his causes of action, as well as for the loss of wages pending his cure, and the amount thereof should be limited to the injuries and losses sustained; that while he suffered considerably, and was entitled to medical treatment, the damage to his eye fortunately turned out not to be serious, nor was he long prevented from following his usual avocation, and in the opinion of the court an allowance of \$200 will compensate for all the injuries and losses sustained by him.

A decree for that sum will be entered upon presentation.

UNITED STATES v. BURKE et al.

(District Court, S. D. New York. August 14, 1914.)

CONSPIRACY (§ 27*)—CRIMINAL LAW (§ 97*)—CONSPIRACY TO DEFRAUD THE UNITED STATES—OVERT ACTS—JURISDICTION.

An indictment for conspiracy to defraud the United States charged the object of the conspiracy to be the bribery of one defendant as a government agent to make purchases on behalf of the commissary department from his codefendant. The overt acts charged were the receipt by such agent of drafts from his codefendant in the Canal Zone, which were sent by him to a bank in New York and by the bank presented for acceptance and collected from agents of the drawer. *Held*, that such collections, having been made while the conspiracy was being carried out, constituted overt acts in furtherance thereof, and that a District Court in New York had jurisdiction of the offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. § 27; * Criminal Law, Cent. Dig. §§ 177-189, 191; Dec. Dig. § 97.*]

Criminal prosecution by the United States against John Burke and Jacob L. Salas. On demurrer to indictment by defendant Salas. Overruled.

H. Snowden Marshall, U. S. Atty., Frank E. Carstarphen, Ben A. Matthews, and Harold A. Content, Asst. U. S. Attys., all of New York City.

Phanor J. Eder, of New York City (Everly M. Davis, of New York City, of counsel), for defendant Salas.

GRUBB, District Judge. The indictment charges that between January 1, 1908, and February 9, 1914, John Burke and Jacob L. Salas did unlawfully conspire to defraud the United States; the agreement consisting of a promise on the part of Burke to cause purchases on behalf of the commissary department to be made from Salas, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in consideration therefor a promise of Salas to cause large sums of money to be paid to Burke. The overt acts charged consist in the delivery in the Canal Zone by Salas to Burke of drafts on May 29, 1909, July 27, 1911, and July 3, 1913, and the receipt of said drafts by said Burke. Acceptance and payment and receipt of payment of these drafts by agents of Burke and Salas in the city of New York are laid as overt acts, giving jurisdiction in the Southern district of New York. The question presented by the demurrer is whether the alleged payments constitute overt acts to effect the object of the conspiracy.

This matter comes on for determination of a demurrer to the indictment, upon the ground that the District Court for the Southern District of New York is without jurisdiction of the offense; the contention being that the indictment shows that the conspiracy was formed between the defendants in the Canal Zone, and fails to show the commission of any overt act within the jurisdiction of this court. It is not clear that the question, intended to be presented, can be raised by a demurrer to the indictment, in view of the fact that the indictment alleges, at least as a conclusion, that the payments, relied upon by the plaintiff, were overt acts to effect the object of the conspiracy.

However, after considering the matter upon the merits, I have reached the conclusion that the averments of the indictment relating to defendant Burke's collection of the drafts in this district through a local bank give this court jurisdiction of the offense. The collecting bank in New York City was an agent of defendant Burke in presenting and receiving acceptance and payment of the draft, and its acts in so doing are Burke's acts; and this is true, though the collecting bank was an innocent agent and not a party to the conspiracy. If the defendant Burke had sent a person from the Canal Zone to New York City with the drafts, and this person had there collected them and received payment from Salas or his agent, it is clear the act of that person would have been that of Burke as much as if done by Burke himself. It is no less true of the collecting bank's act.

The facts of the case of *Ex parte Black* (D. C.) 147 Fed. 832, and 160 Fed. 431, 87 C. C. A. 383, relied upon by the demurrant, show that the payments relied upon by the government in that case as overt acts were made after the conspiracy had been fully completed, and could not, therefore, have been done to effect its object. In that case the object of the conspiracy was to effect a fraudulent entry of public lands. The acts essential to the conspiracy were the successive steps necessary to be taken in the land office to complete the entry. These steps had been taken and the entry completed long before the payments relied upon as overt acts were made. The statute of limitations had barred the acts constituting the entry, and the case was sought to be taken out of the influence of the statute by laying the subsequent payment of money, made after the conspiracy had successfully ended, as an overt act.

In this case the object of the conspiracy alleged in the indictment was to bribe the defendant Burke, by a series of payments of money to him by the defendant Salas, to induce him to purchase supplies

for the plaintiff from Salas. This in itself was a fraud upon the United States, as was held by the Supreme Court in the case of *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, and it is a conspiracy to commit this fraud that is charged in the indictment. The payment of money to the defendant Burke as a bribe was the sole object of the conspiracy alleged in the indictment, and constituted the means by which the conspiracy was to be carried out. In the case of a conspiracy to fraudulently conceal assets from a trustee in bankruptcy, it would not be contended that an act of actual concealment by one of the conspirators was not an overt act to effect the object of the conspiracy, yet the gist of the offense which was the object of the conspiracy in that case was the fraudulent concealment. So, in this case, the gist of the offense, which is the object of the conspiracy, is the payment of a bribe, and it is equally clear that a payment for that purpose may constitute an overt act to effect the object of the conspiracy. The court in the Black Case, relied upon by the defendant, would probably have reached a different conclusion if the conspiracy in that case had been still in progress when the payments were made.

DELTA LUMBER CO. v. SCHWARZ WHEEL CO.

(District Court, E. D. Pennsylvania. November 23, 1914.)

No. 2502.

1. CORPORATIONS (§ 684*)—FOREIGN CORPORATIONS—ACTIONS—RECEIVERS.

Where a corporation sued defendant for breach of contract, seeking to recover in its own name, the fact that a receiver was appointed for the corporation pendente lite in a suit instituted in the state of its domicile constituted no objection to a recovery; it appearing that the corporation still retained title to all of its property, including the chose in action sued on, and that since the institution of the suit it had been relieved of the receivership.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2666; Dec. Dig. § 684.*]

2. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR—FAILURE TO RAISE QUESTION AT TRIAL.

Where defendant was responsible for an error in the instructions, and did not call the attention of the trial court thereto, in order that it might be corrected at the trial, it could not take advantage of the error on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

3. APPEAL AND ERROR (§ 263*)—EXCEPTIONS—NECESSITY.

Error in giving an instruction not supported by the evidence is not available on appeal, where no exception was taken thereto at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

Action by the Delta Lumber Company, a corporation under the laws of West Virginia, against the Schwarz Wheel Company, a Pennsylvania corporation. On motion for a new trial. Denied conditionally.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Carr, Beggs & Steinmetz, of Philadelphia, Pa., for plaintiff.
Wm. F. Brennan, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] To render intelligible the reasons on which the motion for a new trial is grounded, a short statement of the facts involved in this case may be made. The action is by one corporation against another. It is founded upon averments which raise certain well-defined issues, which may be formulated in the questions of whether there had been a contract made between the parties, what the contract was, whether there had been a breach, and, if a breach, what the damage was. A chancery receiver was appointed for plaintiff by the courts of West Virginia, and the further fact may be stated that the company, by the decree of the same court, has, since the institution of the suit, been relieved of the receivership. This latter was not a trial fact, however, as the record evidence of it did not reach counsel until after the close of the case. It is stated now, not as bearing upon the trial questions, but for guidance in awarding judgment and execution.

The action here was brought by the corporation in its own name. With one exception, all the reasons for a new trial now pressed bear upon the right of the defendant to interpose this receivership as a defense. Many cases may be cited in which similar efforts have met with success. An equal or a greater number may be found in which like attempts have failed. In some of the first class of cases the right of action was not in the corporation, but had passed by operation of law or of the corporation to a statutory receiver, or some one in whom alone was the right of action. The ground upon which these rulings are based is apparent. In other cases the corporation was seeking in the foreign jurisdiction to maintain an action which the courts of its own state would not entertain nor permit it to maintain there. All courts will, by applying the principle or policy of comity, respect the orders and decrees of the court or sovereignty to which the plaintiff owes allegiance. In still other cases the corporation was insolvent, or there was other danger of loss or expense to home creditors, which the appointment of an ancillary receiver would prevent. In the second class of cases, none of these or other reasons in the way of a recovery existed, and the corporation was permitted to recover in its own name. This case belongs to the latter class. The receiver here is merely a *pendente lite* appointment. The corporation is still existing and retains title to all its property, including this chose in action. Neither the decree appointing the receiver nor the laws of the state of its incorporation inhibit the corporation from bringing this action. Neither insolvency nor any reason to protect creditors or others through an ancillary receiver appears.

The defense is a purely technical one, and, if successful, would merely subject the plaintiff to expense, trouble, and delays, which are uncalled for, if not required to sustain its right of action. The defendant must, under these circumstances, show a right which has been denied it. None has been shown. If an ancillary receivership is required to protect defendant in the payment of the verdict, such

protection can be accorded on the entry of the judgment and by controlling execution, and is provided for in the order now made.

[2, 3] The remaining reasons relate to complaints of the charge to the jury. All these were dropped at the argument, except one. The jury were told that they might find an agreement to pay a certain rental. This was upon the supposition that a witness for the plaintiff had testified to an agreement to so pay. The notes show no such testimony. The defendant itself was answerable for this error, because it introduced a flat denial that any such agreement had been made. No appellate question arises out of this, because the attention of the trial judge should have been called to the error, in order that it might be corrected. This was not done, nor exception taken to this feature of the charge. To make sure that the defendant does not suffer by this inadvertence, the plaintiff will be required to remit \$170 of the verdict.

The rule for a new trial is discharged, subject to the condition that plaintiff must move for leave to enter judgment on the verdict after notice to defendant, and leave to so move is now allowed, upon plaintiff filing a remittitur for \$170 from the amount of the verdict, and upon making proof that plaintiff has been relieved of the receivership.

UNITED STATES v. HODGES et ux.

(District Court, D. Montana. November 13, 1914.)

No. 39.

1. WOODS AND FORESTS (§ 8*)—SUIT TO ENJOIN TRESPASS ON FOREST RESERVATION—JURISDICTION.

The United States may maintain a suit in equity for an interlocutory mandatory injunction and a final decree of abatement to restrain continuous trespass and waste upon public land which has been withdrawn from sale and devoted to governmental use in connection with a forest reservation.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

2. WOODS AND FORESTS (§ 8*) — FOREST RESERVATIONS — TEMPORARY WITHDRAWAL FROM SALE — VALIDITY.

Although a withdrawal of public land from sale by the Secretary of the Interior for public use in connection with a forest reservation was unauthorized at the time, it is validated by the continued recognition of the withdrawal and use of the land since Act June 25, 1910, c. 421, § 1, 36 Stat. 847 (Comp. St. 1913, § 4523), which expressly authorizes such withdrawals by the President.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

In Equity. Suit by the United States against Homer Hodges and Mrs. Homer Hodges. Decree for complainant.

Burton K. Wheeler, U. S. Attorney, of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Chas. A. Spaulding, of Helena, Mont., and W. E. Keeley, of Deer Lodge, Mont., for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

BOURQUIN, District Judge. This is a suit for a mandatory injunction restraining defendants from interference with plaintiff's occupancy and use of certain lands and tenements, from grazing stock thereon that consume and destroy grass, plants, and trees there growing, and from occupying the same. The answer denies the equity of the bill, and alleges plaintiff has an adequate remedy at law in ejectment. By consent an injunction pendente lite issued, restraining defendants from grazing stock upon the premises. Final hearing has been had.

It appears that in 1908 the Secretary of the Interior withdrew said lands from the public domain and devoted them to administrative uses in connection with an adjacent national forest. Buildings and fences were erected by plaintiff, the premises occupied by the forestry service, and a small tree seedling nursery established. In 1913 the ranger in occupancy without authority transferred possession of the premises to defendants with a view to lease. No lease was entered into. Defendants, when requested to vacate, refused, and continued to occupy the lands and tenements and to graze stock thereon, to some injury to and destruction of the seedling trees. They claim right to enter the lands under the public land laws as a homestead.

[1] It is probable that the continuous trespass, grazing, and destruction of the seedling trees, in the nature of waste, is so far irreparable injury that injunction lies, and that upon familiar principles of equity jurisdiction so attaching would be retained to determine the entire controversy and grant full relief, though in part of legal rights and remedies. Be that as it may, other and perhaps clearer grounds of equity jurisdiction appear warranting the relief sought. The premises involved were devoted to governmental uses and administrative purposes in connection with a national forest, and are still desired and so necessary therefore. They were of common or public use and resort, and of right should be of unobstructed public service and access at all times. Any encroachment upon or appropriation of such public instrumentalities by or to private uses is both a purpresture and a public nuisance. Clearly the government will not in such cases be held to the slow process of proceeding at law, the trespasser in possession pendente lite, but may summarily abate by all necessary force the invasion of its sovereignty and proprietorship, or may resort to equity for its suppression by an interlocutory mandatory injunction and a final decree of abatement. Story, Eq. Jurisdiction, § 921 et seq. See 29 Cyc. 1179, 1219; 32 Cyc. 1271; U. S. v. Brighton Rancho Co. (C. C.) 26 Fed. 218.

In respect to the Secretary's withdrawal of the lands, defendants, neither alleging nor proving they are qualified to enter them, cannot question it. They appear as trespassers, against whom plaintiff is entitled to all the rights and remedies of a sovereign, and also to those of any owner under like circumstances. See *Light v. U. S.*, 220 U. S. 536, 31 Sup. Ct. 485, 55 L. Ed. 570.

[2] However, if the withdrawal, when made in 1908, was a nullity for want of authority, such authority was expressly conferred upon the President by Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. 1913, § 4523). And the continuous recognition and maintenance

of the withdrawal by the departments administering the public domain as the representatives of the President, and presumably by his direction, in legal effect rendered it valid by renewal or ratification on and after the date of said act, even as though then expressly renewed or made.

Decree for abatement, with costs, will be entered.

LOUISVILLE & N. R. CO. v. UNITED STATES.

(District Court, W. D. Virginia. October 1, 1914.)

No. 112.

COMMERCE (§ 89*)—INTERSTATE COMMERCE COMMISSION—POWERS—REVIEW OF ORDERS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 and Act June 18, 1910, c. 309, § 12, 36 Stat. 551 (U. S. Comp. St. Supp. 1911, p. 1297), the Interstate Commerce Commission has power to determine, not only whether a given rate is reasonable, but also whether a given rate is confiscatory, and if a railroad company is dissatisfied with its decision, and desires to introduce further evidence, it should apply to the commission for a rehearing under section 16a. The courts will review such an order only on the evidence which was before the Commission, unless that tribunal has refused to hear evidence that is material.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.*]

In Equity. Suit by the Louisville & Nashville Railroad Company against the United States, in which the Interstate Commerce Commission and the Stonega Coal & Coke Company are interveners. Ruling on admissibility of evidence.

Blackburn Esterline, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Jos. W. Folk, of St. Louis, Mo., and Edward H. Hart, of Brooklyn, N. Y., for Interstate Commerce Commission.

William A. Glasgow, Jr., of Philadelphia, Pa., and J. F. Bullitt, of Big Stone Gap, Va., for intervener Stonega Coal & Coke Co.

Before PRITCHARD and WOODS, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge (orally). The court has considered the propositions which you gentlemen were discussing, and we are of the opinion that the statute contemplates that the Interstate Commerce Commission shall not only have power to determine as to whether any given rate is reasonable, but shall also have the power to determine as to whether any given rate is confiscatory, and that in a case like the one at bar, if the railroad, the complainant here, is dissatisfied as to the decision of the Interstate Commerce Commission, that it is its duty under the statute (section 16a) to apply to the Commission for a rehearing, in order that it may offer any additional evidence bearing on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the question of the unreasonableness of the rate and as to whether the rate is confiscatory. What I have said is subject to this exception: That, if the Commission had refused to hear any testimony that was material on the question as to whether the rates were confiscatory or unreasonable, then this court would be inclined to hear such testimony; but, it appearing that no effort has been made on the part of the railroad to present to the Commission this additional testimony bearing on the question as to whether the rates were confiscatory, it would not be proper for us to consider evidence of that character, and we will exclude the evidence presented by the complainant, and hear only the testimony contained in the record which was before the Commission at the hearing of the case.

In re LIBY.

(District Court, E. D. Pennsylvania. November 24, 1914.)

No. 5066.

BANKRUPTCY (§ 399*)—EXEMPTIONS—PERSONAL PRIVILEGE—WAIVER.

Since, by the laws of Pennsylvania, the exemption allowed to a debtor is a personal privilege to him, which he may waive and lose, and not a police regulation, primarily for the benefit of the community, to prevent the debtor from becoming a public charge, a Pennsylvania bankrupt's failure to surrender all his property to his trustee was sufficient to deprive him of the right to exemptions out of that which he did surrender.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Harry Liby. On petition to review a referee's order disallowing a bankrupt's exemption. Affirmed, and petition dismissed.

Levi & Mandel, of Philadelphia, Pa., for bankrupt.

Harry L. Jenkins and William S. Furst, both of Philadelphia, Pa., for objecting creditors.

DICKINSON, District Judge. The order of the referee is based upon a finding of fact. Every presumption exists in favor of the correctness of this finding. It should not be disturbed by the court, unless a mistake is clear. No such justification for interference by the court with the finding is present in this case. The whole question, therefore, resolves itself into one of law. The question presented is: Does the fact that the bankrupt has not surrendered all of his property to the trustee in bankruptcy deprive him of his right to his exemption out of that which he has surrendered? This again resolves itself into another question: Is the exemption allowed for the benefit of the bankrupt, or is the exemption law in the nature of a police regulation, and primarily for the benefit of the community, to prevent insolvents from becoming public charges?

In some of the states one answer is made to this latter question, and in the others a different answer. In the state of Pennsylvania the ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

emption is viewed as the personal privilege of the debtor, which he may waive, and which he may lose. In other states the public policy feature is given emphasis. The Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) allows whatever exemption is given by the state laws, and the courts of the United States have followed the rulings of the state courts in the construction of exemption statutes. In re Schafer (D. C.) 151 Fed. 505.

This disposes of the only question involved in the present appeal, and the order of the referee is affirmed, and the petition for review dismissed.

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO.

(District Court, E. D. Kentucky, at Frankfort. September 28, 1914.)

No. 758.

REMOVAL OF CAUSES (§ 12*)—DIVERSITY OF CITIZENSHIP—DISTRICT OF SUIT.

The provision for the removal of causes in the Judiciary Act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [Comp. St. 1913, § 1010]), which gives right of removal to a nonresident defendant in civil suits "of which the Circuit Courts of the United States are given jurisdiction by the preceding section," refers to the first part of section 1, which confers jurisdiction on all Circuit Courts of civil suits of the character therein specified, and not to the second part, which relates to venue, and not to essential jurisdiction; and a suit between citizens of different states, brought in a court of the state of which the plaintiff is a citizen and resident, although not in the district of his residence, if otherwise removable, may be removed by the nonresident defendant, notwithstanding the fact that under the venue provision of section 1 it could not have been originally brought in the federal court into which it is removed. The same right of removal exists in such case under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094) § 28 (Comp. St. 1913, § 1010).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

At Law. Action by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company. On motion to remand to state court. Motion denied.

E. S. Jouett, Henry L. Stone, and Jas. B. Wright, all of Louisville, Ky., for plaintiff.

Richards & Harris and Humphrey, Middleton & Humphrey, all of Louisville, Ky., for defendant.

COCHRAN, District Judge. This cause is before me on plaintiff's motion to remand. It is a civil suit at law, brought in the circuit court of Fayette county, Ky., in this district, and removed thence to this court by the defendant. The plaintiff seeks therein to recover of the defendant \$682,972.95 and interest from August 17, 1913. Question is made as to the exact nature of plaintiff's cause of action as set forth in its petition. But for the purposes of this motion I will accept it to be as plaintiff claims it is; that is, a suit to recover that sum as a reasonable rental for one year from August 17, 1912, for the use and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

occupation of its right of way and other property located in 13 different states by the defendant for its telegraph line and apparatus. The ground of the removal was the diversity of citizenship between the parties.

The plaintiff is a Kentucky corporation and citizen, and the defendant is a New York corporation and citizen. No question is made as to the regularity of the removal proceedings. The sole ground of the motion to remand is that the cause was not removable; and the ground upon which it is contended that it was not removable is that it could not have been brought originally in this court.

It is clear that the suit could not have been brought originally in this court, notwithstanding the diversity of citizenship between the parties. This is so because of the "but" clause of section 51 of the Judicial Code (Comp. St. 1913, § 1033), which is in these words:

"But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This district is not the district of the residence of the defendant, because it is a foreign corporation. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. It is not the district of the residence of the plaintiff, for, though a large part of plaintiff's railroad system is located in this district, its principal office is at Louisville, in the Western district of this state. *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. This decision is not only an authority for the position that the district of the plaintiff's residence is the Western district, and not this, but also for the position that, this being so, the suit could not have been brought originally in this court.

It follows, then, that the removability of the suit and the decision of the motion to remand depend solely on the question whether the circumstance that the suit could not have been brought originally in this court rendered it nonremovable, or, more specifically, whether the place where a suit is required to be brought, if brought in the federal court, is an element in determining its removability when brought in the state court. And on this question the decision of the Supreme Court in the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, is a direct authority in support of the position that it is. It was there held that a civil suit at law, brought by a citizen and resident of Michigan against a citizen and resident of Louisiana in a state court of Missouri within the Eastern district thereof, and removed by defendant to the Circuit Court of that district, was nonremovable, and a mandamus was awarded against that court, which had assumed jurisdiction of the suit, commanding it to remand the suit to the state court. It was so held, because the suit could not have been brought originally in the Circuit Court, or, in other words, that district was not the place in which it could have been brought, if brought in a federal court, instead of a state court.

There is just one particular in which that case, in its facts, differs from the one in hand, and that is that there the plaintiff was a non-resident and noncitizen of the state where the suit was brought, where-

as here the plaintiff is a citizen and resident of the state where the suit was brought. But there is nothing in this difference calling for a difference in decision. For here, as there, the suit was brought in a district of which the plaintiff was a nonresident, and because of this circumstance the suit could not have been brought originally in this court, and the decision in the Wisner Case was placed, and could only have been placed, on the ground that in no case can a suit be removed to a federal court that could not have been brought originally in that court. And in the cases of *Shawnee National Bank v. M., K. & T. Ry. Co.* (C. C.) 175 Fed. 458, and *Wheeler v. A., T. & S. F. Ry. Co.* (not reported), the decision in the latter case being quoted in that of *Stone v. C., B. & Q. Ry. Co.* (D. C.) 195 Fed. 832, which in their facts are exactly like those of the case in hand, the Wisner Case was followed and the suits were held nonremovable.

In the *Shawnee National Bank Case* a suit was brought in a court of the state of Oklahoma within the Eastern district thereof by a citizen of that state resident in the Western district against a foreign corporation; i. e., a corporation of Kansas, and removed to the Circuit Court of the Eastern district by the defendant. It was held that the suit was nonremovable, and it was remanded to the state court. In the *Wheeler Case* a suit was brought in a court of the state of Missouri within the Western district thereof by a citizen of that state, resident in the Eastern district, against a foreign corporation—i. e., a corporation of Kansas—and removed to the Circuit Court of the Western district by the defendant. There it was likewise held that the suit was nonremovable, and it was remanded to the state court. I think that there is no escaping the conclusion that, if the Wisner Case is binding on the point decided therein, these two cases were decided as they should have been.

The result of this reasoning is to bring us square up against the decision of the Supreme Court in the Wisner Case. Ordinarily a lone District Judge, when confronted with such a situation as this, has nothing to do but to obey. But here I am going to treat the matter as open for discussion as to whether it is incumbent on me to follow this decision. And, before dealing directly with it, certain preliminary matters call for consideration.

In the first place I would note the state of opinion prior to the decision of that case. There had been no decision of the Supreme Court dealing with that question prior thereto, but there had been numerous cases in the lower federal courts in which it had been considered and decided. And there had been some conflict in the decisions. Judge Keller of the Southern district of West Virginia, in his opinion in the case of *Foult v. Gray* (C. C.) 120 Fed. 156, where the decision was against the removability of the suit, cites, as in accord therewith, the following decisions of the lower federal courts, to wit: *Yuba County v. Pioneer Gold Mining Co.* (C. C.) 32 Fed. 183; *Telegraph Co. v. Brown* (C. C.) 32 Fed. 337; *Pitkin Mining Co. v. Markell* (C. C.) 33 Fed. 386; *Harold v. Mining Co.* (C. C.) 33 Fed. 529; *Tiffany v. Wilce* (C. C.) 34 Fed. 230; *Cooley v. McArthur* (C. C.) 35 Fed. 372; *Central T. Co. v. Virginia, etc., Co.* (C. C.) 55 Fed. 769.

But, as I read these decisions, none of them but the cases of *Yuba County v. Pioneer Gold Mining Co.* and *Harold v. Mining Co.* involved the question or were relevant thereto. The decision in the *Yuba Co. Case* was by Judge Sawyer, concurred in by Justice Field and Judge Sabin. It went so far as to hold that a suit could not be removed by the nonresident defendant, even though it had been brought in the district of plaintiff's residence. That in the *Harold Case* was by Judge Hallett, concurred in by Judge (afterward Justice) Brewer. But these cases were subsequently overruled. The *Yuba County Case* was overruled by that of *Wilson v. Telegraph Co.* (C. C.) 34 Fed. 561, in which the opinion was delivered by Justice Field and concurred in by Judge Sawyer. In referring to the *Yuba County Case* he said:

"The opinion in the case was written by my associate, the Circuit Judge; but I concurred in it, and the judgment which followed. I have, however, long been satisfied that we fell into an error, and I am happy that we have so early an opportunity of correcting it."

The *Harold Case* was overruled in the case of *K. C. & T. Ry. Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 3, in which the opinion was delivered by Judge Brewer. In referring to the *Harold Case* he said:

"I am aware that in the case of *Harold v. Mining Co.* [C. C.] 33 Fed. 529, I concurred with Judge Hallett in an opinion different from that herein expressed; but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous."

Judge Keller also cites as against the removability of the suit these two decisions of the Supreme Court, to wit: *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Mexican, etc., Ry. Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. But here also, as I read these decisions, neither one of them involved the question, and the *Shaw Case* is not relevant thereto. The *Davidson Case* is relevant thereto, and further note of it will be taken in the course of the discussion.

After the case of *Foulk v. Gray*, and prior to the *Wisner Case*, there was no case in the lower federal courts, as far as my reading goes, in which it was held that such a suit was not removable. So that prior to the decision in the *Wisner Case* Judge Keller stood practically alone in the position he took in the case of *Foulk v. Gray*. On the other hand, the cases were numerous in which it had been held that the suit was removable. Such are the following cases, to wit: *K. C. & T. Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 3; *First National Bank v. Merchants' Bank* (C. C.) 37 Fed. 657, 2 L. R. A. 469; *Burck v. Taylor* (C. C.) 39 Fed. 581; *Amsinck v. Balderston* (C. C.) 41 Fed. 641; *Uhle v. Burnham* (C. C.) 42 Fed. 1; *Crocker Nat. Bank v. Pagenstacher* (C. C.) 44 Fed. 705; *Sherwood v. Miss. Valley Co.* (C. C.) 55 Fed. 1; *Long v. Long* (C. C.) 73 Fed. 369; *Duncan v. Associated Press* (C. C.) 81 Fed. 417; *Stalker v. Pullman Palace Car Co.* (C. C.) 81 Fed. 989; *Creagh v. Equitable Life Ass'n Society* (C. C.) 83 Fed. 849; *Cowell v. City Water Supply Co.* (C. C.) 96 Fed. 769; *Whitworth v. Railroad Co.* (C. C.) 107 Fed. 557; *Virginia-Carolina Chemical Co. v. Insurance Co.* (C. C.) 108 Fed. 451; *Rome Petroleum & Iron Co. v. Hughes S. Co.* (C. C.) 130 Fed. 585; *Robert*

v. Pineland Club (C. C.) 139 Fed. 1001; Iowa Lillooet Gold Mining Co. v. Bliss (C. C.) 144 Fed. 446.

Here, then, are 17 different cases, decided by 16 different federal judges, including two justices of the Supreme Court, to wit, Brewer and Gray, in each of which it was held that such a suit was removable. They show that prior to the decision of the Wisner Case the weight of opinion amongst the federal judges was very heavily against the position taken in that case. The text writers, so far as I have consulted them, take this view of the question. Dillon on Removal of Causes, 96; Moon on Removal of Causes, § 65. Judge Dillon, in his work, after giving a résumé of the course of the decisions on the question, concluded as follows:

"Accordingly, it is now well settled that, where the parties are citizens of different states and the other conditions of removability are satisfied, the cause may be removed to a federal court, notwithstanding the fact that neither plaintiff nor defendant is a citizen or resident of the state where the suit is brought or of the district within the territorial jurisdiction of the federal court to which it is to be transferred."

I would next consider the question on its merits. This case was begun after the Judicial Code was enacted and is governed by it. The Wisner Case and all others dealt with herein arose under the act of 1887-88. In considering the question on its merits, I will deal with it as if the case was governed by the act of 1887-88. At the conclusion of the opinion it will be considered how the case stands under the Judicial Code.

The work in hand is that of statutory interpretation. The right of removal from a state court to a federal court is a creature of statute. The extent of the right, therefore, depends solely upon the statute. To the statute, then, must we go in order to ascertain its thought on this subject. This incident of the great painter, Turner, is told. He was visited by two friends, who came to see his pictures. He kept them in a closely shuttered room for a short time before he told the servant to show them upstairs to his studio. He then apologized for the apparent discourtesy by telling them that they had to have their eyes emptied of the common glare before they could really see the colors of his pictures. One on the hunt for reality must see that subjective conditions—preconceptions as well as preferences and prejudices—do not blind his inward or "third" eye. If, "like Lord Nelson at Copenhagen he claps his telescope to a blind eye," he will not see things as they are. This caution here is not a mere pleasantry. It has real relevancy to the work in hand.

It has been quite common, since the enactment of the jurisdictional act of 1887-88, in considering a question of federal jurisdiction arising under it, to make much of the fact that the leading purpose of the act was to cut down federal jurisdiction from what it had been under the act of 1875. Undoubtedly such was its purpose, and that purpose may be a legitimate factor in determining the thought of the act. But it is questionable whether this circumstance has not been overworked. The interpreter should possess it, but not be possessed by it. It should be used by him in the proper place only. So used, it is possible that it may be determinative. Its proper place is not at the outset of the in-

vestigation. The interpreter should begin by fastening himself on the words of the statute. If those words are unambiguous and their meaning clear, he has no occasion whatever to take into consideration this circumstance. It is only in case, after so doing, he ascertains that the words are ambiguous and their meaning not clear that he has any occasion so to do. Until, then, he has so done, he should set this idea severely aside, and only in the contingency stated call it in as an aid in the work of interpretation. To the words of the statute, then, we go to see whether they are unambiguous and their meaning clear.

We have nothing to do with any part of the act of 1887-88, except so far as its first section is concerned. Thereby the first, second, and third sections of the act of 1875 were amended, and made to read as therein set forth. The first section concerns original jurisdiction, the second removal jurisdiction, and the third removal procedure. Whilst we are concerned more directly with the second section, dealing with removal jurisdiction, what it provides cannot be understood without first understanding what the first section provides. The first section consists of two long sentences. The second sentence consists of four separate clauses. The first sentence contains a grant of original jurisdiction. It is a grant of jurisdiction, not to any particular Circuit Court, but to all the Circuit Courts of the United States alike. The language of the grant as to jurisdiction of civil suits is:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum of or value of two thousand dollars"

—which are of a certain character. The character of suits jurisdiction of which is thereby granted is of five different kinds. That of one consists in its subject-matter. It arises under the Constitution or laws of the United States, or treaties made or which shall be made under their authority. That of the other four consists in the parties thereto. The United States is plaintiff or petitioner, or it is between citizens of different states, or it is between citizens of the same state claiming lands under grants of different states, or it is between citizens of a state and foreign states, citizens, or subjects. It will be noted that the grant is to the Circuit Courts of the United States of jurisdiction of "all" such suits. Thereby each Circuit Court is granted jurisdiction of every suit of such kinds. Capacity to cognize any suit of either of those five kinds is conferred on each of the Circuit Courts. Each Circuit Court is thereby given jurisdiction of, or capacity to cognize, every suit that may arise between citizens of different states. This grant, however, is qualified by the third clause of the second sentence, which is in these words:

"Nor shall any Circuit Court * * * have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had, been made."

This clause and the grant of jurisdiction of civil suits in the first sentence properly go together, inasmuch as each have to do with the

jurisdiction, or capacity of cognizance of the Circuit Court. The former is a qualification of the latter. The Circuit Courts are given jurisdiction of, or capacity to cognize, all such suits, except in the contingency specified in that clause, and they are given capacity to cognize all such suits in that contingency under the circumstances therein specified.

Were there nothing more in the section than what has thus been referred to, any suit of the character therein specified could be brought in any Circuit Court of the United States and prosecuted to a finality, provided process could be served on the defendant in the district of such court or he entered his appearance thereto. But Congress by the second clause of the second sentence under consideration limited this right. That clause is in these words:

"And no civil suit shall be brought before either of such courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This clause is a prohibition, and is directed at the plaintiff. He is forbidden thereby to bring any of the suits of which the Circuit Courts are given jurisdiction or capacity to cognize before any of them elsewhere than in the district prescribed. He is forbidden to bring any of them, except such as are between citizens of different states, elsewhere than in the district of which the defendant is an inhabitant, and those that are between such citizens elsewhere than in the district of the residence of either the plaintiff or the defendant. This clause as to the district in which suits shall be brought and the grant of jurisdiction or capacity to cognize in the first sentence are alike in this. If the suit is not brought in the right district, the Circuit Court where it is brought has no more right to hear and determine it, nothing else appearing, than it has to hear and determine it if it is not of the character prescribed by that grant. But they differ in this. The clause as to the place where suit must be brought was enacted solely for the defendant's benefit. Thereby he acquired a privilege or personal exemption from suit elsewhere than in the prescribed district. It having been so enacted, and any Circuit Court by the general grant having capacity to cognize any suit of the character prescribed therein, if it is brought elsewhere than in the prescribed district, the defendant can waive the failure to bring the suit therein, and, upon such waiver, the Circuit Court where it is brought can proceed to hear and determine it, just as much so as the Circuit Court of the proper district could have done had it been brought there. That this is so has been settled by numerous decisions of the Supreme Court dealing with this or a similar provision in the earlier jurisdictional acts. Many of them are referred to in Justice Brewer's opinion in the case of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. That decision is to that effect, and so is the decision in the case of *Western Loan & Savings Co. v. Butte Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

But it is not possible for a defendant to waive the question as to the character of the suit brought and thereby confer on the Circuit Court jurisdiction of a suit of a character different from that prescribed. Because of the fact that the requirement as to the district in which suits of the character prescribed are to be brought may be waived, it is not jurisdictional. The description of the character of suits that may be brought in the Circuit Court of the United States is alone jurisdictional. The matter is thus put in Street's Federal Equity Practice, vol. 1, § 383:

"If a suit is of such nature that it can certainly be brought in some federal court or another—that is, if the subject-matter of the suit or the character of the parties is such that a federal court of some state or district has jurisdiction to entertain it—then the question whether that suit should be brought in one particular state or district rather than in another is not a question of jurisdiction at all. It is rather a question of venue, using this word in the sense of civil division from which the jury must be gathered, and in which the cause, if an equity one, should be tried. True, the term 'jurisdiction' is frequently used in this connection, and as a result some confusion has appeared in the cases. But the higher courts and especially the Supreme Court have constantly insisted on the distinction between the question of essential jurisdiction and the question of the mere place of bringing suit. As commonly put, the distinction is one between essential jurisdiction on the one hand and an exemption from process on the other."

The following quotations from opinions of the Supreme Court accord with this:

In the case of *McCormick v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833, Chief Justice Fuller, after quoting the clause as to the district in which suits shall be brought, has this to say:

"The jurisdiction common to all the Circuit Courts of the United States in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought. Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides."

In the case of *I. C. & I. Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, Justice Gray said:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction."

And in the case of *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 26 Sup. Ct. 55, 50 L. Ed. 178, Chief Justice Fuller said:

"The clause vesting jurisdiction should not be confounded with the clause determining the particular courts in which the jurisdiction must be exercised."

In each one of these three quotations the provision as to the place where suit is to be brought is described as not involving a matter of jurisdiction. The provision as to the character of suits that can be brought is alone referred to as being concerned with such a matter.

This exhausts all of section 1 that it is material to consider on this occasion. So much of the first sentence as relates to criminal jurisdiction and the first and fourth clauses of the second sentence have no bearing here. This characteristic of the first section of the jurisdictional act of 1887-88—i. e., the uniting in the same section a jurisdictional and a venue provision—was a characteristic of the previous jurisdictional act of 1789. The eleventh section thereof contained a grant of original jurisdiction to the Circuit Courts, with a qualification thereof, the same as in the act under consideration. It contained a venue provision also. The jurisdictional provision was narrower and the venue provision broader than the same provision was in that act. The jurisdictional provision therein contained no grant of jurisdiction of suits according to their subject-matter; i. e., of "arising under" suits. It was confined to suits characterized by the parties thereto; i. e., suits where the United States were plaintiffs or petitioners, or an alien was a party, or between a citizen of the state where the suit was brought and a citizen of another state. It will be noted that the jurisdiction of suits between citizens of different states was limited to those between a citizen of the state where the suit was brought and a citizen of another state. By reason thereof, though the grant was to the Circuit Courts generally of jurisdiction of such suits, each Circuit Court did not thereby acquire jurisdiction of every suit between citizens of different states. The Circuit Courts of the states of which the parties were citizens alone acquired jurisdiction thereof. It followed from this, not only that such a suit could not be brought in any other Circuit Court than that of the state of which the parties thereto were citizens, but that the defendant could not waive the objection that the suit was brought in another Circuit Court and thereby confer jurisdiction on it. The same section prohibited the bringing of suits, jurisdiction of which was granted, in any other district than that whereof the defendant was an inhabitant or in which he should be found at the time of serving the writ.

Such—i. e., the uniting of a jurisdictional and venue provision in the same section—likewise was a characteristic of the act of 1875. The first section contained a grant of original jurisdiction to the Circuit Courts, with a like qualification as that heretofore noted. It contained a venue provision. The venue provision was the same as that of the eleventh section of the act of 1789. But the jurisdictional provision was broadened to what it is in the act of 1887-88.

We are now in position to approach and master so much of section 2 as is pertinent, with which we are more immediately concerned. It was, no doubt, in the power of Congress to confer on the federal courts exclusive jurisdiction of the suits covered by the first section, just as it has conferred on them such jurisdiction of other suits coming within the federal judicial power as defined in the federal Constitution. But this it has never done as to any of such suits. On

the contrary, in so far as it has conferred jurisdiction thereof on said courts prior to the Judicial Code, it has always, possibly out of abundant caution, provided in express terms that such jurisdiction shall be concurrent with that of the courts of the several states. In the Judicial Code this express provision has been omitted, but without effect, however, upon the jurisdiction of the state courts. Congress not having conferred exclusive jurisdiction of such suits on the federal courts, the state courts have jurisdiction thereof so far as it has been conferred on them by state laws. Such suits are rightfully brought in the state courts, and that even though the state courts in which they are brought are within districts in the federal courts of which they could not have been rightfully brought. The federal jurisdictional acts, therefore, have always presupposed the rightful bringing in the first instance of the suits covered by them in the state courts, and have provided for the removal of some of them at least to the federal courts.

The question before us is as to the extent to which the act of 1887-88 provided for their removal, or, to put it so as to bring out the exact point at issue, it is as to whether it provided for the removal of every suit of the character described in the first section, or for only such of them as might be brought in the state court of the proper district—i. e., the district in the Circuit Court of which they might have been brought. The decision in the *Wisner Case* was to the effect that it provided for the removal of such suits only as had been brought in the state court of the proper district. It is because this suit, though of the character described in the first section (i. e., between citizens of different states), was not brought in a state court in the proper district (i. e., in the district in the Circuit Court of which it might have been brought), that it is urged it should be remanded to the state court. No detailed consideration need be given to any portion of section 2, other than its first two sentences. These sentences cover three distinct matters, to wit, what suits are removable, the Circuit Court to which they are removable, and the party by whom they can be removed. They differ as to the first and last of these three matters; i. e., as to the suits that are removable and as to the party by whom they can be removed. They agree as to the Circuit Court to which they may be removed. In each instance it is to the "Circuit Court of the United States for the proper district." The suits to which the first sentence relates, and which are thereby made removable, are civil suits then pending or that may thereafter be brought in any state court arising under the Constitution or laws of the United States, or treaties made under their authority, "of which the Circuit Courts of the United States are given [original] jurisdiction" by the first section. The suits to which the second sentence relates, and which are thereby made removable, are any other suits so pending or that may thereafter be brought "of which the Circuit Courts of the United States are given jurisdiction" by the first section.

It will be noted that the phraseology in the first sentence is "are given original jurisdiction" and in the second "are given jurisdiction." This difference, however, is of no significance. Each means the same.

The suits covered by the first sentence are made removable by the "defendant or defendants therein." Those covered by the second sentence are made removable by "defendant or defendants therein being nonresidents" of the state in which the suits are brought. It was this difference as to the party who could remove suits made removable that necessitated putting the matter in two sentences. In the act of 1789, and again in the act of 1875, it was covered by a single sentence. It will be noted that the suits made removable are suits of which the "Circuit Courts of the United States"—i. e., all of them in common—are given jurisdiction by the first section, and that "any" suit of which all of those courts in common are given jurisdiction is made removable. It will be noted further that the phraseology used is not that any suit of the character described in the first section brought in the district in which it is thereby required to be brought, if brought in the federal court, or that in substance. No phraseology is used the plain meaning of which is that no suit whatever can be removed to the federal court that could not have been brought originally in the federal court of the district in the state court of which it has been brought. The language in substance is that any suit of which the federal courts are given jurisdiction by the first section is removable.

With this analysis of these two sentences and notation of their phraseology, we come to the question in hand, to wit, whether it is the thought thereof that any suit of the character described in the first section is removable, or only such a suit as is brought in the district where it is required to be brought, if brought in the federal court. It seems to me to be plain that the thought thereof is that every suit of the character described in the first section, whether brought in the district where it is required to be brought, if so brought, or not, is removable, and that the question is hardly open to argument. As we have seen, the requirement as to the place where the suits covered by the act shall be brought is not jurisdictional. Its requirement as to the character of the suits is alone such. When, therefore, it is provided by the second section that any suit of which the "Circuit Courts of the United States are given jurisdiction" by the first section is removable, it can only mean that any suit of the character therein described is removable, for they are thereby given jurisdiction of every suit of such character. It cannot mean that any suit of such character brought in a state court within the district where it is required to be brought if brought in a Circuit Court is removable. This is made certain by the use of the plural, "Circuit Courts of the United States." It is not said that any suit described in the first section of which a Circuit Court of the United States is given jurisdiction is removable. The language is to the effect that any suit of which all the Circuit Courts of the United States are given jurisdiction by the first section is removable. Now the only thing which all the Circuit Courts of the United States have in common under the first section is capacity to hear and determine every suit of the character thereby described. They do not have in common, in the absence of waiver by the defendant, the right to hear and determine every such suit of which they have capacity so to do. Those Circuit Courts in which the suits are required

to be brought alone have such right. The words of the statute being unambiguous and their meaning clear, there is, therefore, no room in this case for the use of the restrictive purpose that Congress had as an aid to interpretation. That such is the meaning of the words is enforced by other considerations. In the previous jurisdictional acts of 1789 and 1875 it was the character of the suits that determined their removability. The place where they had been brought had nothing to do therewith.

There is nothing in the removal section of the act of 1887-88 to indicate that a change had come over the congressional mind in this particular, and in the absence of a clear indication in the language used therein of such a change it is to be presumed that it was still of the same mind. It is true that a change was made in the phraseology. The removal sections in those acts in themselves described the suits that were thereby made removable. No reference was made to the original jurisdiction section for a description thereof. But in the removal section of the act of 1887-88, as we have seen, reference is made to the first section to fill out the description. There is nothing in this circumstance to indicate a change of mind in the particular stated. It is sufficiently accounted for by a desire to secure brevity. The portion of the removal section of the act of 1875 answering to the two sentences of that of the act of 1887-88 under consideration was contained in a single sentence. That sentence was somewhat long. The requirement of the latter act that an "arising under" suit might be removed by any defendant and the other suits by nonresident defendants only necessitated splitting this sentence into two, which would lengthen the material, and this lengthening would be counteracted by not describing the suits that were removable in full, but referring to the first section to fill out the description. Besides, there was a special reason for the reference to the first section in connection with "arising under" suits, to be referred to later, not indicating a change of mind in that particular.

But there are two consequences which flow from giving the removal section of the act of 1887-88 the meaning that was given to it in the *Wisner Case*, which seem to me to condemn that construction. One of them is this: The first section, as we have seen, provided the district in which certain of the suits covered by them should be brought. Apparently it prescribes where all of them shall be brought. But such is not the case. As, for instance, it does not prescribe where a suit by a citizen of a state against an alien shall be brought. In *re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211. Nor does it prescribe where any of the suits covered by it which were of a local nature shall be brought. *Ky. Coal Lands Co. v. Mineral Development Co. (C. C.)* 191 Fed. 899.

Possibly there are other instances of suits covered by the section as to which there is no prescription as to the place where they shall be brought, which have not yet developed. In view of this, no statement is made as to just what suits covered by the section have a prescription as to the place where they shall be brought. It is certain, however, that, though it does not prescribe where a suit by a citizen of a state

against an alien shall be brought, it does prescribe where a suit not of a local nature by an alien against a citizen of a state shall be; that is, it shall be brought in the district of which the defendant is an inhabitant or, what is the same thing, a resident. *G., H. & S. A. Ry. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. It is certain, also, that it prescribed where a suit, not of a local nature, between citizens of different states, shall be brought; i. e., in the district of the residence of either the plaintiff or the defendant.

If, then, for a suit not of a local nature between citizens of a different state, brought in a state court, to be removable it is essential that it should have been brought within the district, in the Circuit Court of the United States of which it might have been brought—i. e., in the district of the residence of either the plaintiff or the defendant, because the removal section of the act of 1887-88 made the place of bringing the suit, as well as its character, an element of its removability—so, for a suit not of a local nature brought in a state court by an alien against a citizen of a state to be removable it is essential, also, that it should have been brought within the district in the Circuit Court of the United States of which it might have been brought, i. e., in the district of the residence of the defendant. There is no possibility of escaping this conclusion. If the place of bringing the suit is an element in determining its removability in the one case, it is in the other. The very same reason exists for saying that it is in the one instance as in the other. Therefore no suit not of a local nature brought by an alien against a citizen of a state of which he is not a resident is removable. To be so removable it must have been brought in the state of which he is a resident.

But when we come to consider the portion of the section prescribing who may remove suits that are removable, we find it provides that such a suit cannot be removed by a resident. It can only be removed by a nonresident of the state. So what we have is this: If the suit is brought in a state of which the defendant is a nonresident it is not removable, because it is not a removable suit. If, however, it is brought in a state of which he is a resident, notwithstanding it is a removable suit, it is not removable, because the defendant is not a party who may remove. And this is just where the doctrine of the *Wisner Case* lands us. Since that case suits brought in a state court by aliens against citizens of other states not residents of the state where brought have been removed to the federal court of the district in which they were brought, and the question has come up as to their removability, and a conflict of decisions has resulted. In the cases of *Mahopoulus v. Chicago*, etc., *Ry. Co.* (C. C.) 167 Fed. 165, and *Sagara v. Chicago*, etc., *Ry. Co.* (C. C.) 189 Fed. 220, it was held that the suits were not removable. On the other hand, in the cases of *Barlow v. C. & N. W. Ry. Co.* (C. C.) 164 Fed. 765, *Id.* (C. C.) 172 Fed. 513, *Bagenas v. So. Pac. Co.* (C. C.) 180 Fed. 887, and *Decker, Jr., & Co. v. Southern Ry. Co.* (C. C.) 189 Fed. 224, it was held that they were removable.

The case of *In re Tobin*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, has been claimed by the adherents of both sides of the question

to favor their position. The suit there was brought in a state court of Minnesota by an alien against a citizen of New Jersey and non-resident of Minnesota, and removed therefrom by the defendant to the United States Circuit Court for the district of Minnesota. That court denied a motion to remand, and the Supreme Court denied a writ of mandamus to compel it to remand. No reason is given for the decision. On one side, it is claimed that the ground of the decision was that mandamus was not a proper remedy; on the other side, that the suit was not removable. It seems to me that it favors the latter position. I gather this from two circumstances. The pains taken to state the character of the suit, and the fact that in the Wisner Case it had been held that mandamus was the proper remedy, and the case of *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, where the authorities were reviewed, and it was held that it was not, had not then been decided.

Those cases holding that the suit was not removable did so under the authority of the Wisner Case. Those holding that it was not attempted to distinguish it, and thought they had done so. The length of this opinion forbids a consideration of the reasoning by which the attempt was made. Suffice it to say that I do not think the reasoning sound, and that I see no way of escaping the force of Judge Lewis' reasoning in the Sagara Case in favor of the position that it came within the Wisner Case. He said:

"No reason has been assigned which justifies the conclusion that an alien plaintiff should not have the same right to give or withhold consent that a nonresident has who sues in a district of which neither he nor the defendant is an inhabitant. The designation of the particular Circuit Court in which the suit shall be brought, found in section 1 of the act, is as clearly stated in the one instance as in the other. The only discoverable difference is that there are two districts, in either one of which a suit between citizens of different states may be brought, by original process, whereas, if the plaintiff be an alien, there is only one district in which such suit may be brought."

A number of the cases cited in the early part of this opinion as holding to the contrary of what was subsequently decided in the Wisner Case were suits by aliens against citizens. I classed them with suits between citizens of different states, not only because I thought that they were governed by the same principle, but because the judges who decided them were evidently of that opinion. But the fact that these cases did come within the Wisner Case was a *reductio ad absurdum* of the doctrine of that case. It was so because of the consequence thereof just referred to, to wit, that no suit by an alien against a citizen can be removed to the federal court. Judge Pollock, in the *Mahopoulus Case*, recognized that such was a consequence of his decision, but notwithstanding that, because of the stress of the Wisner Case upon him, adhered to it. He said:

"It may be contended the conclusion reached will preclude the removal of any action brought by an alien in any state court into a federal court for trial. This may be conceded to be true. For, as has been so often said by the Supreme Court, construing the present Judiciary Act: 'The whole purport and effect of that act was not to enlarge, but to restrict and distribute, jurisdiction.'"

Here we find this idea of restriction as the only justification for the position that when Congress said that the Circuit Courts of the United States should have original jurisdiction of suits by an alien against a citizen, and that such a suit should be brought in the state of the residence of the defendant, and further that such a suit brought in a state court might be removed to the Circuit Court of the proper district—for it was one of the suits of which the Circuit Courts of the United States were given jurisdiction by section 1—by the defendant, if he were a nonresident of the state, it is to be held to have intended that no such suit should be removed at all. Or, in other words, as Congress intended by the act to cut down jurisdiction theretofore existing, it must be held that it did not intend to give jurisdiction where it said in so many words that it did.

In the Decker, Jr., & Co. Case, Judge Grubb also took note of this consequence. The effect on him was to confirm him in the position that the case did not come within the Wisner Case. He said:

"If an alien sues a citizen in a state court in the district of the citizen's residence, the citizen cannot remove the case, not being a nonresident defendant. So, if the alien sues the citizen in a state court in a district other than that of his residence, if the restriction applies to the case of an alien plaintiff, the citizen cannot remove, without the consent of the alien plaintiff, because, it would not, in that case, be a suit that could be originally instituted in the federal court of that district. There would consequently be no case in which a citizen defendant could remove a suit brought against him by a nonresident alien, except with the consent of the alien. On the other hand, such an alien defendant, sued by a citizen in the state court of the district of the citizen's residence, could remove the suit into the federal court of that district, being a nonresident defendant and the suit being one that could properly be instituted in the federal court of that district, upon authority of the Hohorst Case. Thus the effect would be to open the courts for removal purposes to the alien defendant, sued by a citizen in the state court, and close them to the citizen defendant, when sued by an alien. The argument of the Supreme Court in the Hohorst Case, by analogy, forbids such a conclusion."

But I submit that there is nothing in this consequence to lead one to the conclusion that such a case is not within the Wisner Case. Its sole effect is to undermine that case itself. A case that leads to such a consequence cannot have been decided right.

The other consequence flowing from giving the removal section of the act of 1887-88 the meaning that was given to it in the Wisner Case, which seems to me to condemn that construction of it, is this: I have already taken the position that, if the Wisner Case is to be followed, then the Shawnee National Bank and Wheeler Cases, referred to in the early part of this opinion, were decided rightly, and there can be no doubt that this cause should be remanded. But that the Wisner Case should involve such a consequence is another *reductio ad absurdum* of its doctrine. The point decided in those two cases and in this, if the motion to remand is sustained, comes to this: That it is possible for a suit between citizens of different states, brought in a state court of the plaintiff's residence, to be so brought that it cannot be removed by a nonresident defendant. All that the plaintiff has to do, if there are more districts than one in the state, is to bring his suit in the district of which he is not a resident. Of course, the success of this device depends on his ability to find the defendant in that district. But this out of the way,

and there being more than one district in the state, there is no trouble. Here, then, is a case of a suit between citizens of different states, and hence coming within the federal judicial power, brought in the state court of the state in which the plaintiff resides, that cannot be removed by the defendant, though a nonresident of the state. This cannot be accomplished in every state of the Union. There are many in which it cannot be. It cannot be in all those states where there is but a single district. And there are 20 of these, to wit, Colorado, Connecticut, Delaware, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, and Wyoming. Is it possible that it was intended that the citizens of the states where there are more than one district should have this right of keeping suits between them and citizens of other states in their state courts, and that this right should be denied to the citizens of those states? In many of these states where there is but a single district it is divided into a number of divisions. Where such is the case, it is not possible for a plaintiff to bring his suit in the division of which he is not a resident and thereby prevent a removal. A suit so brought is removable just as much as it would be if brought in the division of which he is a resident. Again I ask, is it possible that the fact of a division of a state into districts, rather than into divisions, makes a difference in the removability of a cause?

In the case of *Foulk v. Gray*, *supra*, Judge Keller gives the reason for providing for the removal of suits between citizens of different states in these words:

"In the class of cases wherein the jurisdiction is conferred by reason of diversity of citizenship, doubtless the reason for permitting the removal is because, if the defendant is sued in the state courts of the state of which the plaintiff is a resident, it may fairly be presumed that he is at a disadvantage as compared with the plaintiff. That this is the reason is the more apparent, because, if he is sued in the state courts of the state of his own residence, in a similar case, he may not remove, though, if sued there in a case involving a federal question, he may remove."

But here we have a case, if the doctrine of the *Wisner Case* is to be followed out to its legitimate consequences, where this reason for permitting a removal has full force and yet cannot be put into effect because the state of Kentucky happens to have been divided into two districts, instead of two divisions. Such, then, are the reasons which drive me to the conclusion that, on the merits, assuming the act of 1887-88 to be still in force, this suit was removable, and that the doctrine of the *Wisner Case* is wrong.

I cannot, however, quit this part of the discussion without taking notice of the fact that the jurisdiction of the federal court in such a case as we have here is to no extent dependent on the doctrine of waiver. In some of the cases, cited in the early part of this opinion as deciding that a suit between citizens of different states brought in a state of which neither party is a resident, much is made of that doctrine as sustaining the jurisdiction. This is notably true of the cases of *Creagh v. Equitable Life Assur. Soc. (C. C.)* 83 Fed. 849, and *Cowell v. City Water Supply Co. (C. C.)* 96 Fed. 769. And the de-

cision in the case of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, was based solely upon waiver.

Waiver, according to 40 Cyc. p. 252, is defined as follows:

"The act of waiving or not insisting on some right, claim or privilege."

The plaintiff, in bringing such a suit in the state court, does what he has a perfect right to do, because Congress has never denied him that right or questioned it to the slightest extent. Its requirement that suit a suit shall be brought in the district of the residence of either the plaintiff or the defendant relates to the bringing of it in the federal court, and not in the state court. On the contrary, by providing for the removal of such a suit into the federal court, it presupposes that the right may be exercised. Defendant, therefore, in removing the suit into the federal court, does not waive anything. He does not thereby fail to insist on any right, claim, or privilege. He merely exercises the right conferred on him by the removal statute to remove the suit from the state to the federal court. Nor can it be said that, if the plaintiff makes no objection to the removal, he waives anything. He has no right to object to the removal. The suit is one coming within the removal statute, and hence the defendant has the right to remove it. It is thus seen that the jurisdiction of the federal court on removal of such a suit is to no extent dependent on the waiver of either party of any right, claim, or privilege.

Still another matter for consideration, before dealing directly with the *Wisner Case*, is whether there was anything in the previous decisions of the Supreme Court that called for that decision. Inasmuch as the removal section of the act of 1887-88 provides, as we have seen, for the removal only of suits of which jurisdiction is given by the first section—i. e., suits that are of the character, as to subject-matter or as to parties, as therein prescribed—it follows that no suit is removable that is not of such character. Because the suit was not of such a character the Supreme Court has a number of times denied the removal jurisdiction. This has been most frequent as to "arising under" suits. It has been a subject of much consideration since the existence of federal courts as to what is essential to constitute a suit an "arising under" suit. Is it necessary that the claim asserted in the suit be based on the Constitution or laws of the United States, or treaties made under their authority, or is it sufficient that the defense to the claim be based thereon, on the idea that, as it is because of the defense so based that the occasion for a suit arises, the suit may be said to have in fact arisen thereunder, though the claim asserted in the suit is not in fact based thereon? Under the act of 1875 it was held that in order to original jurisdiction it was essential that the claim asserted by the suit should be so based, but in order to removal jurisdiction it was sufficient if at the time removal was sought a defense to the claim was pending so based.

After the enactment of the act of 1887-88 the question arose as to whether it was still the law that a suit in which the claim asserted was not based on the Constitution or laws of the United States, or treaties made under their authority, could be removed because the defense thereto was based thereon. Of course, as by that act the

petition for removal had to be filed before the answer was filed, the question could not be presented, save by the plaintiff setting forth in his bill or petition that the defense to the claim asserted was so based. It was held that such a suit was not an "arising under" suit under either section, and hence was not removable. And in this connection much was made of the requirement that the suit should be one of which the federal court was given original jurisdiction by section 1. It was thought that thereby an intent was indicated of a purpose to change the law from what it had been under the act of 1875, particularly in view of the fact that it was decidedly questionable whether on the merits such a suit was removable under the act of 1875. Justice Harlan, who dissented, thought that the purpose of the requirement should be limited to making it clear that, to be removable, the matter in dispute should be of the same sum or value as was necessary for original jurisdiction. This is another reason for accounting for the use of these words than that which I have suggested, to wit, securing brevity. It was so held in the cases of *Tennessee v. Union & Planters Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. Again, in the case of *Mexican National Bank v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, it was held that a suit brought in a state court of New York, within the Eastern district of New York, by a citizen of New York, against a Colorado corporation and citizen, to recover an indebtedness on its part to another Colorado corporation and citizen, which had been assigned by the latter to the plaintiff, could not be removed to the Circuit Court of the Eastern district of New York, and that because the suit was not of the character of suits of which the Circuit Courts of the United States were given jurisdiction by the first section, in that, though the suit was between citizens of different states, it could not have been brought in that court by plaintiff's assignor, between whom and defendant there was no diversity of citizenship, thus bringing it within the qualifying clause of the jurisdictional part of section 1. Still again, in the case of *Cochran v. Montgomery*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451, it was held that a suit brought in a state court within the Middle district of Alabama, by a citizen of Alabama, against a citizen of Alabama and a corporation and citizen of Maryland, jointly, could not be removed by the Maryland corporation and citizen to the Circuit Court of the United States for that district on the ground of local prejudice, because the suit was not of the character of suits of which the Circuit Courts of the United States are given jurisdiction by the first section, in that it was not a suit between citizens of different states.

Now, there is nothing whatever in these four decisions justifying the decision in the *Wisner Case*. They merely decide that if the suit is not one of which jurisdiction is given by the first section—i. e., is not of the character of suits of which jurisdiction is given by that section—it is not removable. It does not follow therefrom that a suit which is of that character is not removable because the suit is brought in a district in the Circuit Court of which it could not have been brought.

In the case of *Traction Co. v. Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, it was held that a condemnation proceeding brought in a state court could be removed to the Circuit Court of the district in which the state court was located. It was recognized on all hands, however, that if the proceeding had not been a suit it was not removable, because the Circuit Courts of the United States were not given jurisdiction by the first section of any proceeding that is not a suit. It would have been sufficient to say that section 2 in terms provided only for the removal of suits, so that there was really no occasion to make any reference to the first section. But in the course of his opinion Justice Harlan made this remark:

"The rule is now settled that, under the Judiciary Act of 1887-88, a suit cannot be removed from a state court, unless it could have been brought originally in the Circuit Court of the United States."

He cited in support of it the decisions in the *Tennessee*, *Davidson*, and *Minnesota* Cases. Now no warrant for this statement in its full sweep is to be found in those cases. They settle no more than that a suit cannot be removed from a state court unless it is such in point of character that it could have been brought originally in the Circuit Court of the United States. They do not settle that it is not removable if, though it is such in point of character, it could not have been brought originally in the Circuit Court of the United States, to which it is sought to be removed, because the district within which it was brought was not the district in which it was required to be brought, if brought in that court. Nor do they in their tendency support such a position. The statement, therefore, is inaccurate, and, if one is not on his guard, calculated to mislead him. It is not a true generalization of those cases, in that it is too wide. A true generalization thereof would be that no suit can be removed that is not of the character described in the first section, and, for this reason, could not have been brought originally in the federal court.

Beyond these cases there is nothing whatever in the previous decisions of the Supreme Court which can be looked to as calling for the decision in the *Wisner* Case, and there is nothing whatever in them calling therefor. On the other hand, there is a dictum in the *Davidson* Case by Chief Justice Fuller, who delivered the opinion in the *Wisner* Case, against the position there taken. It is in these words:

"It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of the residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant, and may be waived by him. * * * Section 2, however, refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

This brings me to the question whether I should follow the decision in the *Wisner* Case. Concerning it I would make these several remarks.

First. There is in Chief Justice Fuller's opinion not the slightest indication that he was aware of the well-nigh unanimous judicial opinion, including that of Justices Brewer and Gray, and of the opinion of the text-writers, against the position there taken.

Second. The position there taken is against that opinion.

Third. It is against his own dictum in the Davidson Case.

Fourth. It is thoroughly wrong on its merits, as I have attempted to show.

Fifth. The conclusion there reached is not reasoned out. It is based entirely on two incorrect assumptions. One was that the question there involved was settled by the previous decisions of the Supreme Court in the Tennessee, Davidson, and Montgomery Cases. They are cited by him in support of this proposition:

"And it is well settled that no suit is removable under section 2 unless it be one that plaintiff could have brought originally in the Circuit Court."

We find here the same sweeping statement as made by Justice Harlan in the Traction Co. Case, which we have found to be inaccurate, and to have no support whatever in those cases.

The other assumption is that the requirement of the first section as to the place where the suits covered by it are to be brought is jurisdictional, and not subject to waiver. That such was his then view of the matter is evident from his statement in his opinion that it would have made no difference, had the plaintiffs consented to the removal. He said:

"In view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have been obtained, even with the consent of both parties."

This is made more evident by his dissenting opinion in the case of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. He there said:

"In my judgment, section 1, in cases where litigants are citizens of different states, confers jurisdiction only on the Circuit Court of the district of the plaintiff's residence and the Circuit Court of the district of the defendant's residence. And it is not conferred on the Circuit Court of the district of neither of them, and cannot be, even by consent."

Of course, if this position is sound, the decision in the *Wisner Case* was sound. But it is not sound. It is in the teeth of the numerous decisions of the Supreme Court referred to in Mr. Justice Brewer's opinion in the *Moore Case*, the decision in that case, and the decision in the case of *Western Loan v. Butte Mining Co.*

Sixth. It has been overruled in the case of *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, in so far as it held that mandamus was the proper remedy for correcting the assumed error of the Circuit Court.

Seventh. The dictum in it, to the effect that it would have made no difference in the matter of jurisdiction if plaintiff had consented to the removal, has been overruled in the *Moore* and *Western Loan v. Butte Mining Co. Cases*.

Eighth. The dictum of Chief Justice Fuller in the *Davidson Case*, heretofore quoted as against the point actually decided in the *Wisner Case*, is quoted with approval by Justice Brewer in the *Moore Case*.

Ninth. Apparently the ground of the decision in the *Tobin Case* was that suit brought by an alien against a citizen in a state of which

he is not a resident is removable. If so, for the reasons heretofore stated, the Tobin Case is in conflict with the Wisner Case, and indirectly overrules it as to the point actually decided therein.

Tenth. And, lastly, I think it is to be taken that, as to the point decided and in question here, it is indirectly overruled by the decisions in the Moore and Western Loan v. Butte Mining Co. Cases. The basis of the decision on its merits, as we have seen, was the assumption that the requirement of the first section as to the place of bringing the suits covered thereby was jurisdictional. Those cases decide otherwise. In so doing they have removed the very foundation on which the Wisner Case was placed.

In view of these several considerations, I am confident in the belief that the Supreme Court will overrule it directly the first opportunity it gets, and, so believing, I think I am justified in refusing to follow it.

It remains but to note the changes made by the Judicial Code, under which this suit arose, to which reference has heretofore been made. In the act of 1887-88, as in the previous acts of 1875 and 1879, the original jurisdictional provision and venue provision were embraced in the same section. This is not so under the Judicial Code. The original jurisdictional provision is contained in section 24 thereof, whereas the venue provision is contained in section 51. Section 24 covers, not only the suits of which original jurisdiction was given by the act of 1887-88, but all other suits of which the District Court is given original jurisdiction by the Code. Section 28 thereof relates to removal jurisdiction, and, instead of its providing that any suit may be removed of which jurisdiction is given "by the preceding section," as in the act of 1887-88, it is provided that any suit may be removed of which jurisdiction is given by this title. I see nothing in any of these changes affecting the matter.

The motion to remand is denied.

VAN DYKE et al. v. GEARY et al.

(District Court, D. Arizona. August 12, 1914.)

1. COURTS (§ 366*)—JURISDICTION OF FEDERAL COURTS—CONSTITUTIONALITY OF STATE STATUTE.

Where the constitutionality of a state statute, under the Constitution of the United States, has not been passed upon by the highest court of the state, it is the right and duty of a federal court, whose jurisdiction is properly invoked, to determine the question in the exercise of its independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

2. CONSTITUTIONAL LAW (§§ 247, 303*)—CORPORATIONS (§ 394*)—EQUAL PROTECTION OF LAWS—DUE PROCESS OF LAW—EXCESSIVE PENALTIES.

Laws Ariz. 1912, c. 90 (Civ. Code Ariz. 1913, pars. 2277-2360), creating a state corporation commission and defining its powers, which provides that its orders shall not be suspended by any court during a judicial review thereof, and imposes such enormous penalties in the way of cumulative fines and imprisonment upon any public service corporation, its officers

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or employes, for failure to obey any such order, as to practically deprive such a corporation of the right to appeal to the courts to determine the validity of any order, is unconstitutional and void as to such provisions, as depriving a corporation or individual against whom an order is made of the equal protection of the laws, and the corporation of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 703, 863-866; Dec. Dig. §§ 247, 303;* Corporations, Cent. Dig. § 1576; Dec. Dig. § 394.*]

3. WATERS AND WATER COURSES (§ 203*)—STATE REGULATION OF RATES—REVIEW OF ORDERS.

That the owner of a water system did not produce any evidence as to the value of the property before a state commission, which subsequently made an order fixing rates to be charged to customers of such system, does not estop him to deny the fairness of the valuation made by the commission, or to claim that the rates made are confiscatory.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

4. WATERS AND WATER COURSES (§ 203*)—WATERWORKS—STATE REGULATION OF RATES—REASONABLENESS OF RATES.

Evidence considered, and *held* insufficient to show that a state commission, in fixing the value of a water system, omitted any element of substantial value, or that water rates fixed by the commission were so low as to be confiscatory.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

5. WATERS AND WATER COURSES (§ 182*)—WATERWORKS SYSTEM—STATE REGULATION—CONSTRUCTION AND VALIDITY OF STATUTE—"WATER CORPORATION"—"PUBLIC SERVICE CORPORATION."

Const. Ariz. art. 15, §§ 2, 3, provide that all corporations, other than municipal, furnishing water for public purposes, shall be deemed "public service corporations," and shall be subject to regulation as to rates, etc., by a state corporation commission. The Public Service Corporation Act of Arizona (Civ. Code 1913, pars. 2277-2360), which defines the powers and duties of the corporation Commission, provides that "the term 'water corporation,' when used in this act, includes every corporation or person * * * owning, * * * operating, or managing any water system for compensation within this state." *Held*, that such provision, as applied to an individual owning and operating such a system, is not in conflict with the state Constitution, and that under the act the corporation commission has power to regulate charges to be made for water furnished by such system.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 267; Dec. Dig. § 182.*]

For other definitions, see Words and Phrases, Second Series, Public Service Corporation.]

6. STATUTES (§ 113*)—SUBJECTS AND TITLES OF ACTS—CONSTITUTIONAL REQUIREMENTS.

The Public Service Corporation Act of Arizona (Civ. Code 1913, pars. 2277-2360), which confers power on the corporation commission to regulate rates to be charged for water furnished by any system, whether owned by a corporation or an individual, is not void as to such provision, under Const. Ariz. art. 4, pt. 2, § 13, providing that every act shall embrace but one subject "and matters properly connected therewith," which subject shall be expressed in the title, because no reference is made in the title of the act to the regulation of individual business.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141-144; Dec. Dig. § 113.*]

7. WATERS AND WATER COURSES (§ 202*)—WATER COMPANIES—STATE REGULATION.

A state commission *held* without power to order the owner of a water system, constructed and operated only to supply residents on certain lands, to connect such system with other consumers and furnish them with water, where there was no evidence to warrant a finding that the supply of water was more than required to properly serve the consumers for whom it was intended.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 276; Dec. Dig. § 202.*]

In Equity. Suit by Ida A. Van Dyke and Cleve W. Van Dyke against W. Paul Geary, Amos W. Cole, and Frank A. Jones, members of the Corporation Commission of the State of Arizona, the Corporation Commission, and George P. Bullard, Attorney General of the State of Arizona, and Norman J. Johnson, County Attorney of Gila County, State of Arizona. On motion for preliminary injunction. Granted in part.

George J. Stoneman and Reese M. Ling, both of Phoenix, Ariz., and F. C. Jacobs, of Globe, Ariz., for complainants.

G. P. Bullard, Atty. Gen., for defendants.

Before MORROW, Circuit Judge, and DOOLING and SAWTELLE, District Judges, convened under the provisions of section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1243]).

SAWTELLE, District Judge. This is an application for an interlocutory injunction, made in pursuance of section 266 of the Judicial Code. Complainants and defendants, and each and all of them, are citizens of the state of Arizona, and this suit is one arising under the Constitution and laws of the United States, other than those requiring diversity of citizenship for federal jurisdiction.

The Arizona corporation commission is a legally constituted board of the state of Arizona, exercising quasi judicial, legislative, and ministerial functions; the defendants Geary, Cole, and Jones are the duly qualified members of said corporation commission; the defendant George P. Bullard is the Attorney General of the state of Arizona; and the defendant Norman J. Johnson is the county attorney of Gila county, Ariz., that being the county wherein is situated the water system and other property in controversy herein.

The complainants, at the town of Miami, Gila county, Ariz., have installed and are operating in the individual name of said Ida A. Van Dyke a water system for the purpose of selling and delivering water for domestic and commercial use and for fire protection in the said town of Miami. Said Ida A. Van Dyke is the sole owner of said water system, which, as is shown by the record herein, was established for the sole purpose of supplying the purchasers of land of the Miami Townsite Company, a corporation owned by said Ida A. Van Dyke and her husband, Cleve W. Van Dyke, with water, and not for the purpose of supplying the public generally with water.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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On October 17, 1913, said Arizona corporation commission, upon its own motion, complained of said Ida A. Van Dyke and Cleve W. Van Dyke, alleging that they were doing business as a public service corporation in distributing, delivering, and selling water for domestic and commercial use and for fire protection in said town of Miami, that the rates and charges for such water were excessive, unreasonable, and unjust, and "that the services and classes of service rendered by said respondents (complainants herein) to consumers of water in the town of Miami are inadequate, unsatisfactory, and uncertain." Said complaint concluded with the prayer that such rates be deemed excessive, unreasonable, and unjust, etc., and was signed by said Geary and Cole, respectively, commissioners as aforesaid.

Said respondents were cited to appear before said corporation commission and make answer to said complaint. In response thereto they did appear before said corporation commission and interposed a verified plea in bar, denying the right, authority, and jurisdiction of the said commission to assert, or attempt to assert, any right, power, authority, or jurisdiction over said respondents, or either of them, upon the grounds, among others, that they are not, and neither of them are, the owners of a water corporation situated in the town of Miami engaged in doing business as a public service corporation in distributing, delivering, and selling water for domestic and commercial use and for fire protection in said town of Miami, and are not acting as a corporation under the laws of the state of Arizona, or any other state, or at all; that the said Ida A. Van Dyke is the sole owner of the said water system in said town of Miami, and the water sold and distributed was and is distributed by her as an individual and as a natural person; that the said Arizona corporation commission is without power or jurisdiction to investigate or control the business so owned by the said Ida A. Van Dyke personally, which said plea in bar was by said Arizona corporation commission overruled and denied.

Thereafter, pursuant to notice duly given, said Arizona corporation commission proceeded to conduct a hearing based upon the complaint theretofore filed, at which hearing respondents were represented by counsel, and subsequently, on, to wit, the 1st day of May, 1914, made and entered an order:

"(1) That the respondents constitute a water corporation, owning, controlling, operating, and managing a water system for compensation in the town of Miami, state of Arizona, and are doing business as a public service corporation in distributing, delivering, and selling water for domestic, commercial, and fire uses in said town.

"(2) That present and existing rates and charges, and each of them, made, maintained, and collected by said respondents, are unjust, unreasonable, and excessive"

—and fixing and prescribing rates to be charged and collected by the owner of said water system and by Cleve W. Van Dyke, the manager thereof. The said Arizona corporation commission, after hearing all the evidence, found that said Ida A. Van Dyke was the sole owner of said water system. To quote from the opinion handed down by said commission:

"Some considerable discussion has ensued relative to the ownership of the plant. The weight of all testimony apparently shows that I. A. Van Dyke is the sole owner thereof, and is doing business as a public service corporation in distributing, delivering, and selling water for domestic, commercial, and fire use in the town of Miami."

In due course said Ida A. Van Dyke and Cleve W. Van Dyke filed with said Arizona corporation commission a motion for a rehearing of the said order, which motion was by said Arizona corporation commission denied. Thereafter they filed their motion, praying for a suspension of the operation of the said order for a period of 60 days from the date the same became operative, alleging that it was their intention to apply to the state courts for a review of said order, and further alleging that, unless said order was suspended by said commission, they would, "pending the determination of the issues raised in the motion for a rehearing, be subject to a fine of not exceeding \$5,000 per day, or to imprisonment for each day during which the petition for a review of said order shall be pending and undisposed of," which motion was by said Arizona corporation commission denied.

On or about the 23d day of July, 1914, and while this case was pending in this court, said corporation commission, after a hearing had before it, made and entered an order by the terms of which said Ida A. Van Dyke was required—

"immediately to construct a water main of necessary size, with proper valves and fittings, and connect her water system in the town of Miami with the consumers of the Live Oak addition to said town, and that she serve all consumers in said Live Oak addition with water, charging the same rate and under the same rules as are in force in said town of Miami, and that this order be carried into effect within ten (10) days from the date hereof."

It is claimed that said Live Oak addition is no part of the town of Miami, that said water system was equipped and is maintained for the sole and only purpose of supplying purchasers of town lots in said town of Miami with water, and that the quantity thereof was barely sufficient for the needs of the owners and purchasers of lots in Miami townsite.

The complainants herein have filed this bill to enjoin the enforcement of the said orders of said corporation commission.

1. The jurisdiction of this court is primarily invoked on the ground that chapter 90 of the Laws of the First Legislature of the state of Arizona, now embraced in chapter 11, title 9, Revised Statutes of Arizona 1913, is unconstitutional, because the fines and penalties therein prescribed are so severe and cumulative that an enforcement of them would work a forfeiture of complainants' property, and in effect destroy the right of the complainants to appeal to the courts for the purpose of testing either the validity of the law or the reasonableness of any order of the corporation commission; that by this means complainants are denied the equal protection of the law and due process of law, in contravention of their rights under the Constitution of the United States and the Constitution of the state of Arizona.

This is not the first time the jurisdiction of this court has been invoked by reason of the objectionable features of the above statute. The same question was presented in the case of Bonbright et al. v.

Geary et al. (D. C.) 210 Fed. 44, and in that case, in referring to the contention of the complainants that the pains and penalties of the Arizona statutes were so severe and cumulative that the complainants could not under the provisions of the statute test the validity of the order of the corporation commission without the danger of being subject to irreparable damage and absolute ruin, the court, speaking through Judge Morrow, said:

"These allegations of the complaint and the provisions of the Arizona statute to which reference is made appear to bring this case within the decision of the Supreme Court of the United States in *Ex parte Young*, 209 U. S. 123-144 [28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764]; but, as the jurisdiction of this court is otherwise complete, we will not stop to discuss that feature of the case."

We think it unnecessary to go into a lengthy discussion of this question. We hold that this court has jurisdiction of this cause, because it involves the decision of a federal question arising under the Constitution of the United States.

[1] 2. Let us now consider the above contention that said chapter 90 above referred to is unconstitutional. As above stated, the constitutionality of this act was not considered or passed upon in the case of *Bonbright et al. v. Geary et al.*, supra, for the reason that the jurisdiction of this court was otherwise complete. It is admitted that the constitutionality of this act has not been passed upon by the Supreme Court of the state of Arizona, and that there is not now pending in said court any case involving this question. That being so, this court must hear and determine, not only the question which concerns the jurisdiction of this court, but also every other question herein involved. As was said by the Supreme Court of the United States in the case of *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359:

"When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the state, and have all the effects of law, and which it would be wrong to disturb. * * * Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But, where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they * * * always do in reference to the doctrines of commercial law and general jurisprudence."

See, also, *Foster's Federal Practice*, vol. 2 (4th Ed.) p. 1266, and a long list of cases there cited.

[2] In considering this question it should be borne in mind that the complainants in due time and in good faith filed with said corporation commission their petition for a rehearing on said order so entered by said corporation commission, which was denied. Subsequently

they filed their petition for a suspension of said order, to enable them to resort to the state courts for the purpose of determining the validity and reasonableness of said order. This petition was also denied. The said Act 90 contains the following provisions:

Section 66: "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder, or bondholder, or other party peculiarly interested in the public service corporation affected, or the Attorney General on behalf of the state, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person, or the state, unless such corporation or person, or the state, shall have made, before the effective date of said order or decision, application to the commission for a rehearing.

"Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person, or the state, shall in any court urge or rely on any ground not set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for a period of the pendency of the application. If any application for a rehearing be granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all despatch and shall determine the same within twenty days after final submission, and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirements of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify the same. An order or decision made after such rehearing abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission."

Section 76: "(a) Any public service corporation which violates or fails to comply with any provision of the Constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public service corporation, is subject to a penalty of not less than one hundred dollars nor more than five thousand dollars for each and every offense.

"(b) Every violation of the provisions of this act, or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

"(c) In construing and enforcing the provisions of this act, relating to penalties, the acts, omission or failure of any officer, agent or employé of

any public service corporation, acting within the scope of his official duties or employment, shall in every case be and be deemed to be the act, omission, or failure of such public service corporation."

Section 77: "Every officer, agent or employé of any public service corporation, who violates or fails to comply with, or procures, aids or abets any violation by any public service corporation of any provision of the constitution of this state or of this act, or who fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement or any part or provision thereof, of the commission, or who procures, aids, or abets any public service corporation in its failure to obey, observe and comply with any such order, decision, rule, direction, demand or requirement, or any part or provision thereof in a case in which a penalty has not hereinbefore been provided for such officer, agent or employé, is guilty of a misdemeanor and upon conviction thereof is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year or both such fine and imprisonment."

Section 81: "In case any public service corporation, corporation or person shall fail to observe, obey or comply with any order, decision, rule, regulation, direction, demand or requirement, or any part or portion thereof, of the commission or any commissioner, such public service corporation, corporation or person shall be in contempt of the commission and shall be fined by the commission a sum not less than one hundred dollars nor more than five thousand dollars, to be recovered before any court of competent jurisdiction, in this state.

"Procedure had in such contempt proceedings shall be the same as in courts of record in this state. The remedy prescribed in this section shall not be a bar to or affect any other remedy prescribed in this act, but shall be cumulative and in addition to any such other remedy or remedies."

Section 74: "(a) This act shall not have the effect to release or waive any right of action by the state, the commission, or any person or corporation for any right, penalty or forfeiture which may have arisen or accrued or may hereafter arise or accrue under any law of this state.

"(b) All penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public service corporation, or any officer, director, agent or employé thereof, or any other corporation or person, or be a bar to the exercise by the commission of its power to punish for contempt."

Section 67: "(h) Upon final hearing the court shall enter judgment affirming, modifying, or setting aside the order or decision of the commission. The provisions of the general laws of this state relating to trials of causes, so far as applicable, and not in conflict with the provisions of this act, shall apply to proceedings instituted in the courts of this state under the provisions of this section. No court of this state shall have jurisdiction to enjoin, restrain, suspend or delay any order or decision of the commission, or to enjoin, restrain or interfere with the commission in the performance of its official duties, and the rules, regulations, orders or decrees fixed by the commission shall remain in force pending the decision of the courts; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

"Section 68: "All rules, regulations, orders, charges and decrees of the commission shall remain in full force and effect pending a final decision of the court with reference thereto. No order staying, restraining or suspending any order, rule, regulation, charge, or decree of the commission shall be made by any court of this state."

Article 15, § 17, of the Constitution of the state of Arizona, provides as follows:

"Nothing herein shall be construed as denying to public service corporations the right of appeal to the courts of the state from the rules, regulations, orders, or decrees fixed by the corporation commission, but the rules, regulations, orders, or decrees so fixed shall remain in force pending the decision of the courts."

In the Young Case, *supra*, the Supreme Court of the United States had before it the statutes of the state of Minnesota, the provisions of which are almost identical with Act 90, known as the Arizona Public Service Corporation Act, and in that case the court held that the Minnesota statutes were unconstitutional, without regard to the question of the insufficiency of the rates prescribed. That decision of the Supreme Court is controlling and decisive of the question now before us. In that case it is stated that the railroad and warehouse commission of the State of Minnesota "made an order fixing the rates for the various railroad companies for the carriage of merchandise between stations in that state of the kind and classes specified in what is known as the 'Western Classification,'" which order materially reduced the rates theretofore existing. The laws of that state (Revised Laws of Minnesota, § 1987) provided:

"That any common carrier who violated the provisions of that section or willfully suffered any such unlawful act or omission, when no specific penalty is imposed therefor, 'if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars for the first offense, and not less than five thousand dollars nor more than ten thousand dollars for each subsequent offense; and, if such carrier or warehouseman be a corporation, it shall forfeit to the state for the first offense not less than twenty-five hundred dollars nor more than five thousand dollars, and for each subsequent offense not less than five thousand dollars nor more than ten thousand dollars, to be recovered in a civil action'"

—which said statute covers disobedience to the orders of the commission. Soon after the creation of said commission, the Legislature of said state passed an act (Laws Minn. 1907, c. 97 [Gen. St. 1913, §§ 4288, 4289]) fixing two cents a mile as the maximum passenger rate to be charged by the railroads in that state. It was provided in that act that:

"Any railroad company, or any officer, agent, or representative thereof, who shall violate any provision of this act shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years, or both such fine and imprisonment."

Section 6 of said act (Laws Minn. 1907, c. 232 [Gen. St. 1913, § 4303])—

"directed that every railroad company in the state should adopt and publish and put into effect the rates specified in the statute, and that every officer, director, traffic manager or agent or employé of such railroad company should cause the adoption, publication and use by such railroad company of rates not exceeding those specified in the act; 'and any officer, director or such agent or employé of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.'"

In that case, as in the one at bar, it was contended that the penalty provisions of said laws attacked were violative of the fourteenth amendment of the Constitution of the United States. The Supreme Court in considering this question said:

"Another federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railroad company, as alleged, or any of its servants or employes, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation. * * *

Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents and employes of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding 90 days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding \$5,000 or imprisonment in the state prison for a period not exceeding 5 years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents, or employes willing to carry on its affairs, except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employe to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employes could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question made by Justice Brewer in *Cotting v. Kansas City Stockyards Company*, 183 U. S. 79, 99, 100, 102 [22 Sup. Ct. 30, 46 L. Ed. 92] are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: 'It is doubtless true that the state may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent an inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents, or employes of the company, the risk of imprisonment for years as a common felon. * * *

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

See, also, *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 240, 33 Sup. Ct. 961, 57 L. Ed. 1507; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; *Standard Oil Co. v. Missouri*, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 963; *Bonbright et al. v. Geary et al.* (D. C.) 210 Fed. 44.

On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the First Legislature of the state of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the corporation commission, and is therefore unconstitutional in that particular.

[3] 3. Complainants' contention that the order of the corporation commission is confiscatory presents a mixed question of law and fact. The question is: Are the rates in question so palpably unreasonable and unjust as to amount to a taking of complainants' property without compensation? If so, this court will grant relief; otherwise, the rates must stand. At the hearing before the corporation commission which was had the 11th day of December, 1913, complainants were represented by counsel, and given a fair and full opportunity to be heard, and to introduce testimony regarding the value of said water system, and the property used and useful in connection therewith; but complainants, relying on their contention that said corporation commission had no jurisdiction over complainants and said utility, failed to introduce any such testimony, and refused to recognize the validity of the investigation then being conducted. It is contended by the respondents herein that, as complainants did not offer any such evidence before the commission, therefore they ought not to be allowed to say now that the valuation placed upon said property for rate-making purposes was not a fair valuation. We cannot adopt this contention. This question arose in the case of *San Joaquin Co. v. Stanislaus County*, which went up to the Supreme Court of the United States from this (the Ninth) circuit, and in that case the Supreme Court said:

"It was suggested to be sure at the argument that it does not appear that the plaintiff offered any evidence as to water rights at the hearing before the supervisors, and therefore it ought not to be allowed to complain now that nothing was allowed for them. But this evidently is an afterthought. In general, a party may wait until a law is passed or regulation is made and then insist upon his constitutional rights." 233 U. S. 459, 34 Sup. Ct. 653, 58 L. Ed. 1041, and cases cited.

[4] While this is true, and while a person is not concluded by the failure to offer testimony, still it would seem but fair to the commission and to the judges, who are called upon to pass upon the justness and reasonableness of the rates upon an application for an injunction pendente lite, that they should at least furnish to the commission a full list of their property, and otherwise aid them in their efforts to fairly inventory and appraise the same. As an illustration, in this case it is not pretended that any mention whatever was made of the alleged water right during the investigation, and the commission was not even requested to include it in their estimate of the value of the property for rate-making purposes. As was said by the Supreme Court of the United States while discussing a similar case:

"If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States." *Knoxville v. Water Co.*, 212 U. S. 1, 16, 29 Sup. Ct. 148, 153 (53 L. Ed. 371).

The record in this case shows that prior to the 28th day of November, 1911, Ida A. Van Dyke and Cleve W. Van Dyke "organized a corporation under the laws of Arizona known as the Miami Townsite Company, which said townsite company purchased a tract of land for the purpose of establishing a town thereon, and caused said tract of land to be surveyed into lots, blocks, streets, and alleys, and established a townsite business; that said land so purchased by the said Miami Townsite Company is the same land upon which is now situated a part of the town of Miami in Gila county, state of Arizona; that in order to facilitate the establishment of said town, and to sell and dispose of lots of land therein, and to provide the purchasers of lots within said town with water, and to protect the inhabitants thereof against damage and loss by fire, the said I. A. Van Dyke, in connection with said townsite business, established and developed a water system known as the I. A. Van Dyke water system upon the land within the town of Miami and adjacent thereto, which said system is connected with the wells of water owned by said I. A. Van Dyke; that said system so established by the said I. A. Van Dyke was established, and is now being conducted by her, for the sole purpose of supplying purchasers of land of the Miami Townsite Company who might reside thereon, with water for domestic, commercial, and fire uses, and was not established for the purpose of supplying the public generally with water;" that said Ida A. Van Dyke has also acquired certain other property, which she alleges is used and useful in connection with the operation of said water system, consisting of 189.7 acres of land, 60 acres of which it is claimed constitute a water basin, and 129.7 acres of which constitute a watershed, and the aggregate value of which is \$73,720; also certain strips of land from two to four feet in width in the said town of Miami, through and upon which the mains and lateral pipes of said water system are laid in Miami townsite, and the strips of land reserved for future use in the laying of mains and lateral pipes, of the alleged value of \$43,884.34; also a water right of the alleged value of \$20,000. The first work was done on this water system in the year 1909. The water in the vicinity of Miami is developed by means of sinking wells and pumping. The testimony shows that the supply is limited, and that it has been necessary to sink and develop several wells before an adequate supply for the needs of said town could be developed. As the town grew, said water system was enlarged, and the water mains and laterals were extended.

The opinion and order of the corporation commission was based upon the evidence introduced at said hearing, including an inventory and appraisal of the property of the water system made by the engineer of the commission, and said order recites that "no comparisons of value can be made, because it is impossible to develop the book value (of the plant) or the historical value from the company's (meaning the

complainants') records." No balance sheet had ever been rendered, and the books and accounts of the water company had not been balanced since December, 1910. The commission then proceeded from the data available to place a valuation upon the water plant and the several units thereof for rate-making purposes at the sum of \$40,105. In arriving at these figures the commission allowed 3½ per cent. for depreciation, and \$3,500 for the working capital.

The testimony further shows that the commission found that the office force, in addition to handling the accounts of the water company, also handled the office work of the Miami Telephone Company, Miami Townsite Company, and Miami Electric Light Company, and estimated that, of the total expense of doing this work, \$1,251.44 should be charged to the water system. Thereupon the commission by its order canceled the then existing rates, and in lieu thereof installed the rates now in question, which the commission estimated would net the complainants \$4,010.50 as interest and as a fair return upon all of the water company's tangible and intangible assets represented by the property on hand October 1, 1913.

As above stated, it is complained that the corporation commission failed to include in the property of the said water system, or consider or allow, a large tract of land containing about 189 acres. It is true that the commission did not allow anything for this property, and their reasons therefor are stated in their opinion, as follows:

"The contention of the company that the hills forming the banks of the main stream and small tributary gulches should be included in the valuation, on the ground that such hills divert water into the main channel, is not considered by this commission. No effort of the company could prevent water being so diverted, and it seems that the snowbanks of the Pinal Mountains or the clouds could attain the same elements of value. The company offered no direct evidence as to the value of real estate, and the testimony of the witness Mackey appears not to have been controverted."

The company alleges that this tract of land was of the value of more than \$38,400. In the affidavits submitted by complainants the same is valued at \$73,720. It will be observed from an examination of these affidavits, especially those of L. F. Fletcher and A. Reid, both of whom are dealers in real estate, and both of whom fixed the value at exactly the same figure, that they did not place a value upon this land for water purposes, or show how or in what manner it was worth \$73,720 when used in connection with said water system. They simply valued the land itself, regardless of the use to which it had been or might be put; in other words, they gave the total value of the land, and in arriving at that value they stated:

"I arrived at my estimate of said valuation and base the same upon the sale of real estate of the same or similar character in the vicinity of said land."

So far as the records show, this land might be underlaid with valuable mineral deposits, or it might be valuable for residential or other purposes, and it seems absurd to ask that they be allowed to require the consumers of water in the townsite of Miami to pay a return upon the actual value of this land, independent of its value when used as a

part of, or in connection with, said water system, and we do not find anything in the record which shows its value when so used, if it has ever been so used. It was stated in argument, and not denied, that the title to the land was acquired under the mineral laws of the United States. Suppose the complainants had gone back to the top of the Pinal Mountains, and acquired twice or thrice the area now owned by them; would it be contended that because these vast areas form a part of the watershed, and the water finds its way ultimately into the complainants' wells, that an allowance should be made for all such property? We think not, and believe that the corporation commission did not err when it refused to make an allowance for this property.

We are likewise of the opinion that the commission properly disallowed the claim for \$20,000 for a water right. The affidavits submitted do not give a definite description of the alleged water right, and on the evidence submitted we are not able to determine whether in fact the complainants have made a legal appropriation of either underground or flood waters.

It is next claimed that complainants are entitled to an allowance of \$43,884.34 on certain strips of land in Miami from 2 to 4 feet wide through and upon which the water mains and lateral pipes of the system are laid, and other strips of like width so located and reserved for future use in the laying of pipes. These strips seem to have been acquired by Ida A. Van Dyke by purchase from the townsite company. Pretermittting any consideration of the right of that company to thus dispose of any part of the streets in Miami, it is certainly true that these strips could be of value, so far as this case is concerned, only as a means of extending the pipes. It could have no value as residence or business property, for it was in the streets, and subject to the servitude of public passage, and no structure could be placed on it which would interfere with the right of the public. We think the corporation commission committed no error in rejecting such claim. As shown by the affidavits of witnesses R. G. Thomas and L. F. Fletcher, these values were secured by a careful tabulation made as follows:

"The rights of way for the water mains are four feet in width, the rights of way for the laterals are two feet in width, and the value of the rights of way were determined upon the basis of the value of abutting property, the amount of value of the abutting property being determined in all instances upon the basis of a valuation placed upon said property by the county assessor for the year 1914. This method was used in all parts of the townsite, with the exception of a proportionately small area in the western part of the townsite. In this western portion the assessor had failed to place a valuation upon this section in lots and blocks, but included the valuation with other property. Upon this portion I made my own estimates of value, based upon the assessor's valuation of other property. In securing the unit of value, the number of square feet of the abutting property was determined, and the assessed valuation placed thereon by the assessor was divided by the number of square feet area. This unit value was then used as a factor in finding the value of the abutting right of way, by multiplying the number of square feet in the abutting right of way by the unit value. The areas of the lots and the areas of the rights of way were determined by Engineer Thomas, and the values of the property determined by the county assessor and myself."

According to this method of arriving at the valuation to be placed on said rights of way, etc., should the property along any of the streets in Miami ever reach the price of \$1,000 per front foot, the value of these strips of land or rights of way would increase proportionately, and the consumers of water in the town of Miami would naturally have to pay for their water such rates as would bring a fair return upon the increased valuation.

It is also claimed that the commission failed to allow anything for a spur track, of the value of \$500, and several other items of small value; but as these items are too small to produce any material effect in the amount of the gross aggregate, this would not affect the question of the reasonableness of the rates fixed and to be charged, and we think it unnecessary to go into details regarding them.

Complainants' counsel cite the case of *Bonbright et al. v. Geary et al.*, supra, in which this court said:

"The inquiry will also be aided by another rule, that if the valuation of any one of the necessary elements of the public service plant is fixed by the rate-making authorities at an amount unjustly and unreasonably low in a substantial amount, or if the value of an element of substantial value used and useful in maintaining or operating such a plant is entirely omitted by the rate-fixing authority, such unreasonable and unjust valuation or omission of valuation is the taking of private property for a public use without just compensation."

We have carefully examined the evidence submitted, and we do not find therefrom that the corporation commission omitted from its estimate of the valuation placed upon the property for rate-making purposes any element of substantial value which should have been included therein.

[5] 4. The next and perhaps the most important question for consideration is whether the complainant Ida A. Van Dyke, individual owner of a water plant, is included within the provisions of the Constitution and laws of the state of Arizona providing for the regulation of charges of public utilities such as are involved in this case. We think she is. We are also of the opinion that the corporation commission was clearly within its jurisdiction in prescribing rates and charges to be made and collected by said complainant Ida A. Van Dyke for water furnished to the inhabitants of the town of Miami. The statute in question uses this language:

"The term 'water corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system for compensation within this state."

Manifestly complainant is within this definition. But it is insisted that the Constitution of the state of Arizona has defined what is a corporation, and that such definition cannot be extended by the Legislature, nor can the Legislature declare that corporations may consist of members not specifically named in the Constitution. The provisions of the Constitution which are said to be controlling are the following:

Article 14, § 1, which is as follows:

"The term 'corporation,' as used in this article, shall be construed to include all associations and joint-stock companies having any powers or priv-

illegals of corporations not possessed by individuals or copartnerships, and corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons."

Article 15, § 2, provides:

"All corporations other than municipal engaged in carrying persons or property for hire, or in furnishing gas, oil, or electricity for light, fuel, or power, or in furnishing water for irrigation, fire protection, or other public purposes, * * * shall be deemed public service corporations."

And article 15, § 3, provides:

"The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state. * * *"

By subdivision (Z) of said Act 90, known as the Public Service Corporation Act, the term "public service corporation" is defined as including every *water corporation*. There is nothing in the Constitution which forbids the Legislature from declaring that a person who engages in furnishing water for compensation to a town or city, or to the inhabitants thereof, shall not be considered, called, and treated as a corporation. There is nothing conflicting in the provisions of the Constitution and the statute. This is not a case of an expansion of a constitutional provision by the Legislature, but a definition by the Legislature which is consistent with the provisions of the Constitution. There is, moreover, another provision of the Constitution which has an important bearing on this case. Article 15, § 6, is as follows:

"The lawmaking power may enlarge the powers and extend the duties of the corporation commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the commission may make rules and regulations to govern such proceedings."

It is contended that the Legislature is not authorized to define the terms used in the Constitution. Why not? If such a definition is not inconsistent with the plain purpose and spirit of the other provisions of the Constitution, we think it may. In our opinion it is perfectly consistent and competent for the Legislature to provide that a water corporation is a public service corporation within the meaning of the law. This construction of the Constitution and the statutes is supported by well-defined rules of construction. Some of these rules are stated in the opinions of the Supreme Court of the United States as follows:

"There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience." *Bird v. United States*, 187 U. S. 118, 124, 23 Sup. Ct. 42, 44 (47 L. Ed. 100).

"To adopt such a construction would put a stop to the ordinary business of life. The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." *Holy*

Trinity Church v. United States, 143 U. S. 457, 460, 12 Sup. Ct. 511, 512 (36 L. Ed. 226).

See, also, *United States v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *Holy Trinity Church v. United States*, 143 U. S. 457-461, 12 Sup. Ct. 511, 512 (36 L. Ed. 226).

"The duty of the court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction." *Oates v. National Bank*, 100 U. S. 239, 244, 25 L. Ed. 580.

"And it is a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. All acts of the Legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act." *Bernier v. Bernier*, 147 U. S. 242, 246, 13 Sup. Ct. 244, 245 (37 L. Ed. 152).

Black, in discussing this question, quotes Judge Story as follows:

"Every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtilities, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." *Black on Interpretation of Laws* (2d Ed.) p. 33.

"A definition incorporated in a statute is as much a part of the act as any other portion. It is imperative. 'The right of the Legislature to prescribe the legal definitions of its own language must be conceded.' 'The right of the Legislature enacting a law to say in the body of the act what the language used shall, as there used, mean, and what shall be the legal effect and operation of the law, is undoubted.'" *Id.* pp. 269, 270.

"A statute should therefore be read with reference to its leading idea, and its general purpose and intention should be gathered from the whole act, and this predominant purpose will prevail over the literal import of particular terms or clauses, if plainly apparent, operating as a limitation upon some and as a reason for expanding the signification of others, so that the interpretation may accord with the spirit of the entire act, and so that the policy and object of the statute as a whole may be made effectual and operative to the widest possible extent. Moreover, the reading of the statute as a whole will often afford the means of correcting apparent mistakes in the wording of particular parts." *Id.* pp. 320, 321.

The authorities sustaining this construction of the statute might be multiplied, but we deem the above sufficient. It seems to us to be giving a very narrow and technical construction to the provisions of the Constitution and the statute to say that it would not include persons, because such a definition is found in the statute, but is absent from the Constitution. It would seem to render the Constitution in-

effective, and would, to a great extent, defeat the beneficial purposes of the statute and the practical ends which it is intended to accomplish. There would be no difficulty whatever in a corporation transferring its property to an individual, and thus destroy the jurisdiction of the corporation commission. Such a construction would therefore result in defeating the statute entirely until the Constitution could be amended to conform to such a view. We are therefore of the opinion that under the Constitution and the statutes passed in execution of it the complainant Ida A. Van Dyke is subject to the statute and the jurisdiction of the corporation commission.

[6] 5. It is also contended by complainants that that portion of said act which purports to confer power upon said corporation commission to investigate individuals engaged in public service enterprises is unconstitutional and void, because the subject of the investigation of individuals contained in the body of the act is not mentioned in the title. In support of this contention, complainants cite section 13, subdivision 2, article 4, of the Constitution of the state of Arizona, which is as follows:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The opinion formed and expressed by the court on the question next preceding this one, and the authorities cited in support thereof, might be deemed a sufficient answer to this contention; however, we will consider it briefly:

The question is: Does this act violate article 4 of the Constitution of the state of Arizona? Does it embrace more than "one subject and matters properly connected therewith"? We think not. A similar provision is contained in the Constitutions of most of the states of the Union, and has been repeatedly construed by the state courts, as well as by the Supreme Court of the United States. We need cite only a few of the cases on the subject.

In the case of *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431, the latter court, in construing a similar provision in the Constitution of the state of New Jersey, said:

"The purpose of this constitutional provision was declared by the Supreme Court of New Jersey in *State v. Town of Union*, 33 N. J. Law, 350, to be 'to prevent surprise upon legislators by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill.' Further, said the court: 'It is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the object must be sought in the end which the legislative act proposes to accomplish. The degree of particularity which must be used in the title of an act rests in legislative discretion, and is not defined by the Constitution. There are many cases where the object might with great propriety be more specifically stated, yet the generality of the title will not be fatal to the act, if by fair intendment it can be connected with it.' * * * And the doctrines of the New Jersey court are in harmony with decisions of the highest courts of other states when construing similar provisions in the Constitutions of their respective states. See authorities cited in *Cooley's Const. Lim.* 146, note 1."

A like provision of the Constitution of the state of Illinois was considered by the Supreme Court of the United States in the case of *Jonesboro City v. Cairo & St. Louis R. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. Ed. 116. In that case the Supreme Court quoted with approval an opinion of the Supreme Court of Illinois, as follows:

"It was held in *Johnson v. People*, 83 Ill. 431, that the Constitution 'does not require that the subject of the bill must be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required.' *People v. Lowenthal*, 93 Ill. 191."

That such a constitutional requirement should be construed liberally is well settled:

"In most of the states, the Constitution provides that no act of the Legislature shall embrace more than one subject, and that such subject shall be expressed in the title of the act. This provision is mandatory, and if it is disregarded, the whole statute, or any separable part of it not embraced within the title, will be rejected as unconstitutional. *But this requirement is construed liberally, and the courts are unwilling to defeat or embarrass legislation by putting too strained or technical a construction upon this clause of the Constitution.*" Black's Constitutional Law, § 107, p. 286.

"In regard to the degree of particularity required in the title of a statute, it is the accepted doctrine that it is sufficient if the title describes, with adequate clearness, the *general purpose and scope of the act*. It need not amount to an index or epitome of the statute, nor is it necessary that the title should set forth the modes, means, and instrumentalities provided in the law for its administration and enforcement. For example, a law incorporating a city, or one granting franchises to a business corporation, or one relating to the general subject of elections, or one regulating the manufacture and sale of intoxicating liquors, or one providing a general system of taxation for the state, will contain a great number of detailed and specific provisions. *But if they all relate to the general subject-matter of the act, and are all germane to its general purpose*, it is not necessary that each should be mentioned in the title. In all such cases, a general and comprehensive title will meet the requirement of the Constitution." *Id.* p. 286, 287.

All that is required of the title to a statute is that it cover the general matter or subject of its provisions. To require every detail of its provisions to appear in the title of an act would be to enlarge the title into an amplified synopsis, which obviously is not within its province. While it is true that this act contains a great number of detailed provisions, still we think that they are all germane to its general purpose, and that the manifest intent of the Legislature and the construction of the words of the act are in favor of the law; that the title of the act embraces "but one subject and matters properly connected therewith."

"Every statute consists of the letter and the spirit, and by comparing the different parts with each other, from the title to the last sentence, it is found to be its own best exposition." 4 Inst. 424.

[7] 6. The order made and entered by the corporation commission on the 23d day of July, 1914, directing the complainant Ida A. Van Dyke to "connect her water system in the town of Miami with the consumers in the Live Oak addition to said town, and that she serve the consumers of said Live Oak addition with water," was, under the facts of the case, in excess of its powers, and complainant is entitled to have an injunction against the enforcement of such order, especially

in view of the following finding made by said commission immediately after it had made a thorough investigation of said water system and prescribed rates to be charged for water by the owners of said system:

"The adequacy of the water supply has been questioned. We are of the opinion that the record would not justify a definite statement on this subject. It is true that the lower well failed for cause unknown, but both wells were supplying sufficient water through a period of drought, demonstrating the adequacy of the supply."

As above stated, the record herein shows that the water system was established and is now being conducted for the sole purpose of supplying purchasers of land of the Miami Townsite Company, who might reside thereon, with water for domestic and commercial use and for fire protection, and it would seem manifestly unjust to the owners of said water system, as well as to the inhabitants of said townsite, to require the extension of said system and the furnishing of water to the inhabitants of said Live Oak addition, or any other addition of said townsite. The facts in the case of *Del Mar Water, Light, & Power Co. v. Eshleman*, 167 Cal. 666, 681, 140 Pac. 595-597, are somewhat similar to the facts of this case, and in that case the court said:

"In this state, where the territory needing water is vastly greater than the available water will supply, it is obvious that the district to be served from any source, or by any water service company, must be limited in extent. Indeed, the same is substantially true of a water service anywhere. The supply is always limited, and the territory to which it is to be served must likewise be limited; otherwise the amount served to each person might, by constantly increasing demands, be made so small that it would be of no use to any one. There can be no doubt, therefore, that the owner of a water supply may make a limited dedication of it to public use, confining the use to such territory as he sees fit. * * * Accordingly, our decisions have recognized and have repeatedly declared the right of a water company to make such limited dedication, and to decline to furnish its water to persons not within the area it has undertaken to serve. *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213; *Thayer v. Cal. Dev. Co.*, 164 Cal. 128, 128 Pac. 21; *Price v. Riverside*, 56 Cal. 433; *Hildreth v. Montecito*, 139 Cal. 29, 72 Pac. 395; 2 *Wiel on Water Rights* (3d Ed.) par. 1281; *Lewis, Em. Dom.* (3d Ed.) pars. 254, 313."

We are accordingly of opinion that a temporary injunction should issue forbidding each and all of the respondents to enforce the fines and penalties provided by the said Act 90 pending this suit. The evidence submitted by the complainants does not afford this court a satisfactory basis on which to adjudicate the question of the value of the property used as a water plant, and therefore the court cannot say that the rates prescribed by the corporation commission are confiscatory, and there is no basis on which an order could be made declaring them illegal. If hereafter it shall appear that, under actual operation of the plant under these rates, the return allowed by such corporation commission operates as a confiscation of the property of complainant *Ida A. Van Dyke*, she may, at the expiration of one year, again present her evidence to the court and obtain appropriate relief on the facts then presented.

The court will retain jurisdiction of the case, with permission to complainant *Ida A. Van Dyke*, if so advised, after the expiration of

one year, to renew her application for an injunction against the rates established by the corporation commission as confiscatory. In the meantime the rates established will remain in force.

An order will be entered in accordance with this opinion.

LOUIS BERGDOLL BREWING CO. v. BERGDOLL BREWING CO. et al.

(District Court, E. D. Pennsylvania. November 30, 1914.)

No. 1291.

1. TRADE-MARKS AND TRADE-NAMES (§ 41*)—PROPERTY—RIGHTS—REGULATION.

Property in trade-marks is recognized at common law, and may be made the subject of legislation by the states; the power of Congress to regulate such subject being derived from the interstate commerce clause of the federal Constitution (Const. art. 1, § 8, cl. 3).

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 46; Dec. Dig. § 41.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 41*)—REGULATION—POWER OF CONGRESS.

Jurisdiction of Congress over trade-marks is limited to interstate commerce transactions.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 46; Dec. Dig. § 41.*]

3. COURTS (§ 299*)—REGISTRATION OF TRADE-MARK—JURISDICTION—ALLEGATIONS IN PLEADINGS.

Registration of trade-marks protects the use thereof only in interstate commerce transactions, so that when a controversy involving the infringement of a trade-mark is between citizens of the same state, and the jurisdiction of the federal court in which the suit is brought depends on the averment that the case arises under the laws of the United States, the cause of action must be an infringement of the proprietary right which arises out of the registration; and facts necessary to confer jurisdiction must be averred.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

4. COURTS (§ 299*)—FEDERAL COURTS—JURISDICTION—LAWS OF UNITED STATES—TRADE-MARK INFRINGEMENT.

Where, in a suit for infringement of a trade-mark, federal jurisdiction depended on an allegation that the case arose under the laws of the United States, but the only averment that the trade-mark was used in interstate commerce was that the mark was registered under an act of Congress, and that under such trade-mark complainant's product had been known throughout the country, and that defendant's violation thereof had caused within the district and elsewhere through the United States great and irreparable injury to complainant, it did not sufficiently aver interstate use, so as to confer jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

In Equity. Suit by the Louis Bergdoll Brewing Company against the Bergdoll Brewing Company and others. On motion to dismiss the bill. Motion granted, with leave to amend.

E. Hayward Fairbanks and J. Bonsall Taylor, both of Philadelphia, Pa., for plaintiff.

R. Stuart Smith and Percy C. Madeira, Jr., both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The question raised here is one of pleading. The pertinent pleading facts, as they negatively and affirmatively are found in the record, are these:

There is no averment of diverse citizenship. The jurisdiction of the court is based upon the averment that the case arises under the laws of the United States, to wit, the fourth proviso of section 5 of the act of Congress of February 20, 1905, relating to trade-marks. Comp. St. 1913, § 9490. The injury complained of is an infringement of the trade-mark rights of the plaintiff acquired under that act. The only interstate averments of plaintiff's claim of right are that the trade-mark is registered under the act of Congress, and that under this trade-mark the plaintiff's product "has been known throughout the country exclusively as the product of the plaintiff." The only interstate averment as to defendant's violation of plaintiff's claim of right is that it has induced purchasers to take the product of the defendant under the belief that it was the product of the plaintiff, and thereby "it has caused in this district and elsewhere throughout the United States great and irreparable injury to the plaintiff."

A motion has been made to dismiss the bill, which is now limited to the sole ground that there is no averment in the bill of an interstate use or threatened use of plaintiff's trade-mark.

The trade-mark legislation of Congress is based upon that provision of the Constitution which confers power upon Congress to regulate commerce among the several states, etc.

[1] Property in trade-marks is recognized at common law, and may be and has been made the subject of legislation in the states. It does not owe its existence as a right to any act of Congress. Legislation, therefore, by Congress, is the mere regulation of a pre-existing right, and is based upon the interstate character of the act.

[2] The use of a trade-mark may be confined to intrastate commerce, or it may be extended into the federal field. With the regulation of trade when thus confined to the limits of a single state Congress has nothing to do. Its power and authority is limited to interstate transactions. It was, therefore, held that Act Cong. Aug. 14, 1876, c. 274, 19 Stat. 141, providing for the punishment of counterfeiting trade-marks, etc., was void, because it included commercial acts not of an interstate character. *U. S. v. Steffens* (Trade-Mark Cases) 100 U. S. 82, 25 L. Ed. 550.

Act March 3, 1881, c. 138, 21 Stat. 502, as well as Act Feb. 20, 1905, both provided only for the registration of the trade-marks which are to be used in interstate commerce. Under the act of 1881 it was held, in a case arising between citizens of the same state, a bill should be dismissed because it failed to allege that the trade-mark in controversy was used on goods intended to be transported to a foreign country. *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145, 32 L. Ed. 529.

[3] Cases of this general character may involve two features. One is a trespass upon the rights of the plaintiff which he has acquired under a common-law trade-mark. The other is an infringement of his statutory proprietary right, acquired under the trade-mark registration acts. The common-law trade-mark is protected against infringe-

ment by its use either in intrastate or interstate commerce. The registration protects the use of the trade-mark only in interstate transactions. When the controversy is between citizens of the same state, and the jurisdiction of the court depends upon the averment that the case arises under the laws of the United States, then the complaint must be an infringement of the proprietary right which arises out of the registration and the facts necessary to confer jurisdiction must be averred. *Prince's Metallic Paint Co. v. Prince Mfg. Co.* (C. C.) 53 Fed. 493.

In the line of the same thought we have the expression of opinion in *Andrews Co. v. Puncture Co.* (C. C.) 168 Fed. 762, that the court does not have jurisdiction where jurisdiction depends upon this fact, unless the registered trade-mark has been used or is threatened to be used in interstate commerce.

As the constitutionality of the acts of Congress depends upon the interstate feature, it follows that the same construction must necessarily be given in this respect to the act of February 20, 1905, as was given to the act of March 3, 1881, and it further follows that the acts of Congress conferring jurisdiction upon the courts in copyright and trade-mark cases must be construed to be limited to interstate use of such trade-marks. *Bernstein v. Danwitz* (C. C.) 190 Fed. 604.

[4] It only remains, therefore, to inquire into the sufficiency of the averments here. As the averment is of a registered trade-mark under the provisions of the act of Congress, this may be taken to include an averment of all the facts necessary to found the right of the plaintiff to the trade-mark registration, and therefore to include the averment of an interstate use of the trade-mark by the plaintiff. There is no averment, however, of an interstate use, actual or threatened, by the defendant. The averment quoted, that injury had been caused to the business of the plaintiff here "and elsewhere throughout the United States," as not an averment of interstate use. The bill should accordingly be dismissed for want of jurisdiction.

The thoughtful care and thoroughness with which the question involved has been discussed by counsel call for more than a passing reference to the views which we have not been able to adopt. The position of the plaintiff may be summarized thus:

1. The trade-mark act of February 20, 1905, and section 24 of the Judicial Code (Comp. St. 1913, § 991), confer jurisdiction of all cases arising "under the trade-mark laws."

On its face this impresses one, but the force of it is lost when we reflect that a case can arise under the trade-mark laws only when the trade-mark and its violation have relation to interstate commerce. Counsel is in error in asserting that nothing in the act limits the right of the plaintiff to trade-marks used in interstate commerce. The act of 1905 expressly so limits it, and confers jurisdiction only in cases "arising under the present act."

2. Plaintiff, having secured a trade-mark right under the act, is presumed to be entitled to it, and it therefore is a trade-mark used in interstate commerce.

This is probably right so far as it goes, but it does not go far enough. The act of violation complained of, actual or threatened, must be an

interstate act, and it is only when the defendant so uses the trade-mark that the act of Congress confers the jurisdiction.

3. The plaintiff does aver the commission of an interstate offense, in that the concluding clause of paragraph 11 avers that damage has been done the plaintiff in this district "and elsewhere throughout the United States."

This averment may be true, and yet the defendant not have used the trade-mark in "commerce with foreign nations or among the several states or with the Indian tribes."

4. Of the cases cited by counsel in their supplemental and supporting brief, *Rossmann v. Garnier*, 211 Fed. 404, 128 C. C. A. 73, gives them no support. The fact there found was an interstate use. So far as the case bears upon the present point, its authority is for the present defendant. In *Dauids Co. v. Dauids Mfg. Co.*, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, the "any infringing use" which counsel have so strongly emphasized necessarily means the interstate use, the exclusive right to which is given by the statute. The citation by defendant of the case of *Bernstein v. Danwitz* (C. C.) 190 Fed. 604, is not open to the criticism directed against it. That case squarely holds that the jurisdiction which depends upon the acts of Congress attaches only when the facts bring the case within those acts.

5. The final stand taken by plaintiff, that the act of 1905, contains additional provisions to those of the act of 1881, and that if the courts are not given jurisdiction an offender in the same state with the defendant would go unscathed, avoids the point in issue. That the act of 1905 made changes in the law must be conceded, but this by no means concedes the point under discussion. The argument is, and it seems to be unanswerable, that Congress has power only to legislate on trade-marks used in interstate commerce, that it has in fact only granted the exclusive right to registered trade-marks when so used, and that jurisdiction is given on this ground to the courts only when the defendant has violated this exclusive proprietary right of the plaintiff by using its trade-mark in interstate trade.

The bill in its present shape must be dismissed. As, however, the plaintiff may be able to amend its bill, five days is allowed in which to make application for leave to amend; otherwise, bill dismissed, with costs to defendant.

RICHARDS v. HARRISON et al

(District Court, S. D. Iowa, Ottumwa Division. March 30, 1914.)

No. 9-M.

1. EQUITY (§ 415*)—DECREE—DIRECTION OF EXECUTION.

A decree of a federal court of equity for the payment of money is not invalid because it does not in terms direct the issuance of execution, since rule 8 of the new equity rules (198 Fed. xxi) makes all such decrees enforceable by execution.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 932-944, 946, 950, 951; Dec. Dig. § 415.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 1234*)—LIABILITY ON SUPERSEDEAS BOND—PARTIAL AFFIRMANCE OF DECREE.

A court of equity rendered a decree reviving a judgment against defendants, who were husband and wife, and also decreeing that certain real estate standing in the name of the wife was held by her in trust for her husband, and subjecting it to payment of the judgment. Both appealed, and joined with a surety in the execution of a supersedeas bond in the usual form, conditioned that they should "prosecute said appeal to effect and answer all damages and costs, if they shall fail to make good their plea." The decree with respect to the land was reversed, but so much as revived the judgment against the husband was affirmed. *Held*, that the signers of the bond were liable thereon for the payment of such judgment and costs up to the amount of the penalty named therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4777; Dec. Dig. § 1234.*]

3. APPEAL AND ERROR (§ 1237*)—LIABILITY ON APPEAL BOND—SUMMARY REMEDY.

The signers of an appeal bond make themselves parties to the suit, and their liability may be enforced by summary proceedings therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784; Dec. Dig. § 1237.*]

In Equity. Suit by William S. Richards against James Harrison, Hettie W. Harrison, and the Title Guaranty & Surety Company. On motion for judgment on appeal bond. Motion granted.

Chester W. Whitmore, William McNett, and Walter McNett, all of Ottumwa, Iowa, for complainant.

W. H. Keating and James A. Devitt, both of Oskaloosa, Iowa, and Frank M. Lowe, of Kansas City, Mo., for respondents.

SMITH McPHERSON, District Judge. April 29, 1891, Seth Richards obtained a judgment in the district court of Mahaska county, Iowa, against the defendant James Harrison for the sum of \$7,586.46, with interest thereon at the rate of 10 per cent. per annum from date, together with the costs of the action; the said judgment being for money borrowed by the said defendant from him, the said Seth Richards. The plaintiff herein succeeded to the rights of said Seth Richards.

This action was originally brought in this court (then the Circuit Court) to revive the said judgment and to subject certain real estate, the title of which was in the wife, Hettie W. Harrison, and for a decree declaring that she held the title to said real estate in trust for her husband, James Harrison, he having no property in his name. After full hearing, this court on March 31, 1910, signed and ordered of record a decree reviving the state court judgment, then aggregating \$21,748.48, against James Harrison, and against Hettie W. Harrison for \$10,355, and declaring that the real estate held in the name of the wife, Hettie W. Harrison, should be subjected to the payment of the judgment. An appeal was taken to the United States Circuit Court of Appeals for this (the Eighth) circuit, resulting in a majority opinion, filed May 14, 1912, reversing the decree of this court. See *Harrison v. Richards*, 196 Fed. 770, 116 C. C. A. 394. On October 18, 1912, on rehearing, it was ordered by the Circuit Court of Appeals as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Thereupon this cause came on to be further heard upon the portion of the said petition requesting a modification of the decree of this court as to the said James Harrison. On consideration whereof, it is now here ordered, adjudged, and decreed that said petition for a modification of the decree of this court be and the same is hereby granted, to the extent only that that part of the decree below which renewed the judgment against James Harrison under date of April 29, 1891, in favor of William S. Richards, be and the same is hereby affirmed, without costs to either party in this court; and it is further ordered and decreed by this court that in all other respects the decree of this court in this cause, entered on the 14th day of May, A. D. 1912, be and the same is hereby approved and confirmed."

November 25, 1912, on application of appellants (James Harrison and Hettie W. Harrison), the following order was made by the Circuit Court of Appeals:

"This cause came on to be heard on the motion of appellants for an order to vacate or modify the order of this court entered October 18, 1912. Upon consideration whereof it is now here ordered that said motion be and the same is hereby denied."

All the foregoing is included in the mandate timely filed in this cause in this court.

The bill of complaint in this case pleaded the state court judgment, and included a general and equitable prayer for relief. James Harrison, in one of his assignments of error to the Circuit Court of Appeals, specifically complained of the revival of the state court judgment; it being contended that this court was without power or jurisdiction to revive or renew such judgment. At the time the appeal was prayed for and granted a supersedeas bond was given and filed, and marked "Approved," with the following order indorsed thereon:

"Approved, and when filed to operate as a supersedeas.

"Smith McPherson, Judge."

The bond was in the usual form; the parts now material for consideration being as follows:

"Know all men by these presents, that we, James Harrison and Hettie W. Harrison, as principals, and Title Guaranty & Surety Company, as surety, are held and firmly bound unto William S. Richards in the full and just sum of ten thousand (\$10,000.00) dollars, to be paid to the said William S. Richards, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents."

Then the bond recites the pendency of the action, the rendition of the decree, the granting of the appeal, and the issuance of the citation to appear in the said Circuit Court of Appeals. After the foregoing is the following:

"Now, the conditions of the above obligation are such that if the said James Harrison and Hettie W. Harrison shall prosecute said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

".....

"James Harrison.

"Hettie W. Harrison.

"The Title Guaranty & Surety Company,

"By Lawrence D. Beechler,

"By J. A. Devitt,

"Attorney in Fact."

On the foregoing facts the complainant has filed a motion for a judgment against the said Hettie W. Harrison and the said Title Guaranty & Surety Company for the amount of the bond, with interest thereon from the date of the application for the order.

[1] It seems there was no specific recital in the original judgment of this court for a writ of execution, but I regard that as immaterial because the general rules in equity provide that when the judgment is for the payment of money only it shall be enforced by writ of execution. The Iowa statutes have a like provision. Code 1897, §§ 3954, 3957. And while it is true that ordinarily judgments contain the recital that, if not paid, a writ of execution shall issue therefor, such recital is a mere repetition of that which the law has already pronounced. The method for the enforcement of the judgment is that prescribed by statute and the rules of the court, and such method can neither be enlarged by additional recitals, nor can it be said to be defective because the judgment does not recite the terms and conditions of the law. The Uniformity Statute of 1872 (Act June 1, 1872, c. 255, § 5, 17 Stat. 197 [Comp. St. 1913, § 1537]) makes the state statutes applicable in such a case.

[2] There is a long line of decisions to the effect, generally speaking, that when a case in equity has been carried to an appellate court, followed by a mandate from such court to the trial court, the trial court has no discretion other than to observe and in most instances literally follow the terms of the mandate as to further proceedings. The different views of appellate courts are fully illustrated and covered by the following cases, namely: *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414, and *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432. These three cases set at rest every contention that can be made respecting the final action to be taken by a court acting under a mandate from an appellate court. And while there are one or more exceptions to the foregoing rule, as generally stated, the case at bar does not come within any exception. So that we here have a case in which there was a money judgment against both James Harrison and Hettie W. Harrison for different sums, and a decree declaring that the wife, Hettie W., held certain real estate in trust for her husband. An appeal was taken, in which it was claimed that this court was in error. This contention was made both by the petition for appeal and in the assignment of error. The appellate court sustained but the one contention, namely, that the real estate was not held in trust by Hettie W. for her husband, James Harrison. To that extent, and to that extent only, was there a reversal. The judgment of this court in pronouncing a money judgment was not reversed; but there was a distinct order of affirmance as respects that one contention.

The supersedeas bond was a joint and several obligation, signed by both James Harrison and his wife, Hettie W., as well as by the surety company. The bond was conditioned that James Harrison and Hettie W. Harrison " * * * shall prosecute said appeal to effect and answer all damages and costs if they shall fail to make good their plea.

* * * James Harrison had no interest in the decree against his wife, subjecting the real estate, other than such moral interest that a husband would have in his wife's affairs. But such an interest as that would not have given him the right to appeal. He only had the right to appeal and complain of the judgment and decree of this court because of the revival of the money judgment rendered against him in the state court several years before. On that issue he made complaint by his appeal, and on that contention, in the language of the bond, he did not make his plea good. The bond is conditioned that he shall make that plea good; otherwise, he will be holden in the penalty of \$10,000, and both the wife and the surety company became obligors to the complainant herein to the full penalty of the bond.

[3] But it is said that the bond recites, " * * * and answer all damages and costs if they shall fail to make good their plea, * * *" and it is contended that the complainant has not been damaged. That is technical and specious, and without merit. *Wood v. Brown*, 104 Fed. 203, 206, 43 C. C. A. 474, by the Circuit Court of Appeals for this circuit, and cases cited. And see *American Surety Co. v. North Packing Co.*, 178 Fed. 810, 812, 102 C. C. A. 258, by the Circuit Court of Appeals for the First Circuit. These sureties made themselves parties to the record, and summary proceedings are in order, without further litigation, and not only allowable, but the correct method of procedure.

The motion for judgment for the amount of the penalty of the bond, with interest thereon, will be sustained, and a judgment accordingly entered; but interest will be allowed only from the time the application for this judgment was filed.

In re KRAMER et al.

(District Court, E. D. Pennsylvania. November 9, 1914.)

No. 4344.

1. BANKRUPTCY (§ 293*)—JURISDICTION OF COURT—SUMMARY PROCEEDINGS.

In a summary proceeding by a trustee to require a third person to turn over money and property alleged to belong to the bankrupt estate, the court of bankruptcy has jurisdiction to determine the question whether respondent has such money or property; a denial of possession not being the assertion of an adverse claim.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

2. BANKRUPTCY (§ 15*)—PARTNERSHIP—JURISDICTION OVER PARTNERS.

A court of bankruptcy, in proceedings against a partnership, has no jurisdiction to administer upon the estate of an alleged secret partner, when he is neither declared a bankrupt nor found insolvent.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 21; Dec. Dig. § 15.*]

In *Bankruptcy*. In the matter of Harry Kramer and Michael Muchnick, individually and as partners composing the firm of Kramer &

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Muchnick. On certificate of referee sur petition for an order upon Jacob Baras. Reversed.

See, also, 210 Fed. 977.

Alfred T. Steinmetz and Carr, Beggs & Steinmetz, all of Philadelphia, Pa., for trustee.

Clinton O. Mayer, of Philadelphia, Pa., for Jacob Baras.

THOMPSON, District Judge. Upon the petition of the trustee, a rule was granted upon Jacob Baras to show cause why an order should not be made upon him to pay and deliver to the trustee the sum of \$19,640.96, alleged to be held by Baras in secret trust for the bankrupts, Kramer and Muchnick. An answer was filed by Baras, whereupon a special reference was made to the referee to ascertain and report the facts, together with the testimony and his findings thereon.

The allegations in the petition are to the effect that the bankrupts, in pursuance of a fraudulent conspiracy entered into by the bankrupts and Baras, had transferred to Baras various sums of money, to be retained and kept by him for the benefit and use of the bankrupts for the purpose of defrauding their creditors. The answer of Baras denies the conspiracy, denies that any money was paid over to him, which he held or is holding as the property of the bankrupts, and denies that he has in his possession or control the sums of money set out in the petition, or that he has any money whatsoever which is the property of the bankrupts.

In the report and opinion of the referee he finds that Baras has taken possession of certain carpet, the property of the firm, but concludes, after considering the testimony taken, for reasons hereafter stated, that he cannot in a summary proceeding find as a fact against contradictory testimony that the respondent has in his possession definite sums of money as alleged in the petition, citing the cases of *In re Green* (D. C.) 207 Fed. 693, and *In re Blum*, 202 Fed. 883, 121 C. C. A. 241. The referee concludes, however, that the testimony establishes a prima facie liability of Baras as a quasi partner in tort in the firm of Kramer & Muchnick as far as the creditors are concerned, and therefore that Baras is liable as a partner to deliver over moneys in the amount of the unpaid debts of the bankrupts. The referee thereupon made the following order:

"I therefore enter an order on Jacob Baras to pay over the value of the goods taken from the premises of the bankrupts as shown in this proceeding, and to pay the costs of this proceeding; and I further enter a rule on the said Jacob Baras to show cause why he should not pay over to the trustee as a partner the amount of \$36,336.14, the amount of the liabilities of the firm, with interest to be added from the date of the adjudication."

[1] Upon the entry of the order, the trustee filed a petition for a certificate of review, in which he assigns error to the action of the referee in his refusal to make an order upon Baras to pay, based upon the following reasons stated in the referee's opinion, which are assigned as error:

(1) "I do not see any distinction between the denial of Baras that he received the money and the case that would be presented if he acknowledged the receipt and testified to a colorable title. In other words, in a summary

proceeding I cannot assume the function of a jury in passing upon the credibility of witnesses."

(2) "I do not see how the scope of the referee in passing upon the credibility of testimony is affected by the fact that the person charged in the proceeding denies possession, instead of setting forth a claim of colorable title."

(3) "While Muchnick testified freely and without the embarrassment shown on his first examination, which induces me to find his story quite convincing and the contradictions in Baras' testimony affect its credibility, I feel that, as against his unqualified denial of the receipt of the moneys charged against him, it is his right to have the truth of the testimony and merits of the claim determined, if he so prefers, in a plenary suit."

(4) "I therefore, as it involves passing upon the truthfulness of testimony, cannot find as a fact that Baras received other moneys than the repayment of indebtedness with usurious interest."

I think the learned referee has misapprehended the effect of the decisions in the cases of *In re Green*, *In re Blum*, and the case of *In re Yorkville Coal Co.*, 211 Fed. 619, 128 C. C. A. 570, in that he has extended the rule there adopted as to the power of a bankruptcy court in a summary proceeding in passing upon a question of whether a claim to property is an adverse claim, by applying that rule to the inquiry as to whether money or property which it is sought to recover as belonging to the bankrupt estate is in the possession or control, or has come into the possession or control, of the respondent. To quote from the opinion of this court in the case of *In re Green*:

"As I construe the decisions, the determination of questions of fact is for a jury or a chancellor in a plenary suit, if the uncontradicted facts asserted are sufficient, if true, to make out a real adverse claim, no matter how ill-supported it may appear to be."

The *Green Case* is supported by the decision of the Circuit Court of Appeals for the Second Circuit in the case of *In re Yorkville Coal Co.* In that case the court said:

"The basis of an *adverse claim* is disclosed by the testimony, when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant. A claim is not adverse if it consists merely in a refusal to turn over property to the trustee, but it is not prevented from being adverse because it is based on false testimony, or originates in a fraudulent transaction."

The court concludes:

"The bankruptcy court in a summary proceeding may inquire whether a claim is not merely asserted (colorable), but whether there are facts which, if true, would be the basis for a legal claim. Whether the facts are true, or fraudulent, or false, or fictitious, it cannot determine without the claimant's consent. It is the claimant's right to have the truth of the testimony and the merits of the claim determined, if he so prefers, in a plenary suit."

The trustee in his petition asserts (1) that certain moneys have come into the possession of the respondent; (2) that the moneys are the moneys of the bankrupt estate. In the cases of *In re Green*, *In re Blum*, and *In re Yorkville Coal Co.*, no question of the possession of money or property was raised, and the rule adopted was applied in each case to a claim to the right of possession by a party admitting possession. In *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, possession was admitted, but the facts set up by the respondent were held not to be sufficient in law to constitute a real ad-

verse claim, and summary proceedings were sustained because the evidence was held to establish a merely colorable claim.

If the position of the referee is correct, the object of summary proceedings for the recovery by the trustee of money or property of the bankrupts would be entirely defeated; for in no case, except where possession was admitted, and then, upon the assertion of an adverse claim, it was found that the claim was not real as a matter of law, but merely colorable, could an order be made for the return of the money or property, for if the trustee offered evidence to trace property into the possession of the respondent, and the respondent offered evidence to the contrary, the proceedings would come to an end without any claim of adverse title being even asserted. Certainly the situation is anomalous, if the court having jurisdiction of a bankrupt's assets cannot determine whether property claimed by its officer has or has not come into the possession of a third party. No question of the right to possession is thus determined, for if the trustee produces testimony to trace the property into the hands of the respondent, and the respondent denies possession, and upon that question the referee finds in favor of the trustee, the respondent may still have set up evidence to prove an adverse claim to the right to possession. In determining the question of possession, the referee must of necessity find the facts from the testimony on the part of the trustee and on the part of the respondent. In denying possession, the respondent does not in any sense put himself in the position of asserting an adverse claim, for he does not thereby assert any claim. If the property is found to have come into his possession, his claim must then be based upon the right to possession.

In the present case the question upon which the referee refused to make a finding of fact was not as to right to possession, but whether in fact the money in question had come into the respondent's hands, and I think he was in error in holding that he had no authority to pass upon the evidence to determine that question.

[2] 2. The second question in the case arises upon the petition of Baras for review of the action of the referee in entering a rule upon him to show cause why he should not pay over to the trustee as a partner the sum of \$33,336.14, the amount of the liabilities of the firm, with interest to be added from the date of adjudication. Baras was not named in the creditors' petition in bankruptcy. In order to sustain the action of the referee in entering the rule to hold Baras liable as a quasi partner, the bankruptcy court must in some manner have obtained jurisdiction over his assets as a partner in the firm of Kramer & Muchnick. No argument was advanced by counsel for the trustee to sustain the action of the referee, and I think, in view of the decision of the Supreme Court in *Francis v. McNeal*, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, the referee had no jurisdiction to enter the rule to show cause. The question here is quite similar to that involved in the case of *In re Samuels*, 215 Fed. 845, 132 C. C. A. 187, where the practice in proceedings before the referee is discussed in view of the decision in the case of *Francis v. McNeal*. I think it may be regarded as definitely settled that a court of bankruptcy in

proceedings against a partnership has no jurisdiction to administer upon the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent.

The practice in this case is not warranted by any provision of the Bankruptcy Act. The case, therefore, will be remanded to the referee, for further report upon his findings under the original reference, and the rule upon Baras, entered June 18, 1914, vacated.

In re LITTLE ELK LOGGING CO.

(District Court, W. D. Washington, N. D. October 15, 1914.)

No. 5279.

BANKRUPTCY (§ 350*)—CLAIMS—LABORER'S LIEN—PRIORITY.

Rem. & Bal. Code Wash. § 1162, provides that every person performing labor on, or who shall assist in obtaining or securing, sawlogs, shall have a lien on the same for the work or labor done, whether such work was done at the instance of the owner or his agent. *Held* that, where claimant sold certain land to a bankrupt, payable \$1,000 cash and the balance at the rate of \$2 per thousand stumpage on the timber on the land as removed, retaining title to the premises, timber, and logs removed therefrom until payment, claimant, by permitting the bankrupt to cut and remove the timber, made the bankrupt its agent for that purpose, and hence the lien reserved for laborers performing such work was prior to that acquired by claimant on the logs cut and removed from the land under its reservation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Little Elk Logging Company, a corporation. On petition to review a referee's order refusing to sustain the alleged priority of a claimant's lien over the liens of laborers. Affirmed.

Alexander & Bundy, of Seattle, Wash., for petitioner.

M. J. McGuinness, of Snohomish, Wash., for respondents.

NETERER, District Judge. The Brown Bros. Lumber Company sold to the Little Elk Logging Company, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 9, township 27 N., range 6 E. W. M., for \$4,250, of which was paid in cash \$1,000, and the balance was to be paid at the rate of \$2 per thousand stumpage on the timber upon said land as the same was removed. The total amount to be paid before December 31, 1914. Time is made the essence of the contract, and on default all payments made to be forfeited, and the purchaser to have no further interest in the land. It was further provided:

"That until payment of the full purchase price the title to said premises and said timber and logs removed therefrom shall remain in the first party, subject only to the right of the party of the second part to cut and remove the timber and sell the logs in the ordinary course of business," etc.

One hundred and forty-eight thousand three hundred and ninety feet of timber was cut and taken from the land, which has not been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paid for. Liens were filed by laborers, aggregating \$1,716.44. A receiver was appointed by the state court, and under the court's order the logs were sold. Bankruptcy proceedings were then instituted, and after the election of a trustee the Brown Bros. Lumber Company filed a petition, asking that the title to the logs be adjudged in it, and the money received from a sale of the logs be paid upon its preferred claim, and the balance upon its account be allowed as a general claim against the estate. The referee allowed the claim as a general claim, and held the lien claims of the laborers to be prior, and directed the payment of the proceeds of the sale of the logs to the lien claims, less expenses of the trustee in making the sale, and that any deficit be allowed as a general claim against the estate. The matter is brought to this court on a petition for review.

It is contended by the Brown Bros. Lumber Company that the reservation of title in the contract of sale saves to the grantor the title to the timber until it is paid as stipulated in the contract. Section 1162, Rem. & Bal. Code of Washington, provides that:

"Every person performing labor upon, or who shall assist in obtaining or securing saw-logs, spars, piles * * * shall have a lien upon the same for the work or labor done * * * whether such work, labor or services was done, rendered or performed at the instance of the owner of the same or his agent."

The contract of sale of the timber authorized the grantee to enter upon the land and cut and remove the timber. By this provision the owner of the land created, for the purpose of this lien statute, the purchaser as agent to remove the timber. This relation being established by this contract, the rights of laborers upon this timber would immediately attach under the statute, and the logs would be held for all of the services performed in the removal of the timber. The logger's lien statutes of Washington are remedial in their nature, and should be liberally construed in the instance of the person performing labor in the removal of the timber; and where, as in the instant case, the removal of the timber was contemplated by all of the parties and the labor necessary to such removal, it is not necessary to discuss any of the other matters which were suggested upon the argument.

I think the decision of the referee was right, and should be affirmed.

THOMAS v. BOSTON & M. R. R.

(District Court, D. New Hampshire. November 16, 1914.)

No. 117.

COMMERCE (§ 27*)—REGULATIONS—RAILROADS—"INTERSTATE COMMERCE."

Plaintiff was injured by a falling timber while engaged in tearing down part of a railroad roundhouse, which had been rendered useless by a fire. The active function of the roundhouse as an instrumentality in interstate commerce had ceased to exist; the work of removal being necessary, that a new building might be erected for railroad purposes, and which would likely be used in connection with interstate commerce. Held, that plaintiff was not engaged in "interstate commerce" at the time

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of his injury, and had no cause of action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

At Law. Action by Gordon Thomas against the Boston & Maine Railroad. On demurrer to declaration. Demurrer sustained, and writ dismissed.

Taggart, Burroughs, Wyman & McLane, of Manchester, N. H., for plaintiff.

Branch & Branch, of Manchester, N. H., for defendant.

ALDRICH, District Judge. The defendant demurs on the ground that the circumstances of the injury disclosed by the declaration do not bring the employé within the provisions of the act of Congress of April 22, 1908, in respect to liability of common carriers in certain cases.

According to the declaration, the plaintiff was engaged in tearing down a roundhouse, or that part of it which had been rendered useless by a fire, and was injured, not by an instrumentality being actively used in interstate commerce, but by a falling timber.

The active function of the roundhouse as an instrumentality in interstate business had ceased to exist, and the employment, therefore, was in connection with the removal of a useless structure, to the end that a new one might be created for railroad purposes, and very likely for uses in connection with interstate commerce.

As said in several of the cases, there must be a line somewhere, and it would seem that, if this case is within the line, you might as well say that all employés upon railroads, engaged both in interstate and intrastate business, may have the benefit of the act, with the result that with few exceptions all personal injury litigation would be in the federal courts. I do not think the case is within the spirit of the reasoning of either the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, or Ill. Central R. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; and it cannot, it seems to me, be reasonably said that the plaintiff was engaged in interstate commerce at the time of the injury.

Demurrer sustained; writ dismissed. Judgment for the defendant for his costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CURTIS v. WALPOLE TIRE & RUBBER CO. et al.

FISHER et al. v. ANTHONY et al.

ANTHONY v. WALPOLE TIRE & RUBBER CO. et al.

(Circuit Court of Appeals, First Circuit. December 4, 1914.)

Nos. 1094-1096.

1. ASSIGNMENTS (§§ 48, 59*) — EQUITABLE ASSIGNMENT — TRANSFER OF ACCOUNT.

The W. Company, having borrowed \$15,000 from claimant, gave him a letter, addressed to the F. Company, directing it to pay claimant that amount out of its indebtedness to the W. Company, and to accept the writing as an order to pay claimant direct, if he so desired. There was due the W. Company from the F. Company at this time more than \$13,000, and the F. Company's treasurer accepted the order and wrote claimant, asking an indulgence on payments. Thereafter the F. Company assigned, among other accounts, certain invoices of goods sold to the F. Company, aggregating \$22,500, for advances made by the T. Company, and, the W. Company having failed, the balance of the F. Company's debt was paid to the W. Company's receivers. *Held*, that the transaction was not a mere promise of the W. Company to pay claimant's debt out of a particular fund, but constituted an equitable assignment, vesting claimant with a power coupled with an interest in the account, which was irrevocable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 133, 160; Dec. Dig. §§ 48, 59.*]

2. ASSIGNMENTS (§ 68*)—EQUITABLE ASSIGNMENT—WAIVER.

Claimant, being a director of the W. Company, loaned to it \$15,000, receiving as security an equitable assignment of an account against the F. Company. At a subsequent meeting of the directors of the W. Company its treasurer was authorized to assign accounts receivable to the T. Company for moneys advanced, pursuant to which the same account, previously assigned to claimant, was transferred to the T. Company. It did not appear, however, that claimant knew that the treasurer would assign that account; but, if he did know of the accounts the treasurer proposed to assign to the T. Company, he knew that, so far as the F. Company's account was concerned, it only related to certain particular invoices of goods out of that account, amounting to \$22,461.83. *Held*, that any waiver of claimant's assignment arising from such subsequent transfer did not affect his right to the balance of the account, after deducting such specified invoices.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 127; Dec. Dig. § 68.*]

3. ASSIGNMENTS (§ 90*)—EQUITABLE ASSIGNMENTS—INTEREST.

Where claimant loaned the W. Company \$15,000, taking a note bearing interest, secured by an equitable assignment of an account against the F. Company, which was thereafter placed in the hands of a receiver, the assigned account being sufficient to pay claimant's note and interest, he was entitled to recover interest, as well as the principal, out of the fund, as against the receiver.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 156; Dec. Dig. § 90.*]

Appeals from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit by Rensselaer L. Curtis against the Walpole Tire & Rubber Company and others. From a decree awarding a portion of a fund

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—10

paid to the receivers by the Foster Rubber Company to Alfred W. Anthony and another, Robert C. Fisher and others, receivers, and R. L. Curtis appeal; and from so much of the decree as disallowed the claimant's demand for interest from July 1, 1913, he appeals. Reversed on claimant's appeal, and affirmed on the other appeals.

Guthrie B. Plante, of New York City (Morris & Plante, of New York City, on the brief), for appellant Curtis.

Edward H. Ruby, of Boston, Mass., for appellant Anthony.

Lee M. Friedman, of Boston, Mass. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for Walpole Tire & Rubber Co. and its receivers.

Before BINGHAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

BINGHAM, Circuit Judge. In April, 1913, the Walpole Tire & Rubber Company declared a dividend, having funds to meet the same on deposit in a Providence bank. The bank failed, and the company concluded to raise money to pay the dividend, and, on the 16th day of that month procured a loan of \$15,000 from Alfred W. Anthony, the claimant. In doing this, the Tire Company gave to Anthony a note for \$15,000 payable to his order, signed by the Massachusetts Chemical Company and indorsed by the Walpole Tire & Rubber Company, and as security therefor, gave a writing addressed to the Foster Rubber Company, reading as follows:

"Walpole, Massachusetts, April 16, 1913.

"Foster Rubber Company, 105 Federal Street, Boston, Mass.—Gentlemen: This is to certify that your account, amounting approximately to \$15,000.00, shall be paid to Alfred W. Anthony in the usual sums which you deposit.

"Please accept this as an order to pay him direct if he so desires.

"Yours very truly,

Walpole Tire & Rubber Company,

"By A. T. Baldwin, Treasurer."

There was then due the Tire Company from the Foster Company \$13,493.54. On April 23d the treasurer of the Tire Company wrote a letter to Anthony, in which he said:

"I was going to suggest if, after we had sent you a couple more checks, reducing to \$10,000, perhaps it would not inconvenience you if we skipped a week on account of very heavy disbursements the last few days of the month. The account will always be good for the balance due you, so that you are protected on the order given."

It was found in the court below that at the time this loan was made, and letters were written, there was a running account in existence for goods sold by the Tire Company to the Foster Company, and that it was the understanding of the parties that the loan of \$15,000 should be secured by this account.

On the 19th of June, 1913, the Tire Company assigned, among other accounts, to the Traders' Commercial Company of New York certain invoices of goods sold to the Foster Company, aggregating \$22,500, and notice of this assignment was at once given to the Foster Company. Anthony failed to give notice to the Foster Company of his assignment until July 31st, when notice was given.

August 2, 1913, the Tire Company was put into the hands of receivers. The balance then due it from the Foster Company was more than sufficient to cover the amount due on the note to Anthony and the unpaid balance covered by the assignment to the Traders' Commercial Company. In September, 1913, the Foster Company paid to the receivers the balance in its hands on its account with the Tire Company, arrangement having been made with Anthony and the Traders' Company, whereby it was agreed that such payment should be made without prejudice to their rights; and on receiving this payment the receivers deposited the sum of \$11,500 in a special bank account to await the determination of Anthony's claim; that sum being the amount due him on his note as of July 1, 1913.

The claim of Anthony was referred to a master, who, having heard the parties, made a report, in which he found the amount due the claimant was \$11,500 and interest from July 1, 1913, and that he was entitled to be paid that sum out of the balance obtained by the receivers on the Foster account.

The allowance made by the master was afterwards approved and affirmed by the District Court, except so far as it related to the question of interest. The court allowed interest at 6 per cent. from July 1st to August 2d, the date of the appointment of the receivers, and such further sum as accrued upon the \$11,500 after it was deposited by the receivers in the bank as aforesaid, and a decree was entered accordingly.

From this decree the receivers and R. L. Curtis, a creditor of the Tire Company, appealed on the ground that the District Court erred in finding and ruling that the writings of April 16th and April 23d constituted an equitable assignment by the Tire Company to the claimant of the account then due and to become due the Tire Company from the Foster Company, to secure the claimant for what might be due him on his note, until paid; and the claimant appealed from the decree so far as it disallowed his claim for interest from July 1, 1913, until the note should be paid, on the ground that his claim was not a preferred, but a secured, claim, and the sum in the hands of the Foster Company at the time it was turned over to the receivers was more than sufficient to pay his note and the balance due the Traders' Company in full.

Counsel for the creditor and the receivers contend that the writings of April 16th and 23d amount to nothing more than a mere promise to pay a debt out of a particular fund, and do not constitute an assignment of the fund, even in equity; that to make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise; and that these writings disclose that no actual or constructive appropriation of the account, as it then existed or as it thereafter accrued, was made, so as to confer a complete and present right on the claimant.

[1] We are, however, of the opinion that the District Court did not err in this particular, and that the writings of April 16th and April

23d, when read together and taken in connection with the transaction which the parties were undertaking to carry out, show that it was intended to assign the entire account as then due and to become due from the Foster Company to the Tire Company to secure the claimant's note. By their delivery to the claimant with this intention there was an actual appropriation of the account as it then existed, and a constructive appropriation of it as to sums that might become due in the future. The transaction was not a mere promise to pay the note out of a particular fund. *Field v. City of New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; *Ingersoll v. Coram*, 211 U. S. 335, 368, 29 Sup. Ct. 92, 53 L. Ed. 208; *Barnes v. Alexander*, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530; *Peugh v. Porter*, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. Ed. 859; 3 *Pomeroy's Eq. (2d Ed.)* §§ 1235, 1236, 1237. The Tire Company retained no right to collect the account for its own benefit, or to revoke the disposition promised as to the future. By the assignment an equitable interest in the account as it then stood, and as it might thereafter accrue, passed to the claimant as security for his note, together with a power to collect the account and apply the proceeds in satisfaction of the note. As the assignment vested in the claimant an equitable interest in the account, with a power to collect the same, he thereby became possessed of a power coupled with an interest in the account assigned, which was irrevocable. *Hunt v. Rousmanier's Adm'rs*, 21 U. S. (8 Wheat.) 175, 5 L. Ed. 589.

Being of the opinion that the claimant obtained an assignment of the entire account as it stood on April 16th, and as it might thereafter accrue, and the sum turned over to the receivers being more than sufficient to pay the claims of the Traders' Company and of the claimant in full, many of the questions argued by counsel for the receivers and the creditor pass out of the case, and it is unnecessary to consider them.

[2] It appears that the claimant was a director in the Tire Company, and was present, and took part, at a meeting of its board of directors on the 19th of June, when it was voted that "the treasurer be authorized to execute a contract with the Traders' Commercial Company of New York, and assign accounts receivable" to it, in pursuance of which the assignment heretofore referred to was made to the Traders' Company; and in view of this it is argued that the claimant waived his right in the account under the assignment to him. This objection, however, is without foundation in fact—First, because it does not appear that the claimant knew that the treasurer would assign the account which had already been assigned to him; and, second, if he did know what accounts the treasurer proposed to assign to the Traders' Company, he knew that, so far as the Foster Company account was concerned, it only related to certain particular invoices of goods out of that account amounting to \$22,461.83. If this was a waiver of the claimant's assignment as to these invoices, it did not affect his right to the balance of the account as security for his note, and is of no importance, as the balance due on that account, after

deducting the invoices assigned to the Traders' Company, is more than enough to pay his note in full.

[3] As to the matter of interest, we think the District Court was in error. The claimant is not seeking to establish a preferred claim. His position is that the sum due on the Foster account was pledged to him as security by the assignment, and that, as this sum is sufficient to pay his note, principal and interest, he is entitled to have it satisfied therefrom.

In No. 1096, *Alfred W. Anthony v. Walpole Tire & Rubber Company et al.*, the decree of the District Court is modified, by allowing interest on the claimant's note at 6 per cent. from July 1, 1913, to the date of payment, and, as thus modified, it is affirmed; and the appellant recovers his costs of appeal.

In No. 1094, *Rensselaer L. Curtis v. Walpole Tire & Rubber Company et al.*, the decree of the District Court, as modified by the decree of this court in No. 1096, is affirmed; and the appellees recover their costs of appeal.

In No. 1095, *Robert C. Fisher et al., Receivers, v. Alfred W. Anthony et al.*, the decree of the District Court, as modified by the decree of this court in No. 1096, is affirmed; and the appellees recover their costs of appeal.

PRICE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1914.)

No. 4017.

1. INDICTMENT AND INFORMATION (§ 125*) — DUPLICITY — ASSAULT WITH WEAPON ON MAIL CUSTODIAN.

A count in an indictment under the latter part of Cr. Code (Act March 4, 1909, c. 321) § 197, 35 Stat. 1126 (Comp. St. 1913, § 10367), charging that defendant attempted to rob a mail clerk of mail matter in his custody, and in the course of such attempt put the life of the clerk in jeopardy by the use of a dangerous weapon, is not duplicitous; the attempt to rob being an essential element of the offense of putting the life of the clerk in jeopardy, which must necessarily be charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

2. CRIMINAL LAW (§ 309*)—EVIDENCE—PRESUMPTION OF GOOD CHARACTER.

In a criminal case, where no evidence is offered in regard to defendant's character, there is no presumption that his character is good, which can be considered by the jury as evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 738; Dec. Dig. § 309.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Frank Price. Judgment of conviction, and defendant brings error. Affirmed.

James C. Denton, of Muskogee, Okl., for plaintiff in error.

Frank Lee, of Muskogee, Okl. (D. H. Linebaugh, of Muskogee, Okl., on the brief), for the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The defendant was indicted and convicted for a violation of section 197 of the Criminal Code, which reads as follows:

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal or purloin such mail matter or any part thereof, or shall rob any such person of such mail, or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if, in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

[1] The indictment contained two counts. The first is based upon the first part of the section, and charges the crime of assault with intent to rob, steal, and purloin mail matter. The second count is based on the latter part of the section, and charges the attempt to commit the crime of robbery, and that in the course of such attempt the defendant put the life of a mail clerk in jeopardy by the use of a dangerous weapon. The first assignment of error is based upon the overruling of a demurrer to the second count of the indictment, and also the order of the court declining to require the government to elect as to which of the two crimes charged in the second count the government would stand upon. It is said that these rulings were erroneous because this count is duplicitous. This assignment is clearly devoid of merit. The crime of robbery is an essential element of the crime attempted to be charged in the second count of the indictment. It is quite manifest that the government could not charge the defendant with the offense of having put the life of the postal clerk in jeopardy while attempting to commit the crime of robbery, without charging that crime as an element of the second and graver offense. Where one crime is an essential element of another and more serious offense, the indictment is not duplicitous because it charges both of the crimes. It would be fatally defective if it did not do so.

[2] The error most relied on is the action of the court in declining to give the following request:

"You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence."

No evidence had been offered as to defendant's character. The action of the court was clearly right. The request was wrong in both its aspects. In a criminal case, when no evidence is offered in regard to defendant's character, there is no presumption that his character is good, and certainly such a presumption, if it were to be indulged, would not be evidence.

In our jurisprudence a person on trial for crime cannot be attacked either as to his general character or as to specific acts of wrongdoing. In this respect the common law differs from the systems in vogue on the continent of Europe. There a defendant's whole past is part of every criminal investigation, and any acts of wrongdoing of which he

has been guilty may be arrayed against him. They are considered a legitimate basis of inference in determining whether he is guilty of the particular act for which he is upon trial. Our law emphasizes the protection of the citizen rather than society. In order to shield the defendant from surprise, and against being overwhelmed by a multitude of charges, and in order to confine the investigation within reasonable limits, it restricts the trial to the specific act of wrongdoing charged in the indictment. This protection of the defendant against a general charge of bad character or bad conduct is, however, a rule of law, and not a presumption of fact. To call it a presumption is only to indulge in loose language. To say that the defendant's character shall not be attacked, unless he himself puts it in issue, is manifestly a very different thing from saying that his character is presumed to be good. In counsel's brief there are numerous excerpts from text-books and encyclopedias, and some decisions, in which this rule of law that the character of a defendant shall not be attacked unless he himself puts it in issue, is stated in the converse form that his character is presumed to be good. For example, in 3 Ency. of Evidence, p. 34, the following language is used:

"The law presumes the good character of a person accused of crime, and no inference of bad character arises from his failure to offer evidence of good character."

By the author these two statements are manifestly regarded as equivalent. It needs no argument, however, to show that they are not so. Counsel cites the following cases which are referred to in the encyclopedias and text-books: *People v. Fair*, 43 Cal. 137; *People v. Gleason*, 122 Cal. 370, 55 Pac. 123 (see this case fully explained and cases cited in *People v. Griffith*, 146 Cal. 339, 80 Pac. 68); *Goggans v. Monroe*, 31 Ga. 331; *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465; *Stephens v. State*, 20 Tex. App. 269; *Cluck v. State*, 40 Ind. 263; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *State v. Kabrich*, 39 Iowa, 277; *State v. O'Neal*, 29 N. C. (7 Iredell) 251; *State v. McAllister*, 24 Me. 139; *State v. Upham*, 38 Me. 261; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Olive v. State*, 11 Neb. 1, 7 N. W. 444; *Biester v. State*, 65 Neb. 276, 91 N. W. 416; *Ackley v. People*, 9 Barb. (N. Y.) 609. An examination of these cases will show that the alleged presumption of good character was not involved in any of them. They all turn upon the question whether error was committed by allowing the state to introduce evidence as to defendant's character, when he had introduced no evidence on that subject, or allowing counsel to attack defendant's character under like circumstances, or the giving of instructions which invited the jury to consider against the defendant the fact that he had put in no evidence as to his previous good character. These were the questions that passed into judgment in those cases. Whatever is contained in the opinions touching the presumption of good character is said by way of illustration or emphasis, and is no part of the judgment. Similar language is also used in *People v. Weiss*, 129 App. Div. 671, 114 N. Y. Supp. 236; *State v. Garrand*, 5 Or. 216; *Commonwealth v. Cleary*, 135 Pa. 64, 19 Atl. 1017, 8 L. R. A. 301. But the question ac-

tually involved in these cases was whether the court could in its instruction restrict the use of evidence produced by the defendant as to his good character to simply turning the scale by producing a reasonable doubt, and thus prevent the jury from considering it generally on the question of defendant's guilt or innocence. It is manifest that general language used in such cases as to the presumption of defendant's good character cannot be considered as part of the decision.

Whenever the question has been directly presented for decision it has been held, with a single exception, that unless the defendant puts his character in issue by producing evidence himself, it is wholly outside the case. On the one hand, there is no presumption in regard to his character being either good or bad; and, on the other hand, neither the court nor counsel can properly refer to defendant's character as an element to be considered by the jury. *Addison v. People*, 193 Ill. 405, 62 N. E. 235; *Dryman v. State*, 102 Ala. 130, 15 South. 433; *Griffin v. State*, 165 Ala. 29, 50 South. 962; *People v. Johnson*, 61 Cal. 142; *People v. Griffith*, 146 Cal. 339, 80 Pac. 68; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969; *People v. Bodine*, 1 Denio (N. Y.) 281, 315; *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Gater v. State*, 141 Ala. 10, 37 South. 692; *McQueen v. State*, 82 Ind. 72; *State v. Smith*, 50 Kan. 69, 31 Pac. 784; *State v. Collins*, 14 N. C. 117; *Knight v. State*, 70 Ind. 375, 380.

The so-called presumption of good character is properly classed by Mr. Chamberlayne among the pseudo presumptions. 2 Chamberlayne on Evidence, § 1168. His entire discussion of the quite common error of treating a rule of law as a presumption of fact, is one of the best to be found in the books. Section 1159 et seq. See, also, 2 Wigmore on Evidence, § 290, note 2. In so far as *Mullen v. United States*, 106 Fed. 892, 46 C. C. A. 22, is at variance with these views, we do not consider it to be a sound exposition of the law.

Our attention is called to the case of *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. In that case the trial court gave a full and accurate charge on the question of reasonable doubt, but refused to give a properly framed request on the presumption of innocence. This refusal was assigned as error. The question raised was whether the refusal to charge as to the presumption of innocence was cured by the giving of a proper charge on the subject of reasonable doubt. This question is examined with much learning in the opinion, and the assignment of error is sustained. In reviewing the subject a passage is quoted from Greenleaf to the effect that the presumption of innocence is evidence, and that view is developed to some extent in the opinion. It will be seen, however, from the error assigned, that this point was not directly involved, but is rather a part of the argument than a part of the judgment. When the case of *Coffin v. United States* went back for a second trial, the proposition that the presumption of innocence is evidence in favor of the defendant was wholly omitted from the charge to the jury. The language of the trial court was as follows:

"The burden of proving Haughey and the defendants guilty as charged rests upon the government, and the burden does not shift from it. Haughey and the defendants are presumed to be innocent until their guilt in manner

and form as charged in some count of the indictment is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such character as to overcome this presumption of innocence and to satisfy each one of you of the guilt of Haughey and the defendants as charged, to the exclusion of every reasonable doubt."

On the second appeal this language is quoted (162 U. S. 681, 16 Sup. Ct. 943, 40 L. Ed. 1109), and in no way criticized by the court. Even more impressive is the action of the Supreme Court in the case of *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. It was there urged that the trial court erred in giving to the jury the following instruction:

"The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt"

—and in refusing the following instruction asked by the defendant:

"Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy." 165 U. S. 51, 17 Sup. Ct. 241, 41 L. Ed. 624.

It will be noticed that the request which the court declined to give is taken verbatim from the opinion in the *Coffin Case* (156 U. S. 459, 460, 15 Sup. Ct. 394, 39 L. Ed. 481), and embraces its most distinctive statements as to the presumption of innocence being evidence. The court held that no error was committed in declining to give this request, and observed that:

"The court might well have declined to give it on the ground of the tendency of its closing sentence to mislead."

Inasmuch as the Supreme Court itself thus holds that it is not error to refuse to charge that the presumption of innocence is evidence, it would seem that this subordinate feature of the opinion in the *Coffin Case* no longer expresses its views on that subject. See also *Thayer's Preliminary Treatise on Evidence*, 551; *Wigmore on Evidence*, § 2511; *Chamberlayne on Evidence*, §§ 1173, 1175c, 1176c.

Certainly we do not think that the doctrine that the presumption of innocence is evidence should be extended into any new field. To apply it to the pseudo presumption of good character would be peculiarly vicious. The state may rebut the presumption of innocence; all its evidence is leveled directly at that presumption. But against this so-called presumption of good character the state is powerless. It may not meet it by evidence, argument, or instruction from the bench; for, until the defendant has first introduced evidence on the subject of his character, the state may not enter that field. The presumption, if it is allowed at all, must be a conclusive presumption, because it cannot be rebutted by evidence. Thus in our courts the basest character would be placed in a better position than the most upright; for the latter will usually be shown by evidence, and may be met by counter evidence, while the former will be made whiter than snow by the simple alchemy

of presumption. To allow such a presumption would be as unjust to society as the denial of the correct rule of law would be to the defendant. If the presumption exists, counsel have a right to use it in argument, and to require its declaration from the bench. What will be the effect upon juries? When they are told by the court that the presumption exists, and that they must give effect to it in their decision, they are bound to conclude that this means something, though they have no way of knowing what weight they ought to attach to this peculiar "evidence," which has no basis either in testimony or in inference. It would be a poor advocate, indeed, who could not raise a "reasonable doubt" out of such metaphysics. Sound legal administration—an administration that is just to society as well as the defendant—forbids the allowance of any such presumption. When the defendant is given the benefit of the presumption of innocence, and the rule in regard to reasonable doubt, and is protected against any attack upon his past life, either by evidence, argument, or instruction, he is fully protected against injustice. To go farther is, in the language of Mr. Justice Brewer (in an article in the *North American Review*), "not to protect the innocent, but to make it impossible to convict the guilty."

The judgment is affirmed.

SMITH, Circuit Judge. My views of the subject considered in the foregoing opinion are quite fully expressed in *Chambliss v. United States of America*, *infra*, 132 C. C. A. 112, and I simply concur in the result in the foregoing opinion.

CHAMBLISS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1914.)

No. 4025.

1. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

On the trial of a defendant, charged with having introduced liquor into the Indian country in violation of Act July 23, 1892, c. 234, 27 Stat. 260, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506, or with having carried liquor into Indian Territory in violation of Act March 1, 1895, c. 145, 28 Stat. 693, an instruction that defendant might be convicted if the jury found that he had in his possession liquor which had recently been introduced into the district from a point without the state and district was erroneous, as not applicable to the evidence, where there was no evidence as to the time when the liquor found in defendant's possession was introduced or carried into the district.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

2. CRIMINAL LAW (§ 814*)—EVIDENCE—PRESUMPTION OF GOOD CHARACTER.

In the absence of any evidence as to the character of defendant in a criminal case, an instruction that the law presumes his good character, "and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence," *held* properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. WORDS AND PHRASES—"RECENT."

"Recent," as used in connection with the presumption arising from the possession of stolen goods, is a term not capable of exact or precise definition, and varies within a certain range with the conditions of each particular case, and is a question of fact wholly for the jury (citing Words and Phrases, Recent).

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Ed. Chambliss. Judgment of conviction, and defendant brings error. Reversed.

James C. Denton, of Muskogee, Okl., for plaintiff in error.

Frank Lee, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The plaintiff in error, the defendant in the District Court, was indicted, arraigned, pleaded not guilty, tried, convicted, sentenced, and sued out a writ of error to this court.

The indictment, so far as material, charged that Ed. Chambliss on August 27, 1912, in the county of Muskogee, in the Eastern district of Oklahoma, said county and district then and there being a portion of the Indian country of the United States, did carry into said Indian country and into the county aforesaid, from without such Indian country and without the district and state aforesaid, one quart of intoxicating liquor, to wit, beer; the said county and district having been a portion of the territory of the said United States known as the Indian Territory.

It must first be borne in mind that there were two wholly separate and distinct laws or sets of laws on the subject in force at the time in the territory described:

First. The act of the Fifty-Second Congress of July 23, 1892 (27 Stat. 260), as amended by the act of the Fifty-Fourth Congress of January 30, 1897 (29 Stat. 506). *United States v. Wright*, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219.

Second. The act of the Fifty-Third Congress of March 1, 1895 (28 Stat. 693, 697). *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248.

Under the act of 1892, as amended by the act of 1897, all persons were prohibited from introducing liquor into the Indian country and from disposing of liquor to any Indian under charge of an Indian agent and the phrase "Indian country" included Indian allotments. Under the act of 1895 all persons are prohibited from carrying liquors into Indian Territory and the manufacture and sale of liquor in said territory is prohibited.

Under the act of 1892, as originally enacted, the punishment was imprisonment for not more than 2 years and a fine of not more than \$300; but by the amendment of 1897 the punishment was fixed at not less than 60 days' imprisonment and a fine of not less than \$100 for

the first offense and not less than \$200 for each subsequent offense. The act of 1895 prohibited the manufacture, sale, or otherwise disposing of any liquor in Indian Territory, or the carrying of any liquor into the territory, under a penalty of not over \$500 fine and imprisonment for not less than 1 month nor more than 5 years.

It will be observed that under the acts of 1892 and 1897 the guilty party was subject to a fine without maximum limit, but with a minimum of \$100 for the first offense and \$200 for subsequent ones. Under the act of 1895 he was subject to a fine with no minimum, but a maximum of \$500. Under the act of 1897 the imprisonment was without maximum, except in the discretion of the court, but there was a minimum of 60 days. Under the act of 1895 the maximum imprisonment was 5 years and the minimum was 1 month.

While these offenses were largely identical in character, we have shown in former opinions their points of difference. These laws were all concurrently in force in some cases over identically the same territory. In other cases one was applicable and the other was not. Which of these offenses did the indictment charge? We think it charged both, and as the indictment was in a single count it was probably duplicitous; but, if so, we do not find that question was raised at all. The demurrer did not raise it, first, because it was not enumerated as one of the grounds of demurrer; and, second, the question could not be raised by demurrer. *Pooler v. United States*, 127 Fed. 509, 62 C. C. A. 307. This question not having been raised at all below, we have nothing to do with it, except to point out that an offense under the acts of 1892 and 1897 is a separate and distinct offense from one committed under the act of 1895.

For all else the indictment was good and sufficient. It was substantially conceded at the trial that the deputy United States marshal and a special officer of the Indian service went to defendant's house in Muskogee on August 27, 1912, and there found in one of the rooms approximately 1,200 pint bottles of beer in 10 barrels and 4 gallons of whisky in a 5-gallon keg. The defendant testified that he bought the liquor of a man named Lee, but it subsequently appeared he referred to Leland McGee; that for perhaps 30 days he had been buying beer and whisky of this man, and it was always delivered at night; that he bought 6 barrels of beer at one time and 10 at another, previous to securing the liquor in question; that he had bought it three or four different times, and in addition had bought a good deal from colored fellows; that he bought this liquor for the purpose of selling it again.

As all the liquor of all his prior purchases was gone at the time this particular liquor was discovered, and he had also sold some of the last installment of liquors which he claims he obtained from Leland McGee, he is confessedly guilty of having sold it, and of violating the first prohibition in the act of 1895. If he had stood indicted for that offense, scarcely anything that could have been introduced into this case would have been prejudicial to him; but he was not indicted for that offense, but for carrying or introducing liquor into the Indian country, or Indian Territory.

[1] Under these circumstances the court charged the jury as follows:

"Because there are certain circumstances under which persons may procure liquor in this district without being guilty of introducing, as that term is used in this statute, the mere fact that one is in possession of liquor of itself would not constitute a prima facie case of introducing. But in a case of this character, where the jury find from the evidence beyond a reasonable doubt that the liquor involved has been recently introduced into this district from a point without the state and district, and that therefore some one has violated the introducing law, and the liquor so introduced illegally is found in the possession of the accused, then, unless there is some explanation which the jury finds consistent with his innocence—that is, consistent with any other condition than that he introduced it—the jury, under such circumstances, are warranted in returning a verdict of guilty; if you find, as I say, liquor recently introduced into this district and in defendant's possession, and his explanation of his possession you do not find to be consistent with any other condition than that he introduced it."

Again the court instructed the jury:

"If inadvertently I instructed you that, if you find from any standpoint that this defendant was in the illegal possession of this liquor, your verdict should be guilty, I did not intend to say that. What I did intend to say, and what I now say, if you find beyond a reasonable doubt from the evidence that the liquor involved in this case was recently introduced from a point without this state and district into this district, the liquor which is conceded to have been in his possession, then the fact of possession under these circumstances would warrant you as a jury in returning a verdict of guilty as against this defendant, unless his explanation with regard to his possession of the liquor is consistent with some other theory than that he introduced it, or was interested in it, or aided, abetted, assisted, or procured its introduction."

Pen. Code (Act March 4, 1909, c. 321) § 332, 35 Stat. 1152 (Comp. St. 1913, § 10506), is as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

It was doubtless to this provision that the court referred in this instruction. But, notwithstanding this provision, if, as he claims, without any arrangement or understanding, express or implied, of any kind by the defendant to aid, Leland McGee had imported liquors into Eastern Oklahoma, and having them there had sold them to the defendant, who had nothing to do with the importation, then the defendant would under the evidence be guilty of a violation of the first provision in the act of 1895, because that statute expressly prohibited the sale of liquor in Indian Territory under the same penalty prescribed for carrying such liquors into the territory; but he would not be guilty of the offense of carrying liquors into the territory.

In this case there was not the slightest evidence as to when these liquors were carried into Old Oklahoma or Indian Territory. There was not a syllable of evidence as to when the offense charged was committed, and the sole question is whether there was any justification for this instruction in the evidence. It will be conceded that there was probably no law under which liquors could legally have been in Indian Territory, except possibly the dispensary provision in the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267), as they

could not be manufactured or carried there for 17 years at the time in question. But if the jury found that some one had introduced liquors illegally, the mere finding of the liquors years afterwards in defendant's possession would not warrant it in finding that he introduced them. This was an evident effort to extend the doctrine of recently stolen property to such liquors.

Where any person is found in possession of recently stolen property, the burden of accounting for such possession rests upon him, and it is commonly stated that the possession raises a presumption against the accused which will justify conviction if he does not meet it by a reasonable explanation. It is, however, everywhere conceded that the presumption is one of fact and not of law. 25 Cyc. 134. But in order to warrant a presumption of guilt the possession must be recent. 25 Cyc. 140. The word "recent" is defined by Webster's International Dictionary as:

"1. Of late origin, existence, or occurrence; lately come; not of remote date, antiquated style, or the like; not already known, familiar, worn out, trite, etc.; fresh; novel; new; modern; as recent news."

"Recently" is defined as follows:

"Newly; lately; freshly; not long since."

[3] It must, of course, be conceded that the word "recent," as used in connection with the presumption arising from the possession of stolen goods, is a term not capable of exact or precise definition, and varies within a certain range with the conditions of each particular case, and is a question of fact wholly for the jury. 7 Words and Phrases, 5998. The rule that the recent possession of goods illegally obtained is evidence as against the possessor that he illegally acquired them has been extended to burglary, embezzlement, robbery, and other cases (Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090), but in such cases it has been customary to charge, as the court did here, that such evidence would warrant conviction, not that it created any presumption of guilt. Of course, the principle has been justly extended in cases of murder to the finding of the implement by which it was committed in the defendant's custody.

We do not desire to pass upon questions not necessary to a disposition of this case, and therefore do not determine whether the rule as to recent possession of property applied to intoxicating liquors found in Indian Territory, but content ourselves with saying that all the authorities agree that the weight of such evidence depends upon how soon after the crime the property is found in the defendant's possession, and as there was no evidence when these liquors were imported, and consequently none that they had been recently imported, the instruction had no basis to support it in the evidence, and the case must be reversed. This does not weaken the law, because possession not recently after the importation is admissible in evidence; but it is not for the court to say that it would warrant a verdict of guilty, and again there is no necessity for indicting a defendant in a case like this for introducing liquor, when he is manifestly

subject to indictment for the violation of the law against one who sells, gives away, or furnishes liquor.

[2] There was no evidence offered as to the character of the defendant. He asked the court to instruct the jury:

"You are instructed that the law presumes the good character of the accused, and such presumption is to be considered *as evidence* in favor of the accused in considering the question of his guilt or innocence."

The portion of this instruction that the law presumed the good character of the accused is perhaps correct, but the jury were sought to be instructed that the absence of evidence should be considered evidence in favor of the accused in considering the question of his guilt or innocence. Reliance is placed upon the case of *Mullen v. United States*, 106 Fed. 892, 46 C. C. A. 22. In that case the trial judge had said:

"Now it is a fact that cannot escape your attention—could not probably escape your attention—that if these defendants desired, or anybody behind them desired, to have colored men deprived of the right of voting, that it would be at such a precinct as this; and it is not improbable that just such men as these defendants would be chosen to carry that object into execution. Those are circumstances that you might weigh in this case in reaching a conclusion."

The defendant objected to this charge and announced that:

"If your honor please, we offered your honor an instruction that the defendants were presumed to be persons of good character, and that that presumption prevailed during the progress of the case."

To which the court responded:

"I do not think that the jury should be told that the defendants are presumed to be persons of good character; but they are presumed, as the court had told the jury, whether of good character or bad character, to be innocent until their guilt has been established to the exclusion of a reasonable doubt by testimony."

It is true that upon examining the written application to charge the jury in that case it is found to correspond with the instruction offered in this case, but it is not referred to in the opinion, except in general terms, and the instruction asked was not analyzed in that case. In substance the instruction in question tells the jury that the absence of evidence should be considered as evidence in favor of accused in considering the question of his guilt or innocence. In *Wigmore on Evidence*, vol. 4, § 2511, it is said:

"The 'presumption of innocence' is a term which has been the subject of two special fallacies, namely: (1) That it is a genuine addition to the number of presumptions; and (2) that it is *per se* evidence.

"1. As to the first of these fallacies it is to be noted that the 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases; i. e., the rule that it is for the prosecution to adduce evidence (ante, section 2487), and to produce persuasion beyond a reasonable doubt (ante, section 2497). As to this latter part, the measure of persuasion, the 'presumption' says nothing. As to the former part, the 'presumption' implies what the other rule says, namely, that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i. e., to say in this case, as in any other, that the opponent of a claim or charge is presumed

not to be guilty is to say in another form that the proponent of the claim or charge must evidence it. But in a criminal case the term does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, nothing but the evidence, i. e., no surmises based on the present situation of the accused—a caution particularly needed in criminal cases. So far, then, as the 'presumption of innocence' adds anything, it is merely a warning not to treat certain things improperly as evidence.

"2. As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf, declaring that 'this legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled.' But it cannot be regarded as 'matter of evidence.' No presumption can be evidence; it is a rule about the duty of producing evidence (ante, section 2490). This is, in itself, only a matter of the theory of presumptions, and to that extent may be regarded as a mere question of words—of the way of phrasing a rule upon the substance of which there is no dispute. But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice."

In a note to this section Professor Wigmore says:

"A glaring instance of this fault is to be found in the decision of Coffin v. U. S. (1896) 156 U. S. 432, 162 U. S. 664, 15 Sup. Ct. 394, 16 Sup. Ct. 943 [39 L. Ed. 481, 40 L. Ed. 1109], where the opinion of the court, proceeding upon the above phrase of Greenleaf as a leading authority, declares this 'presumption' to be 'evidence in favor of the accused.' This opinion received apparent sanction in the later case of Allen v. U. S. (1896) 164 U. S. 492, 17 Sup. Ct. 154 [41 L. Ed. 528]. But in Agnew v. U. S. (1897) 165 U. S. 36, 51, 17 Sup. Ct. 235 [41 L. Ed. 624], its particularly objectionable sentence, declaring that 'legal presumptions are treated as evidence,' is referred to as 'having a tendency to mislead'; in this case the trial court had refused to give an offered instruction copying that sentence, and the refusal was held proper; so that the Agnew decision may perhaps be taken as a recantation to this extent of the unfortunate heresy put forward in the Coffin Case. It is to be observed that the opinion in the Agnew Case (in 1897) was published subsequently to a notable lecture on the Presumption of Innocence, apropos of the Coffin Case, delivered by Professor Thayer, at Yale University (in 1896), in which the history of the presumption was carefully examined, its meaning acutely expounded, and the fallacies of the opinion in the Coffin Case exposed in detail. This lecture was reprinted in the learned lecturer's Preliminary Treatise on Evidence (1898) Appendix B, p. 551.

"The fallacy of Coffin v. U. S. is substantially repudiated in the following cases: 1899, State v. Soper, 148 Mo. 217, 49 S. W. 1007 (there is not a 'two-prong presumption' in favor of one who is charged with wife murder, repudiating State v. Leabo, 84 Mo. 168 [54 Am. Rep. 91]); 1900, State v. Kennedy, 154 Mo. 268, 55 S. W. 293 (refusal to instruct on the presumption of innocence is not error where an instruction on reasonable doubt has been adequately given); 1896, People v. Ostrander, 110 Mich. 60, 67 N. W. 1079 (similar). The common phrase about the presumption of innocence is illustrated in the following cases: 1898, Bryant v. State, 116 Ala. 445, 23 South. 40; 1897, People v. Winthrop, 118 Cal. 85, 50 Pac. 390; 1899, Emery v. State, 101 Wis. 627, 78 N. W. 145. The following series of rulings shows the influence of the Coffin Case: 1898, Bartley v. State, 53 Neb. 310, 73 N. W. 744 (the phrase sanctioned; but an instruction omitting it is not held erroneous); 1898, Bart-

ley v. State, 55 Neb. 294, 75 N. W. 832 (the Coffin Case noted; question left undecided); 1899, McVey v. State, 57 Neb. 471, 77 N. W. 1111 (following Bartley v. State)."

The Coffin Case, referred to by Professor Wigmore, is the chief authority relied upon in Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22. Of course, that case was upon the law of the presumption of innocence. State v. Linhoff, 121 Iowa, 632, 97 N. W. 77. There seems to be a very limited number of authorities upon whether the presumption of good character is a disputable presumption of law or a presumption of fact. It is evident that a correct instruction could be given upon this subject of the presumption of good character, which would have been undoubtedly ample without embracing either the statement that the presumption is one of law or that it should be treated as evidence. If the jury be instructed that the defendant is presumed to be a person of good character, and that presumption prevails throughout the progress of the case that under all the authorities is sufficient, without stating whether it is a presumption of law or of fact, or that it should be considered as evidence in favor of the accused.

We should therefore be loth to reverse this case for the refusal to give this instruction, if it did not have to be reversed in any event; but out of deference to the opinion of the Supreme Court in Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, and to the opinion of the Circuit Court of Appeals of the Sixth Circuit in Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22, the writer thinks it should have at least been given in a modified form, and the case is reversed and remanded, with directions to set aside the verdict and grant a new trial.

Judges HOOK and AMIDON concur in the reversal upon the first ground. They also concur in nearly all that is said as to the presumption of good character, but are unable to assent to the statement that such a presumption exists in a criminal case. Their views on that subject are expressed in the opinion in Price v. United States, 218 Fed. 149, 132 C. C. A. 1, just filed.

SHIPOWNERS' & MERCHANTS' TUGBOAT CO. v. HAMMOND LUMBER CO.†

(Circuit Court of Appeals, Ninth Circuit. November 17, 1914.)

No. 2388.

1. SHIPPING (§ 209*)—LIMITATION OF LIABILITY—LOSS OF TOW—TUGS EMPLOYED IN COMMON VENTURE.

Where two tugs belonging to the same owner were co-operating in the towing of a raft of logs, which was lost, the hawser of one being made fast to the forward bitts of the other, which was attached directly to the raft, so that they were towing tandem, if either tug is liable for the loss of the tow, both are liable, and both must be surrendered in a proceeding by the owner for a limitation of liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SHIPPING (§ 209*)—PROCEEDING FOR LIMITATION OF LIABILITY—GROUNDS FOR DISMISSAL.

Where there is but a single claim against a vessel owner, for which a limitation of liability is sought upon which an action has been brought to recover judgment in a state court, and the value of the vessels involved largely exceeds the amount of such claim, the proceeding should be dismissed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

Appeal from the District Court for the First Division of the United States for the Northern District of California; Maurice T. Dooling, Judge.

In the matter of the petition of the Shipowners' & Merchants' Tug-boat Company, owner of the tugs *Dauntless* and *Hercules*, for limitation of liability; the *Hammond Lumber Company*, damage claimant. From a decree dismissing the petition, petitioner appeals. Affirmed. For opinion below, see 212 Fed. 455.

The appellant filed in the court below its petition for a limitation of liability, and alleged therein that it was the owner of the steam tugs *Dauntless* and *Hercules*; that on September 9, 1911, the appellee delivered a large raft of piling to the master of the *Dauntless* at Astoria, Or., to be towed to the port of San Francisco; that the tug made fast to the raft by means of a long steel towing hawser, attached to a towing machine on the tug; that the master of the *Dauntless* was unable to procure the services of a bar tug to assist him with the raft out of the Columbia river and across the bar at the entrance thereof, and that thereupon he called to his assistance the tug *Hercules*, which made fast by a line attached to the towing machine on the *Hercules*, and to the forward bitts of the *Dauntless*; that the tugs proceeded with the raft toward the open sea, and by the usual channel taken by vessels proceeding to sea; that in their progress the raft stuck, and the tugs were unable to make headway with it, and at the same time the tide began to ebb, and by reason of the sea and tide the raft became unmanageable, and, despite the efforts of the tugs, the raft was gradually turned and swept broadside against the sea until the after end thereof tailed off towards the breakers, and the raft pulled the towing hawser off the towing machine on the *Dauntless* and being clear became a total loss; that the loss of the raft occurred without the consent, privity, knowledge, design, or neglect of the petitioner; that the appellee, the owner of the raft, has commenced in the circuit court for Clatsop county, state of Oregon, an action wherein recovery is sought in the sum of \$71,249.71, the alleged value of the raft and its equipment; that the petitioner desires to contest its liability and that of each of said tugs for the loss of the raft, and claims the benefit of a limitation of liability, as provided in sections 4282 to 4289, inclusive, of the Revised Statutes (Comp. St. 1913, §§ 8020-8027), and the other limited liability statutes enacted thereafter. And the petitioner alleged that, while not admitting its liability for the loss, it was entitled to have its liability if any, limited to the value of the *Dauntless*, or, if not, to the value of the two tugs. Thereupon the *Dauntless* and *Hercules* were duly appraised; the value of the former was found to be the sum of \$45,000, and the latter the sum of \$70,000; and the petitioner was directed to file undertakings in those sums, conditioned for the payment into court of the values of the tugs as determined in the appraisal. Thereupon a monition was issued, citing all persons claiming damages or loss occurring upon said voyage of the tugs to appear and make proof of their claims before the commissioner, and in response thereto the appellee appeared and filed its claim, claiming the value of the raft in the sum of \$71,249.90.

The answer of the claimant alleged that the loss of the raft was occasioned

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the neglect of the petitioner, its officers, and servants, and of said tugs. The answer alleged also the commencement of the action in the circuit court of Clatsop county on November 9, 1911, and it alleged that the Hercules was pulling upon the tug Dauntless at the time when the raft broke away, and that the power of the Hercules so applied actually contributed to the force which caused the raft to break away, and that the Hercules being in the lead of the tandem of tugs necessarily participated in choosing the path through which the tugs and tow passed.

On October 23, 1913, the appellee filed a motion for the dismissal of the petition, on the ground that there was but one claimant, and that default had been taken against all other persons who might claim damages, loss, or injury, and that the total value of the tugs were greatly in excess of the appellee's claim. The motion to dismiss was allowed, and an order was made directing the dismissal of the limitation proceedings as to the appellee, but retaining jurisdiction thereof for the protection of the petitioner against any other possible claimants.

Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant.

William Denman and Denman & Arnold, all of San Francisco, Cal. (W. S. Burnett, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). In the court below the motion to dismiss was based on two grounds: (1) That only one claim was made against the tugs; and (2) that the amount thereof was much less than the appraised value of the tugs, and that for those reasons there was no occasion for limitation of liability, and no reason for depriving the claimant of its common-law remedy of trial by jury. On the latter ground the motion was allowed. The decision in *White v. Island Transportation Co.*, 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993, may be accepted as establishing the rule that the limited liability acts of Congress authorize a proceeding for limitation of liability "whether there be a plurality of claims or only one."

[1] But it is urged that the court below erred in holding that both the tugs, being engaged in the same venture, were equally liable, if liable at all, though the Dauntless was the only one directly attached to the raft, and in holding that, since the value of the two tugs greatly exceeded the amount of the claim, there was no occasion for limitation of liability. The appellant, while not contending that the test question in determining whether the value of a vessel should be included in the fund is whether it is itself liable in rem for the injury done, asserts that the ultimate inquiry is limited to the question whether or not the vessel, or her officers or crew, are at fault, and it argues that there is nothing appearing in the record to indicate that the Hercules was at fault, and that, in any event, it was error to dismiss the petition without having heard testimony as to whether there was any fault, and upon which tug, if either, the blame should be placed.

We think that enough is alleged in the appellant's petition to show that if either tug was liable to surrender, both were. It appears therefrom that both tugs were engaged in a common venture, that both were exerting a strain upon the hawser when it parted, and that the

Hercules, as the leader of the tandem of tugs, must necessarily have participated in the selection of the route and the direction of the movements of the tugs and tow. For instance, it is alleged that "the tugs proceeded with the raft," that "the tugs were unable to make headway," and that "despite the efforts of the tugs" the raft was turned and swept broadside, etc.

The appellant relies upon the decision of the Circuit Court of Appeals for the Second Circuit in *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83. That was a proceeding in rem against two tugs, the *Mason* and the *Babcock*, belonging to the same owner, and which had been engaged in towing a steamship under a contract made with the owners. The *Mason* did the towing, and her master directed the movements of the ship. The evidence, as found by the court, was that, while both tugs were cooperating in the same joint undertaking, each was acting independently of the other in doing a distinct part of the work; the office of the *Mason* being to tow and to signal to the steamship, and the office of the *Babcock* being to operate the stern line of the steamship, so as to turn her course when required. The *Mason* was exonerated, for the reason that she had nothing whatever to do with the signaling to the tow.

But the same court, in *The Anthracite*, 168 Fed. 693, 94 C. C. A. 179, in a proceeding in rem, held that where two tugs acted jointly in towing a barge, which was brought in contact with a rock by negligent steering, both tugs were responsible, although one of them was acting only as a helper, and the master thereof submitted himself entirely to the commands of the master of the other tug. The decision in that case is in point in the case at bar, as is also *Thompson Towing & Wrecking Ass'n v. McGregor*, 207 Fed. 209, 124 C. C. A. 479.

The question involved in this case has also been decided by this court adversely to the appellant's contention in *The Columbia*, 73 Fed. 237, 19 C. C. A. 436. In that case it was held that where the owner of a barge, which had no motive power, had undertaken to transport freight upon the barge, such barge and a tug, belonging to the same owner, by which the motive power was supplied, became one vessel for the purposes of the voyage, and that, without surrendering both, the owner was not entitled to limit his liability for damages caused by the negligence of the crew of either the barge or the tug. In so holding this court followed *The Bordentown* (D. C.) 40 Fed. 683, a leading case, in which Judge Brown held a tug liable which was under the control of another tug, where both belonged to the same owner, and in the opinion said:

"Where all the tugs employed belong to the same owner, and are under one common direction, and are engaged in the service at the time when the fault is committed, they are in the same situation * * * as a single vessel, as respects responsibility for the negligence of the common head. The words 'such vessel,' in section 4283, embrace all such tugs."

[2] The question remains whether in a case where, as here, there is but a single claim, and the value of the tugs largely exceeds the amount of the claim, the proceeding should be dismissed, in a case

where an action had already been brought in a state court to recover judgment for the claim. The object of the acts of Congress for limitation of liability apply only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress to oust the jurisdiction of other courts. In *The Defender* (D. C.) 201 Fed. 189, 191, the court said:

"The proceeding is intended for the purpose of limiting liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the res involved."

The appellant argues that it is not necessarily true that there will be but one claim against the fund. But upon its own statement of the facts as alleged in the petition it is inconceivable that any claim other than that of the owner of the raft can possibly arise. So far as the petition advises us, there was no personal injury to any one engaged in the venture, and no property was involved therein, other than the tugs and the raft. It was for the petitioner to set forth facts showing the peculiar and exclusive jurisdiction of the court of admiralty. This it has failed to do.

The decree is affirmed.

LAKE SHORE ELECTRIC RY. CO. v. KURTZ.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1914.)

No. 2500.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered, in an action by the conductor of an electric car to recover for an injury received by being thrown from the car by reason of its alleged sudden reduction of speed while passing through an open switch, causing the car to lurch, and *held* to justify the submission of the case to the jury under the statutes of Ohio, making the negligence of a fellow servant that of the employer and adopting the rule of comparative negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. APPEAL AND ERROR (§ 927*)—REVIEW—REFUSAL TO DIRECT VERDICT.

A federal appellate court, on review of the denial of a motion to direct a verdict, cannot determine questions of credibility of witnesses, and must take that view of the evidence most favorable to the party against whom the direction was asked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

In Error to the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Action at law by Harry J. Kurtz against the Lake Shore Electric Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

T. H. Hogsett, of Cleveland, Ohio, for plaintiff in error.

R. B. Newcomb, of Cleveland, Ohio, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This review involves an alleged error in refusing to direct verdict for defendant. Plaintiff was a conductor on defendant's baggage car, there being also a motorman and a messenger. By reason of an alleged unusual lurching of the car as it passed through an open switch, plaintiff was thrown out of the door at the side of the car, colliding with a pole 15 inches from the car, and so thrown under the car and seriously injured. The negligence complained of is the running of the car at an excessive rate of speed, and not under control, and the nearness of the pole to the track.

[1] The only question is whether there was substantial evidence tending to show defendant negligent; for under both the Norris Act (101 Ohio Laws, 195; Gen. Code Ohio, 6245-1), which counsel seem to agree is applicable, as well as under the Ohio Railroad Act (99 Ohio Laws, p. 25), the negligence of a fellow employé is made that of the employer, and the rule of comparative negligence prevails, subject to limitations whose proper application by the court is not here challenged.

There was substantial evidence tending to show negligence of the motorman. The car regularly stopped at a booth on the switch track. It was necessary for the conductor to be at the rear of the car, to watch and guide the trolley and keep it in contact with the proper wire as the car passed through the switch. He testified that the usual speed of the car in crossing the switch was 5 to 6 miles an hour; that the air was usually applied by the motorman at a distance of 150 to 200 feet before reaching the switch, and that there was always time, after such application of air, for plaintiff to get to the rear platform and look after the trolley; that on the day in question the air was not applied until the car was practically at the switch, or, at the most, only 15 to 20 feet therefrom; and that the car was then running 15 miles an hour. The evidence in the case tended to show negligence in maintaining this speed at the time and place stated.

We are not impressed with the contention that plaintiff was not at his post when the car struck the switch, in that he was sitting near the door in the center of the car, eating his lunch. He was not required to be at all times on the rear platform; and, at the most, this was a question merely of contributory negligence. The latter consideration applies to the contention that plaintiff, as conductor, had the right to control the speed of the car.

[2] The alleged improbability of plaintiff's story was a question of fact for the jury. This court, on review of a denial of motion to direct verdict, cannot determine questions of credibility of witnesses, and must take that view of the evidence most favorable to the party against whom the direction is asked. *Big Brushy Coal Co. v. Williams* (C. C. A., 6th Cir.) 176 Fed. 529, 532, 99 C. C. A. 102; *Erie R. R. Co. v. Weber* (C. C. A., 6th Cir.) 207 Fed. 293, 296, 125 C. C. A. 37.

The authorities cited in support of the proposition that plaintiff had no right to have his head out of the door are not in point. Plain-

tiff's claim is that he was thrown out of the door, not that he voluntarily protruded his head or any part of his body therefrom.

There being evidence of negligence on the part of the motorman in the respect stated, it is unnecessary to consider whether the company was negligent with respect to the proximity of the pole.

The judgment should be affirmed, with costs.

PEOPLE'S LIGHT CO. V. RATHBUN-JONES ENGINEERING CO.†

(Circuit Court of Appeals, Fifth Circuit. December 9, 1914.)

No. 2640.

SALES (§ 262½*)—IMPLIED WARRANTY OF QUALITY OR FITNESS—SALE OF SPECIFIC ARTICLE MADE AND WARRANTED BY ANOTHER.

A warranty cannot be implied from a sale by a manufacturer of machinery, in connection with machinery of its own make, of a known, described, and definite article made by another manufacturer, who does warrant it, though the purchaser makes known that it is required by him for a particular purpose or use.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 740-748; Dec. Dig. § 262½.*]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit in equity by the Rathbun-Jones Engineering Company against the People's Light Company. Decree for complainant, and defendant appeals. Affirmed.

John C. Scott, of Corpus Christi, Tex., and Frank H. Booth, of San Antonio, Tex., for appellant.

C. L. Bates and James D. Walthall, both of San Antonio, Tex., for appellee.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. The decree appealed from is unquestionably correct, unless the defendant's demand by way of counterclaim or reconvention was established. The trial judge, in setting out his reasons for finding against that demand, stated two conclusions, among others: (1) That, under the evidence, the only substantial grounds of complaint by the defendant were due to defects in the gas producer; and (2) that the plaintiff was not liable for damages resulting from such defects, because it did not guarantee the gas producer or its sufficiency in any respect.

The first-mentioned conclusion is one of fact. Certainly it cannot be said that that conclusion was unwarranted by the evidence in the case. The evidence was such that plainly it furnished support for the conclusion that the main, if not the sole, trouble experienced by the defendant in the use of the machinery was due to the gas producer, and that whatever damages the defendant sustained were attributable to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 5, 1915.

deficiency of that machine, and not to any fault in the engine sold by the plaintiff.

We think that the other conclusion, which was one of law—that there was no contract shown whereby the plaintiff guaranteed the gas producer or its sufficiency for any purpose—was a correct one. In the written proposition made by the plaintiff to the defendant, the acceptance of which by the latter made the contract between them, the only mention of a gas producer was in the enumeration among the articles to be furnished of “one No. 7 R. D. Wood & Co.’s lignite producer as per attached specifications”; but, accompanying and attached to that proposition was a written proposition by R. D. Wood & Co., addressed to the defendant, offering to furnish a gas producer. So far as that latter proposition guaranteed the machine offered by it, its acceptance made such guaranty the obligation, not of the plaintiff, but of R. D. Wood & Co. Nowhere in the contract to which the plaintiff was a party is there anything indicating an agreement or undertaking on its part to guarantee the sufficiency of the gas producer offered to be supplied by Wood & Co. If anybody is liable in damages by reason of such a guaranty, it is Wood & Co., and not the plaintiff. Though the defendant bought the gas producer from the plaintiff, there is nothing in the terms of the latter’s written contract to show a warranty or guaranty by it of that machine, and a guaranty cannot be implied from a sale by it of a known, described, and definite article, made by another manufacturer, who does guarantee it, though the purchaser makes known that it is required by him for a particular purpose or use. *Pullman Car Co. v. Metropolitan Railway*, 157 U. S. 94, 15 Sup. Ct. 503, 39 L. Ed. 632; *Seitz v. Brewers Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Grand Avenue Hotel Co. v. Wharton*, 79 Fed. 43, 24 C. C. A. 441. The only guaranty, if any, the breach of which caused substantial damage to the defendant, was that of R. D. Wood & Co. For that breach the plaintiff is not chargeable with liability.

We think that the ultimate conclusion of the trial judge was correct, and that the decree appealed from should be affirmed; and it is so ordered.

YUNGHAUSS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. October 8, 1914.)

No. 291.

ALIENS (§ 68*)—NATURALIZATION—APPLICATION—TIME.

Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), provides for a declaration of intention to become a citizen, but that no alien who has declared his intention to become a citizen shall be required to renew such declaration, and that not less than two or more than seven years after he has made such declaration he shall make and file in duplicate a petition in writing to be made a citizen, provided that, if he has filed his declaration before the passage of the act, he shall not be required to sign the petition in his own writing, etc. *Held*, that a declaration made prior to the act is valid, no matter how long prior

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes

thereto it may have been made, but that after the passage of the act the person making the declaration has no superior rights to a subsequent declarant, and in both cases final application for citizenship must be made within seven years after the passage of the act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an order of the District Court for the Southern District of New York denying the application of the appellant to become a citizen of the United States. The facts fully appear in the opinion of Judge Mayer in the District Court, concurred in by Judges Hough and Hand. 210 Fed. 545.

William Blau and Moses Cohen, both of New York City, for appellant.

John E. Walker, Asst. U. S. Atty., of New York City.

Before COXE and ROGERS, Circuit Judges.

COXE, Circuit Judge. The question presented is an interesting one and is not free from doubt, but we are inclined to the opinion that the construction of the law adopted by the District Judges gives effect both to the provisions of the act of 1906 and to the law as it existed prior thereto, without interfering improperly with the rights of applicants for citizenship. It puts all aliens upon a par as to the time in which their declaration is to be made. A declaration made prior to the act of 1906 is valid, no matter how long prior thereto it may have been made, but after the date of the passage of that act the person who made the declaration has no superior rights to one who declares thereafter. In both cases action must be taken within seven years. It seems to us that this is what Congress intended. In effect the act says to the alien who has made his declaration prior to 1906:

"Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the act."

The cases sustaining this view are *In re Wehrli* (D. C.) 157 Fed. 938, *In re Goldstein* (D. C.) 211 Fed. 163. The opposing view is clearly stated by Judge Orr in *Eichhorst v Lindsey* (D. C.) 209 Fed. 708, and by Judge Maxey in *Re Anderson* (D. C.) 214 Fed. 662.

We think the decision of the District Court should be affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ORIENTAL TISSUE CO. v. LOUIS DEJONGE & CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 33.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—THIN LEAF OR FABRIC.

The Gregory patent, No. 848,301, claim 2, for a thin leaf or fabric composed entirely of soluble cotton and a coloring matter incorporated therein, intended to be used for decorative purposes instead of metal leaf, *held* valid and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Oriental Tissue Company against Louis Dejonge & Co. Decree for complainant, and defendants appeal. Affirmed.

The following is the opinion of Mayer, District Judge, in the lower court:

The patent is for an imitation metal leaf which can be used as a substitute for gold leaf, silver leaf, and the like. The patentee states: "My invention consists in providing a thin leaf or fabric which is made to imitate metal leaf—such, for instance, as gold leaf, silver leaf, and the like—which thin leaf or fabric is suitable for use in embossing and decorative purposes generally; it being extremely tenacious and capable of being more easily handled than the gold or other metal leaf itself."

In making this leaf, the patentee dissolves soluble cotton in a suitable solvent, such as amyl acetate (amyl oil the patentee calls it); to this solution he adds an appropriate amount of some metallic coloring matter, such as gold bronze, and then he flows this mixture, which is lighter than water, upon some suitable surface, such as water. The mixture spreads out in a thin sheet on the water surface, and the solvent, amyl acetate, evaporates or volatilizes, thereby leaving a very thin leaf or fabric, which consists of the soluble cotton with the small metallic flakes or bronze incorporated therein; the sheet resembling very closely real gold leaf. The sheet is only about one four-thousandth of an inch thick.

This suit is brought upon the article itself, and not upon the method of making the leaf. The claim reads:

"2. A thin leaf or fabric composed entirely of soluble cotton and a coloring matter incorporated therein."

In addition to the defenses of anticipation, noninvention, and noninfringement, the defendant has set up in its answer the statutory defense that Gregory surreptitiously or unjustly obtained a patent for that which in fact was invented by one Healy. Much testimony has been taken on this question of prior invention by Healy. To analyze this testimony in detail would involve practically an extended outline of the record and a summary of the briefs in regard to this subject.

The defendant has not sustained the burden cast upon it in respect of Healy's claim, and there is enough question as to accuracy of dates and enough controversy as to various details to suggest serious doubt as to Healy's claim of prior invention; but in any event the testimony of Edward C. Seward disposes of the matter. Mr. Seward is an experienced member of the bar of long standing and represented the interests which were associated with Gregory and which intended to promote his invention. On January 31, 1906, Gregory filed an application for patent on the leaf and on the method for making it. The Patent Office required that this subject-matter be separated into two patents, one on the method and the other on the article itself, and accordingly a short time thereafter, and while the original application was still

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pending, Gregory filed an application for a patent on the article itself which matured into the patent in suit. These applications and the inventions embodied therein were assigned by Gregory to one Walter A. Ker, the New York manager of a large bookbinding concern and by Ker to complainant.

While Gregory's original application for patent was pending, and in May, 1906, Gregory's attorneys, Messrs. Brown & Seward, of No. 261 Broadway, New York City, received word from the Patent Office that an interference was about to be declared between Gregory's application and the application of another party. Gregory suspected that Healy might be the party who had filed the other application, and he interviewed Healy on June 6, 1906. Healy decided that he would join with Gregory and Ker, and on June 11th an agreement was drawn up whereby Ker, Gregory, Healy, and two other men were to form a corporation for the manufacture of the leaf in accordance with the Gregory patents, each one of the parties to have an equal number of shares of stock. Healy was apparently satisfied with the arrangement and signed the agreement. It became necessary to straighten out the situation in the Patent Office, and in conformity with the understanding between the parties regarding the settlement of the interference Healy signed an abandonment of his invention on June 20, 1906, and this paper was sent to the Patent Office. Owing to some informality in the abandonment, the Patent Office refused to give the paper effect and a few days later Healy and Gregory went to the office of Messrs. Brown & Seward, in order to explain to them the condition of affairs so that the interference could be properly settled.

Mr. Seward carefully explained to them the necessity of determining who was the real inventor. I am entirely satisfied that Mr. Seward made the situation clear to Healy, pointing out the importance and necessity of these two men determining who the real inventor was. Mr. Seward prepared an abandonment for Healy to sign, and advised that the two men "should not use undue haste if there was any question about who the real inventor was, but should take the matter deliberately. They said they would do so and took the abandonment that I [Seward] had prepared away with them without signing." This abandonment was signed by Healy on June 25th and forwarded to the Patent Office; this now being the second abandonment to Gregory which Healy had signed.

Messrs. Brown & Seward heard a few days later that the abandonment had not been received by the Patent Office, and accordingly on June 30th Healy saw Mr. Seward again and signed a third abandonment. Before this third abandonment was filed, information came that the second abandonment had been received and accepted by the Patent Office.

The record shows that Mr. Seward took every precaution which a careful lawyer could take. The matter was not hastily disposed of, and it must be remembered that at this time it was a matter of indifference to Mr. Seward, as representing the interests intending to promote the invention, as to who was the inventor. It was a matter, however, of vital importance that the letters patent should issue to the true inventor. I am not only satisfied that Gregory must be regarded as the inventor, but that any other conclusion would be gravely inequitable. As Judge Cox said in *United Shirt & Collar Co. v. Beattie*, 149 Fed. at page 741, 79 C. C. A. at page 447: "The question is at best a technical abstraction. No rights of rival inventors are involved. * * * A decision against Pine [here Gregory] now will benefit infringers, but will be no benefit to Dormandy [here Healy]."

The complainant in this suit has made its investments upon the faith of Healy's conduct, as well as Gregory's, and at this late date a court of equity will not be seen to destroy or impair the rights of complainant under the circumstances disclosed in this record.

The defendant introduced in evidence ten patents, only two of which need be referred to specifically. The remaining eight patents seem to me to be in remote or nonanalogous arts, and, in any event, do not make any disclosure which can be regarded as anticipating or as negating invention by Gregory.

The Oeser patent (No. 660,024, October 16, 1900) was for a process for the manufacture of colored or similar films such as are used for the coloring of paper, leather, and the like. The inventor pointed out that great difficulty

had been experienced from the disintegration or crumbling of the film after it had been attached to the surface of the fabric, with the result that the film gave off its color and soiled the surrounding fabric to which it had been fixed. "My invention," said Oeser, "is intended to obviate this difficulty, inasmuch as the color or bronze film manufactured by my improved process will not give off its color. It is also possible by this process to obtain shaded or differently colored foils, such as may be used in imitation of the appearance of marble, wood, and the like."

The product claim (No. 3) in this patent was for "a new article of manufacture, a film consisting of isinglass, glycerin, albumen, and a color." There is certainly nothing in the claim or in the patentee's description to suggest a composition of soluble cotton and a color.

A British patent to one Herman Ernst was granted September 23, 1893. It was for a "process for obtaining color leaf which can be employed in the same way as, for instance, metal or gold leaf for blocking on cardboard, etc., which is performed by pouring a mixture of 70 to 75 per cent. of collodium (of 2 per cent.) solution and oil color (25 to 30 per cent.) on a polished surface and loosening the formed thin leaves when perfectly dry." The claim was for "process for obtaining color leaf for blocking."

It seems strange, if the Ernst patent was so clear and informing as to anticipate or negative invention by Gregory, that no one made imitation metal leaf from 1893 down to Gregory's time. In the first place, an inspection of the leaves in evidence made by defendant's expert seems to indicate that the Ernst patent, even under the most favorable experimental manufacture in pursuance thereof, produces a result far removed from the actual result of the disclosure in the patent in suit. Secondly, the use of an oil color negatives a leaf having any metallic lustre, and consequently negatives the production of an imitation metal leaf. While this patent sets forth a process for making a color leaf, which can be used for blocking purposes, it certainly negatives the production of an imitation metal leaf.

The truth is that the Gregory invention was to all intents and purposes a pioneer. It is highly meritorious, and because of its merit, aided doubtless by necessary capital and good business methods, a new industry has been created, which the courts should be disposed to protect as against a too fine construction of the prior art.

The most serious question is that of infringement. There is a sharp dispute as to the meaning of the claim; but the claim is stated in simple language, and in connection with the context I think its interpretation is plain. "Coloring matter" means, of course, that coloring matter which will produce the imitation leaf desired. "Entirely" means the absence of any ingredient which is foreign either to soluble cotton or the appropriate coloring matter.

I am satisfied that defendant's leaves have some adhesive matter on one side, the purpose of which is to cause them to adhere to books and other articles by an embossing process. Professor Carmichael testified that there are certain substances in commercial soluble cotton bought in the regular course of trade. He said: "I have found naphtha, mineral oil, and castor oil, among the liquid substances, and gums and resins, with the properties of gum sandrac, gum mastic, and common resin, among the solids." This same expert (whose testimony is impressive) analyzed defendant's leaves (X-Q. 183) and testified to finding gum mastic only to the extent of a fraction of 1 per cent.

The defendant insists that its leaf contains a small percentage of glycerin and about 25 per cent. of gum mastic. It is contended by complainant that defendant's expert purposely omits in his per cent. statement the fact that the soluble cotton is itself only 12½ per cent. of the leaf, in order to make the percentage of adhesive seem very large, and complainant claims that, when the percentage of adhesive to the total leaf is figured, it would be found that the adhesive is only between 3 and 4 per cent. of the leaf as a whole.

In this not unusual battle of experts, it is significant and persuasive that the leaves of complainant and defendant handed to defendant's expert were not analyzed, or, in any event, that defendant did not offer any testimony as to the actual constituents of those leaves manufactured by the parties to the suit. Without further elaboration, I may say that I am convinced that

the defendant has infringed. Even the addition of gum mastic for adhesive purposes would not, under settled authority, relieve against infringement. Complainant may have the customary decree.

Seward Davis, of New York City, for appellants.

E. C. Seward, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. This is an appeal from a decree of the District Court holding United States letters patent No. 848,301 for a thin leaf or fabric valid and infringed. The patent is on the article and not on the method of making it. Only the second claim is involved, as follows:

"2. A thin leaf or fabric composed entirely of soluble cotton and a coloring matter incorporated therein."

The patentee describes his invention in the specification as follows:

"My invention consists in providing a thin leaf or fabric which is made to imitate metal leaf—such, for instance as gold leaf, silver leaf and the like—which thin leaf or fabric is suitable for use in embossing and decorative purposes generally, it being extremely tenacious and capable of being more easily handled than the gold or other metal leaf itself."

We have but little to add to the opinion of the District Judge. The defendant insists that claim 2 is invalid because it is so broad as to include patents which Judge Mayer did not specifically consider in his opinion, among others British patents to Berard, No. 1,884 of 1857, to Abel, No. 9,962 of 1904, and United States patent No. 600,824 of 1898, to Stevens & Lefferts. These patents do disclose the making of thin sheets or films by dissolving soluble cotton in a suitable solvent which subsequently evaporates and adding coloring matter. Claim 2 taken literally would cover products made by these earlier patents and so construed would be invalid as too broad. It is, however, to be construed in connection with the specifications and with what the patentee describes to be and what we find actually was his invention, viz., a thin metallic leaf, an article which is not shown to have been anticipated.

Decree affirmed.

ADAMS & WESTLAKE CO. v. PETER GRAY & SONS, Inc.

(Circuit Court of Appeals, First Circuit. June 11, 1914. On Rehearing, January 6, 1915.)

No. 1054.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SIGNAL LAMP.

The Hamm patent, No. 651,782, for a signal lamp, *held void* for anticipation and lack of patentable invention.

Appeal from the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Adams & Westlake Company against Peter Gray & Sons, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 206 Fed. 303.

Fredrick P. Fish, of Boston, Mass., and Louis K. Gillson, of Chicago, Ill., for appellant.

Richard P. Elliott, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This case relates to a patent, No. 651,782, issued June 12, 1900, to William S. Hamm, on an application dated on May 16, 1898, for improvements in signal lamps. The facts of the case are so fully stated in the opinion of the District Court, passed down on July 2, 1913, 206 Fed. 303, that we have no occasion to recite them at length. Except as stated herein, we agree with that opinion that the difficulty in the alleged invention is "in finding any new principle of operation, or a result new in kind, as distinguished from an improved result due to a better and more careful application of old principles."

The leading features of the complainant's lamp relate to the prevention of sweating. This was accomplished by directing a current of incoming fresh air extending downward, so as to establish a curtain between the external globe and the current of air from the ascending products of combustion, which downward current would hold the external globe at the temperature of the external air while furnishing an upward current which would maintain combustion. There seems to be no doubt that this arrangement accomplished the purpose of preventing sweating; but the learned judge of the District Court was of the opinion that it was anticipated by the patent to Hamm, No. 592,705, issued on October 6, 1897. His opinion said that reference was there made to sweating, quoting what that patent said, as follows:

"I have overcome this defect by constructing a lantern having a top-air admission, the air descending within the globe, and to a certain extent in contact therewith, to the bottom of the globe, and thence to the flame. Thus a current of air of the same temperature as that of the globe (which is that of the exterior air) is always in contact therewith, any deposition of moisture thereon being prevented."

This method of preventing sweating is, in principle, covered by claim 2 of patent No. 592,705, although somewhat differently expressed.

While patent No. 592,705 is elaborately considered by the respondent, and its anticipation of the patent in suit fully pointed out, we regret to say that the only reference we find to it from the appellant is an oral statement to the effect that what was shown by the earlier patent had not been in public use two years. This is true with reference to the date of the application for the patent now in suit; but the claim in patent No. 592,705 covers the ground so far as sweating is concerned, so that to maintain the present patent as to it would give the complainant an additional period beyond what the statute grants to patentees.

It is true that patent No. 592,705 was specifically for a signal hand lamp, which, however, as explained in that patent, is subject to all the liability of sweating, and consequent danger to railroad trains, pointed out in the patent now in suit. Indeed, the patentee in the prior patent stated that his invention was not restricted to hand lamps, but was adapted to other forms of signal lanterns, and that it admitted of changes in mechanical construction not involving invention, and that therefore, he did not confine his invention to any particular type of lantern, or limit himself to the precise details of construction therein contained.

We regret that this phase of the case was not more fully met by the complainant than it has been; but, on the record now before us, we are of the opinion that to sustain this appeal on account of the matter of sweating would make the invention run from 1897, instead of from the date at which the present patent issued. *Battin v. Taggert*, 17 How. 74, 83, 15 L. Ed. 37, applies here.

Other features of the complainant's lamp for which much importance was claimed at the argument are found in the combination described in claim 5 of the patent. They are the pocket formed above the "plate in the upper part of said casing or body" there referred to, between so much of the "internal cone" as extends above the plate, and the "outer cone" above the plate, open at the top, surrounding the "internal cone," and extending above the same, also the "cap above said outer cone." It is said that the patentee substituted for a fluted cap fitting closely over the flue, as in prior lamps, a flat open top such as Fig. 1 of the patent in suit represents, whereby the outflow of gases from the flame through the "internal cone" is not obstructed, as was formerly the case with the fluted cap, while the greater risk involved of admitting sudden gusts which might extinguish the flame is counteracted by the pocket surrounding the "internal cone," which effectually "traps" any wind gusts before they can enter the "internal cone" and reach the flame. The complainant sometimes referred to this pocket as the "wind trap."

The patent, however, nowhere so sets forth any such superiority of the cap shown in Fig. 1 over the fluted cap before used as above referred to, nor does it anywhere so describe any such trapping of wind gusts in the pocket referred to, as to indicate that the patentee regarded these features as inventions of his to secure the results now ascribed to them.

As was said in the opinion of the District Court, it was, of course, fundamental to guard against gusts that might enter and extinguish the flame, whether through the chimney or outlet for products of combustion, or from the air inlets. That opinion continued:

"So far as this feature is concerned, it may be said that the testimony that the complainant's lamp does not blow out shows merely that the entrance and exit are better guarded than other devices; and upon this question the devices of the complainant and defendant are to be compared with reference to the special structures, rather than to any novelty in principle."

We find nothing in the record which induces us to disagree with the District Court in regard to this part of the lamp, or to find, as it could

not, any new mode of operation, or patentable novelty. On the whole, while we are very much impressed by the benefits which have come to the public from what has been done by the complainant appellant, or by his patentee, we feel constrained to affirm what has been decided by the District Court.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

On Rehearing.

PER CURIAM. In this case a judgment was entered for the respondent on June 11, 1914. On a petition for rehearing the court ordered the entire case reargued, and the same has been done. On full consideration of what has occurred accordingly, to which the court gave full and careful attention, we have received no impression that there was any error in our previous judgment, and we have concluded to confirm the same. It follows, therefore, that on this rehearing we re-enter our judgment as follows:

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

CHARLES HUNNICUTT CO. v. A. B. GASTON CO. et al.

(Circuit Court of Appeals, Third Circuit. November 30, 1914.)

No. 1842.

1. PATENTS (§ 328*)—VALIDITY—SEED CORN GRADER.

The Hunnicutt patent, No. 989,976, for a seed corn grader, *held void* for prior use.

2. PATENTS (§ 81*)—SUIT FOR INFRINGEMENT—DEFENSE OF PRIOR USE—EVIDENCE TO OVERCOME.

Where the manufacture and use of an anticipating device prior to the issuance of a patent is clearly established in an infringement suit, the burden rests upon complainant to carry back the date of invention to a time prior to such use by strong and convincing evidence, and the unsupported testimony of the patentee is not sufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Suit in equity by the Charles Hunnicutt Company against the A. B. Gaston Company, a partnership, and the A. B. Gaston Company, a corporation. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 207 Fed. 585.

H. A. Toulmin, of Dayton, Ohio, for appellant.

H. C. Lord, of Erie, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, Circuit Judge. [1] The opinion of the District Court in this case was delivered by the late Judge Young, and is reported in 207 Fed. at page 585. We agree with his satisfactory treatment of the questions discussed, and shall only add a few words in reference to the unpatented Kretchmer device.

[2] The patent in suit—for “a portable and manually operable corn-grading device for grading seed corn”—was applied for by Charles Hunnicutt on April 20, 1908, and of course, this is the *prima facie* date of the invention. A previous manufacture and public use by Kretchmer having been set up as a defense, the Gaston Company was bound to fix the earlier date by evidence that should convince the mind beyond reasonable doubt. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. After reading and considering the record on this subject, we are of opinion that the burden thus imposed was successfully maintained, and that one date for such use has been certainly fixed in November, 1907—this, indeed, is not denied—and another date has been fixed in February or March, 1906, with a sufficient degree of probability. If for the moment we disregard the date in 1906, the date in 1907 is also earlier than the application, and shifts the burden of proof to Hunnicutt, requiring him to carry back his invention to a time before these November sales. And the evidence to overcome the Kretchmer date in November must at least be strong and convincing. Some cases hold that its quality must be as high as the quality required to establish an anticipating use; but, whichever degree of proof may be required, the patentee does not satisfy it by his own unsupported testimony. *Clark Thread Co. v. Willimantic Co.*, 140 U. S. 492, 11 Sup. Ct. 846, 35 L. Ed. 521; *Columbus Chain Co. v. Standard Chain Co.*, 148 Fed. 622, 78 C. C. A. 394; *Eck v. Kutz* (C. C.) 132 Fed. 763; *Fay v. Mason* (C. C.) 120 Fed. 511.

We think nothing else of any substance was offered here. The letters from the Pioneer Implement Company that are relied on to carry the patentee's date to the fall of 1906 or to the summer of 1907 are ambiguous in their references; but, even if they plainly referred to the double grader now in question, the patentee would still be confronted with the testimony concerning the public use in February or March of 1906. This testimony satisfied Judge Young, and we see no reason to disagree with his conclusion on that subject.

The decree is affirmed.

F. WESEL MFG. CO. v. PRINTING MACHINERY CO.

(District Court, S. D. New York. November 5, 1914.)

No. 11-42.

1. PATENTS (§ 328*)—INFRINGEMENT—PRINTING PLATE HOLDER.

The Storm patent, No. 673,485, for a printing plate holder, the essential feature of which is that the block supporting the clamp which holds the plate in place on the base is removable from the groove in the base in which it slides at any point, but can be fixed in position by turning a screw, construed, and held not infringed.

2. PATENTS (§ 22*)—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.

While the nonuse of a patented device does not estop the owner of the patent from asserting rights thereunder, it is not entitled to the liberal application of the doctrine of equivalents which might be invoked if the device had gone at once into extensive use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*]

In Equity. Suit by the F. Wesel Manufacturing Company against the Printing Machinery Company. On final hearing. Decree for defendant.

Kiddle & Margeson, Wylie C. Margeson, Robert Fletcher Rogers, and Edwin A. Packard, all of New York City, for complainant.

Kerr, Page, Cooper & Hayward, of New York City, Alfred M. Allen, of Cincinnati, Ohio, and Thomas B. Kerr, of New York City, for defendant.

ROSE, District Judge. Complainant is the owner of Letters Patent No. 673,485, May 7, 1901, to Edward R. Storm. It says the defendant has infringed the first and third of the 15 claims thereof. The patent is for an improvement in printing plate holders. The patentee sometimes employs the same word to describe different things. It will be well, therefore, to define the sense in which certain terms will be here used.

The printing plate itself will be called the "plate." The block, bed, or base upon which it must be secured while printing is being done will be referred to as the "base." The device which actually holds the plate in place may be thought of as composed of two elements: (1) The block; that is, the element which keeps the whole in its place in or on the base and supports the clamp which grips or holds the plate; (2) the clamp, which does the actual gripping or holding. The terms as above defined will be used in preference to those actually employed by the patentee.

[1] He says that the invention has three purposes: (1) To provide a block which may be inserted and secured in a slotted base at any part of the latter; (2) to afford facilities for quickly adjusting the plates to correct and perfect register and reliably to secure them to the base for printing; (3) to provide a means for removing the plates after printing.

At the time the application for the patent was made, it was common to construct a base with slotted diagonal grooves extending from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one of its sides to the other. In order to keep the blocks from coming out of the grooves, the latter were made wider at the bottom than at the top, while the blocks themselves were given a width only slightly less than the bottom of the groove, but greater than that of the top. This construction, of course, prevented the block from coming out of the groove when the user wanted it to stay in, but it also held it fast when he would like to have taken it out. Such block could be put in or taken out only at the end of the groove, which was, of course, in the line of one of the sides of the base. The impossibility of inserting or extracting it at any other part of the groove was a serious and obvious limitation upon its convenience and economical usefulness. It was and is common to secure a number of plates to the same base. When this is done, it usually happens that some plates are surrounded by others. If the plates are held by blocks and clamps which cannot be taken out of the groove, except at the end of the groove, and it becomes necessary to change the position of one of the inside plates (as in practice is frequently the case), all the plates which lie between it and the side of the base must be taken off. It was, therefore, desirable to devise a block and holder which could be put in or taken out of the groove at any point. No invention was required to appreciate this want, although invention might well be exercised in supplying it.

Storm conceived the idea of a block which should itself be of less width than the groove at the top and of keeping it in its place in the groove by the use of a screw, which he inserted diagonally in the block. Until it was desired to make the block fast in the groove, the point of the screw remained imbedded in the block. After the latter had been put in the groove, the screw was turned until the point, emerging from the block, impinged firmly upon the side of the groove. This contact it was supposed would be close enough to keep the block from moving laterally in the groove. The physical projection of the screw prevented any vertical movement of the block. When there was any reason to remove the block, a few turns of the screw again brought the latter back into the block, which then could be easily lifted out of the groove.

The third claim of this patent is for—

“the combination of a block having grooves of greater width at the lower than at the upper part and adjustable plate clamps adapted to be inserted in the said grooved block at any point of the groove and secured to the block, having means as a screw and face plate with a holding catch thereon adapted to move the printing plate over limited distances and hold the said printing plate securely to the said block at any point of such limited distances.”

It will be observed that one of the elements is adjustable clamps adapted to be inserted in a groove block at any point in the groove. Defendant's blocks can be inserted at any point of the groove, but instead of the screw, it keeps them in place by a simple spring device arranged automatically to press upon the sides of the groove, and thereby prevent the blocks coming out of the latter. These springs can be instantly released from action by grasping the block with a pair of tweezers. The device of the defendant is intended to accomplish, and does accomplish, the same object as Storm set out to attain. Storm was not the first to discover that such object was of itself desirable. Every

one who had anything to do with plate holders must have always known how useful would be a block which could be inserted or taken out at any part of the groove. Storm found one way of accomplishing that purpose. His discovery, if it involved invention, entitled him to the exclusive use of that way and of all equivalents thereof. It did not and could not give him the right to say that no one else should accomplish that same object in any other way, no matter how widely different from his. In short, his invention lay, not in recognizing the desirability of a block which could be inserted anywhere, but in finding out a way of so inserting it.

Equivalence is therefore to be tested by the means employed, not by the end attained. The simple device of the defendant does not appear to be the equivalent of the somewhat crude and clumsy method employed by Storm. It is very doubtful if there could be any invention either in putting a screw through the block, so as to hold the block in place, or in taking the screw out again when you wanted to remove the block. For millenniums men have used screws for such purposes. It is not, however, necessary, to decide whether in so employing the screw Storm was an inventor or not. It is enough to say that his invention, if there was one, did not cover all adjustable plate clamps adapted to be inserted in a grooved base at any point of the groove. If the third claim of his patent is to be construed as having that breadth, it is invalid, because it covers more than he invented. If, on the other hand, it be construed to include only a screw or some equivalent means of securing the block, defendant does not infringe.

The first claim is for—

"the combination of a block having grooves adapted to receive and hold one or more plate clamps and adjustable plate clamps, held in the grooves each having a holding catch, and means, as a screw adapted to force the holding catch against the edge of the printing plate, move the said printing plate over limited distances and hold the said printing plate securely to the said block at any point of such limited distances."

It was and is desirable to be able to change the position of the plate on its bed through the means of the block and clamp and without removing the block from its place. Storm thought to achieve that purpose by cutting an inclined plane in the block and by securing a clamp to the block by a screw other than the one already referred to. The end of this screw impinged upon the inclined plane. By turning it in one direction or the other, its pressure upon the inclined plane would result in a certain limited movement of the clamp. This clamp had a beveled edge to fit over the oppositely arranged bevel of the plate. The block was put in the groove and screwed in what was believed to be at least its approximately desired position, and then the nicer adjustment was intended to be made and preserved by the manipulation of this second screw, which could give to the clamp a movement of perhaps as much as an eighth of an inch.

In defendant's device, there is a cogwheel, the cogs of which fit into a ratchet with which the edges of the bottom of its groove are equipped throughout their entire length. This wheel is made to move by a small tool inserted through a hole in the clamp. As a conse-

quence, the lock with its clamp may be moved along the entire length of any groove, and, as has already been stated, it may be taken out from the groove at any point. The clamp, which, like that of Storm, is beveled, may be, therefore, adjusted to the printing plate at any place on the base, and its adjustment may be easily and quickly changed to any extent desired. One of the elements of the Storm combination is a clamp, or, as he calls it, a holding catch, adapted to move the plate over limited distances and hold the plate secure to the block at any point of such limited distance.

Complainant's present contention in effect is that the word "limited" may be stricken out of this claim, or that the claim shall be construed precisely as it would be if that word was not in it. It may be that Storm unnecessarily restricted his patent by insertion of that term; but he did insert it, and complainant must stand by the consequences. In the sense in which the word "limited" is used by Storm, defendant's device moves through unlimited distance, and will hold the printing plate securely to the base at any point, no matter how remote from the place at which the block was originally inserted. Even if the evidence showed that Storm had made a great contribution to the art and was entitled to the rewards commensurate therewith, it would be difficult to hold that either of the claims of the patent in suit is infringed by defendant.

[2] It does not appear, however, that his device was ever used at all until two or three months ago and after this suit was brought. Defendant's holder was put on the market some years ago, and is, as defendant claims, protected by letters patent. Complainant thereafter began the manufacture of a device which superficially appears to resemble complainant's far more closely than it does that of Storm. Defendant, in another district and court, sued complainant for infringing its patent. After that proceeding was brought, complainant, preparing to defend it, had its attention called to the Storm patent, which it then purchased. This suit followed. Its expert caused holders of the kind described by Storm to be made, and demonstrated they would work by using them in printing a thousand sheets for a customer of the printers at whose shop the experiment was tried.

Complainant is, of course, right in saying that the fact that Storm did not see fit to use his patent did not justify defendant or any one else in infringing it. Nor does there appear to be any evidence in this case that Storm or his assignee is in any way estopped from asserting any rights that he ever had. On the other hand, there is here no reason to give to the doctrine of equivalents that liberal application which may be sometimes properly made in favor of a patent which has at once gone into extensive use. In such cases there is a presumption that the patentee had made a real and important contribution to the art. The facts here in evidence raise none such.

It follows, from what has been said, that defendant has not infringed either of the claims in suit, and the bill of complaint must accordingly be dismissed, with costs.

UNITED STATES v. ROHE & BRO. et al.

(District Court, S. D. New York. November 17, 1914.)

1. INSPECTION (§ 7*)—MEAT INSPECTION ACT—CONSTRUCTION.

Meat Inspection Act June 30, 1906, c. 3913, 34 Stat. 674, providing for the inspection and reinspection of meat intended for food and the plants where such meats are prepared, covers two classes of cases, one where the establishments are inspected and the other where they are not, but does not impose criminal liability on the operator of an inspected establishment, which is subject to inspection, who has complied with the inspection laws, because he has fully complied with the requirements of the Department of Agriculture.

[Ed. Note.—For other cases, see Inspection, Cent. Dig. §§ 13-17; Dec. Dig. § 7.*]

2. INSPECTION (§ 7*)—MEAT PRODUCTS—INDICTMENT.

An indictment charging that defendants offered for transportation in interstate commerce from New York City to Charleston certain hams, which were, and which defendants knew to be, unfit for human food, and which they knew were intended for human consumption, did not state an offense under Meat Inspection Act June 30, 1906; the proviso of the act imposing a penalty generally for shipping meat unfit for human food being limited to those persons whose plants for the preparation of meats are not inspected, to wit, retailers and farmers.

[Ed. Note.—For other cases, see Inspection, Cent. Dig. §§ 13-17; Dec. Dig. § 7.*]

3. INSPECTION (§ 5*)—MEAT PRODUCTS—REINSPECTION BEFORE SHIPMENT.

Meat Inspection Act June 30, 1906, makes it unlawful to ship meats in interstate commerce unless inspected as required by the act "and the regulations of the Department of Agriculture." *Held*, that the regulation of the Department of Agriculture is but a condition on which the act operates, and that it is within the power of the Secretary of Agriculture to require a reinspection, immediately before shipment, of meat which has been previously inspected.

[Ed. Note.—For other cases, see Inspection, Cent. Dig. §§ 9-11; Dec. Dig. § 5.*]

4. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE.

In a prosecution for shipping meat in interstate commerce not properly inspected, the court will take judicial notice of the regulations of the Secretary of Agriculture, but cannot take such notice of regulations made by the Bureau of Animal Industry.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. § 304.*]

5. INSPECTION (§ 7*)—MEAT PRODUCTS—CERTIFICATE—COUNTERFEITING.

Meat Inspection Act June 30, 1906, makes it an offense to counterfeit or falsify, not only certificates authorized or required by the act, but also certificates required by the regulations of the Department of Agriculture.

[Ed. Note.—For other cases, see Inspection, Cent. Dig. §§ 13-17; Dec. Dig. § 7.*]

Rohe & Bro., a corporation, and Jacob Fowler, were indicted for violating Meat Inspection Act June 30, 1906, and demurred to the indictment. Overruled.

The indictment here is in three counts, the first of which charges that defendants offered for transportation in interstate commerce from New York City to Charleston, S. C., certain hams which were, and which defendants

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

knew to be, unfit for human food, and which they knew were intended for human consumption.

The second count charges that, pursuant to Act June 30, 1906, 34 Stat. 674, the Secretary of Agriculture duly made rules and regulations for the inspection of meat food products to be shipped in interstate commerce, and that these rules and regulations prescribed that all carcasses of meats or parts thereof, whether fresh or cured, that had been previously inspected, should be reinspected by an inspector of the Bureau of Animal Industry immediately before the shipment thereof in interstate commerce, to determine whether such carcasses may have become unfit for human food; that while these rules and regulations were in effect, and on April 7, 1913, the defendants knowingly and willfully offered for transportation from New York City to Charleston, S. C., certain hams which had not been inspected and examined in accordance with the said rules and regulations, as the defendants well knew, in that the said meat had not been reinspected by an inspector of the Bureau of Animal Industry immediately before the shipment thereof, but the said hams were then and there unfit for human food, as defendants well knew.

The third count charges that, pursuant to the act of June 30, 1906, the Secretary of Agriculture duly made rules and regulations which require that when any meat food products, which had been inspected and passed and so marked, should be offered to any common carrier for transportation in interstate commerce, the person offering such meat food products should make and deliver to the carrier a certificate to the effect that such products are, at the date of shipment, wholesome and fit for human food; that while these rules were in force, and on April 7, 1913, the defendants did falsely present the aforesaid certificate to the Clyde Steamship Company upon the offer of certain hams for transportation from New York City to Charleston, S. C., and did thereby knowingly and willfully falsely represent that said hams were at the date of said offer wholesome and fit for human food, defendants well knowing the contrary to be true.

The objection to the first count is that the Meat Inspection Act does not make it a crime for an *inspected* establishment to ship unwholesome meat products in interstate commerce. The objection to the second count is that the act does not authorize the Secretary of Agriculture to delegate to the Chief of the Bureau of Animal Industry the right or authority to make regulations; that the Chief of the Bureau of Animal Industry has at no time prescribed the manner or times of reinspection, as provided by regulation 19; and that the Secretary of Agriculture is not given authority to determine the times of reinspection, as the act specifically provides that reinspections shall be made by the inspectors "when they deem it necessary." The objection to the third count is that the act does not authorize the Secretary of Agriculture to require the presentation of a certificate to the common carrier; that such certificate, if authorized, is not included in the words "marks, stamps, tags, labels or other identification devices" (section 9); and that a false statement in the certificate is not a forging, counterfeiting, or false representation of the certificate.

H. Snowden Marshall, U. S. Atty., of New York City (Roger B. Wood and Ben A. Matthews, Asst. U. S. Attys., both of New York City, of counsel), for the United States.

O'Gorman, Battle & Vandiver, of New York City (I. H. Levy, of New York City, of counsel), for defendants.

RUDKIN, District Judge (orally). I have examined the demurrer in this case and am of opinion that it is not well taken. I have very grave doubt whether the first count of the indictment charges a crime under the Meat Inspection Act (34 Stat. 674); but, inasmuch as it was conceded on the argument that it does charge a crime under the Food and Drugs Act, the demurrer is not well taken.

[1, 2] Personally, I do not think the first count charges a crime under the Meat Inspection Act. That act covers two classes of cases, the one where the establishments are inspected, and the other where they are not. Where the establishment is inspected, and subject to inspection, and the inspection laws are fully complied with, I do not think it was ever the intention of Congress to make a man a criminal, even though he had fully complied with the requirements of the Department of Agriculture. True, the statute imposes a penalty generally for shipping meat unfit for human food. But this is a proviso to that part of the statute exempting certain establishments or certain persons from the operation of the act, and is followed by another proviso limited to the same class.

I realize that a proviso is not necessarily restricted by other parts of the act, and that it may be of general application, but in the connection in which the proviso occurs here, and in view of the general purpose of the act, I am clearly of the opinion that it only relates to retailers and farmers whose products are not subject to inspection under the law. If the act had used the word "knowingly," there might be some reason for a different construction; but the penalty is absolute, and the person must know only that the meat is intended for human food, otherwise he ships it at his peril; and to say that a person whose products have been at least thrice inspected by government authority should ship those products at his peril, especially where the products were inspected immediately before shipment, would be a harsh application of the statute, which I do not think Congress intended, or the courts will enforce.

[3] I do not think that the other counts of the indictment charge a violation of regulations at all. The statute provides that it shall be unlawful to ship unless inspected as required by the act *and the regulations* of the Department of Agriculture. The regulation of the Department of Agriculture is but a condition on which the act operates, and I think it is clearly within the power of the Secretary of Agriculture to require this reinspection of the meat immediately before shipment.

[4] It was argued that the mode of inspection was left to the Bureau of Animal Industry, or some other board, and that that bureau has prescribed no rules. I must take judicial notice of the regulations of the Secretary of Agriculture, but cannot take judicial notice of regulations made by the Bureau of Animal Industry. In any event, this goes merely to the manner of inspection, and not to the fact of inspection.

[5] The same is true of the other count. The statute makes it an offense to counterfeit any certificate authorized or required by the act or *by the regulations* of the Department of Agriculture.

The demurrer will be overruled as to all three counts.

Ex parte CHUNG KIN TOW.

(District Court, D. Massachusetts. April 30, 1914.)

No. 1025.

1. HABEAS CORPUS (§ 92*)—EXTRADITION PROCEEDINGS—QUESTIONS REVIEWABLE—IDENTITY OF PRISONER.

Where petitioner was arrested under an extradition warrant for his return to Illinois as a fugitive from justice, whether petitioner was the same person alleged to have fled from the justice of the demanding state is open to review on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

2. EXTRADITION (§ 39*)—PROCEEDINGS—HEARING BEFORE GOVERNOR OF ASYLUM STATE.

The Governor of an asylum state, on whom requisition is made for the surrender of an alleged fugitive from justice, is not required to hear the prisoner before ordering his removal.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 45, 46; Dec. Dig. § 39.*]

3. HABEAS CORPUS (§ 103*)—EXTRADITION—PROCEEDINGS—CERTIFICATE OF GOVERNOR.

The Governor of a demanding state having certified that requisition papers were sufficient according to the practice of that state, and the Governor of the asylum state having accepted such view and issued his warrant for removal, the court on habeas corpus would not interfere, unless it is clear that the papers do not comply with the statutory requirements in substantial and important particulars.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 90, 91; Dec. Dig. § 103.*]

Habeas corpus on petition of Chung Kin Tow to obtain his release from detention under an extradition warrant issued by the Governor of Massachusetts. Petition dismissed, writ discharged, and petitioner remanded.

Herbert Parker and Thomas J. Barry, both of Boston, Mass., for petitioner.

Leon R. Eyges, Asst. Atty. Gen., of Boston, Mass., for respondent.

MORTON, District Judge. This is a petition for a writ of habeas corpus. The respondent, Frederick F. Flynn, is a member of the Massachusetts district police, and he is detaining the petitioner under a warrant issued by the Governor of Massachusetts for the removal of the petitioner to the state of Illinois upon extradition proceedings instituted by the Governor of that state. Two questions are presented: (1) Whether the petitioner is a fugitive from the justice of the state of Illinois; (2) whether the requisition papers are sufficient in law to justify the warrant for removal.

The material facts are as follows: On or about February 13, 1912, at Chicago, in the state of Illinois, one Mark Chung was assassinated, by being shot to death in a shop in which he was working. The murderer fled. Harry Eng Hong was immediately accused of the mur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

der by alleged eyewitnesses to it, and within four days thereafter the Chicago police published a notice containing a picture supposed to be that of Harry Eng Hong, and saying that he was wanted for said murder. The warrant of the Governor of Massachusetts is against Harry Eng Hong, and the respondent contends that the petitioner is Harry Eng Hong. The petitioner contends that he is not Harry Eng Hong, but Chung Kin Tow, that he never was in the state of Illinois, and is not a fugitive from justice. This was the principal issue of fact before me.

[1] That this question is open upon habeas corpus proceedings, either in the federal or in the state courts, seems to be settled. *McNichols v. Pease*, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; *Robb v. Connolly*, 111 U. S. 624, 638, 4 Sup. Ct. 544, 28 L. Ed. 542; *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515.

The view which I was at first inclined to take, upon analogy to habeas corpus proceedings in immigration and army cases (see *Chin Yow v. U. S.*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Japanese Immigrant Case*, 189 U. S. 86, 100, 23 Sup. Ct. 611, 47 L. Ed. 721; *In re Grimley*, Petitioner, 137 U. S. 147, 150, 11 Sup. Ct. 54, 34 L. Ed. 636), that the decision of the Governor of Massachusetts was conclusive, if fairly made upon fundamentally correct principles of law, cannot, I think, notwithstanding the language used in *Roberts v. Reilly*, 116 U. S. 80, 95, 6 Sup. Ct. 291, 29 L. Ed. 544, and in *Ex Parte Reggel*, 114 U. S. 642, 652, 5 Sup. Ct. 1148, 29 L. Ed. 250, be supported in view of the other decisions referred to. See, too, *Moore on Extradition* (1st Ed.) § 634.

[2] The Governor upon whom the requisition is made is not obliged to hear a prisoner before ordering his removal. "The person demanded has no constitutional right to be heard before the Governor on either question, and the statute provides for none." *Peckham, J.*, *Munsey v. Clough*, 196 U. S. 364, 372, 25 Sup. Ct. 282, 284 (49 L. Ed. 515). The prisoner plainly has a right to be heard upon the questions involved in his extradition. *Robb v. Connolly*, 111 U. S. 624, 638, 639, 4 Sup. Ct. 544, 28 L. Ed. 542. And it seems to follow that his hearing shall be before the court upon habeas corpus proceedings. *Cases supra*; *Rev. Laws Mass. c. 217, § 14*. In this case, however, the Governor of Massachusetts did hear the petitioner fully before ordering his removal to Illinois.

It seems to me to be established by a fair preponderance of the evidence, and I accordingly find, that the prisoner is Harry Eng Hong, the identical person named in the requisition of the Governor of Illinois, and that he was in Illinois at the time when the alleged murder was committed, and is now a fugitive from the justice of that state. In arriving at these findings I have assumed, as contended by the petitioner, without so deciding, that the burden of proof upon the whole case was upon the respondent to justify his detention of the prisoner.

[3] The Governor of Illinois having certified the requisition papers as sufficient according to the practice of that state, and the Governor

of Massachusetts having accepted that view and issued his warrant for removal, this court ought not to interfere, especially since the merits of the controversy are against the petitioner, unless it is clear that the papers do not, in substantial and important particulars, comply with the statutory requirements. It does not seem to me that that can properly be said of the extradition record in this case. McNichols v. Pease, *ubi supra*.

Petition dismissed; writ discharged; petitioner remanded.

UNITED STATES V. HOUGENDOBLER.

(District Court, E. D. Pennsylvania. November 9, 1914.)

No. 28.

CRIMINAL LAW (§ 360*)—TRIAL—EVIDENCE.

In a criminal prosecution, the admission of evidence of transactions prior to the period of limitation, which has a bearing upon what occurred subsequently, is not error, where it has no tendency to show the commission of any offense prior to the one charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 801; Dec. Dig. § 360.*]

Criminal prosecution by the United States against Charles D. Hougendobler. On motion by defendant for new trial and in arrest of judgment. Denied.

John H. Hall, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Cleon N. Berntheizel, of Columbia, Pa., and John E. Malone, of Lancaster, Pa., for defendant.

DICKINSON, District Judge. The motion in this case is based upon two grounds. One is that evidence was admitted relating to matters prior to the statute of limitation. The other is that in presenting the evidence for the United States and that for the defendant the two presentations were so separated that the jury lost sight of the bearing of each toward the other, and this worked an injustice to the defendant.

The admissibility of evidence question relates to some transactions which, although transpiring before the three-year period, had a bearing upon what subsequently occurred. There was no charge of any offense having been committed beyond the three-year period, and no evidence to that effect admitted. Besides this, the jury were expressly told that there was no charge of wrongdoing beyond the limitation period, and, further, that if, by anything which had occurred, the jury had received a different impression from the evidence, they were to disregard it entirely and absolutely, and not consider anything in the nature of wrongdoing which they might think had been done before the statutory period. We are not convinced that there was any error

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the admission of the evidence. We feel satisfied that every precaution was taken to make sure that the defendant should not be prejudiced by the evidence being given a broader scope than that for the purpose of which it was admitted. We find, therefore, in this no reason for interfering with this verdict.

With respect to the complaint made of the charge, the thought was in mind to present as sharply as possible the case and the defense so far as it bore upon the fact of whether or not the aggregate sum of the deposits had been used up for postage on third class mail. This was one of the most important questions of fact in the case, and probably its turning point. If the defendant's version of the facts bearing upon this feature were not adequately presented to the jury, it could not be denied that injustice had been done. We have, therefore, carefully read the charge. We find that the testimony of the witness for the United States and the testimony of the defendant as to this fact are presented in succeeding sentences. The jury, therefore, must have had the whole matter in their mind when they disposed of it. If there was any inadequacy in this presentation, it was that all the evidence supporting the transactions was not marshaled and directed to this point. The only part referred to was the testimony of one witness, and the testimony of the defendant was placed in direct and immediate opposition to it. The jury were told that, if this witness for the prosecution was mistaken in his recollection of that fact, the shortage in the accounts would be explained, and it would, of course, follow that this part of the charge would fall, and equally, of course, all the other charges would go with it. The only ground of complaint against this presentation of that fact is one which might come from the United States, for the reason that it left out other evidence on the part of the prosecution which gave support to the testimony opposed to that of the defendant. We do not see that the defendant can complain of this.

The rule for new trial is discharged.

CONNECTICUT GENERAL LIFE INS. CO. v. EATON, Internal Revenue
Collector.

(District Court, D. Connecticut. October 27, 1914.)

No. 1709.

1. INTERNAL REVENUE (§ 9*)—EXCISE TAX ON CORPORATIONS—MUTUAL INSURANCE COMPANIES—PREMIUM "DIVIDEND."

Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300, 6301), imposes an annual excise tax on insurance companies equal to 1 per cent. of their net income above \$5,000, such net income to be ascertained by deducting from the gross income, *inter alia*, "the sums other than dividends paid within the year on policy and annuity contracts." *Held*, that in case of a life insurance company, which, although a stock company, conducts a mutual department, but collects premiums

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the participating policy holders on the level premium plan, and at the end of the year, when the cost of carrying the policy has been ascertained, credits the policy holder with the excess paid, which he may have applied in reduction of the next premium, to purchase additional insurance, to shorten the premium-paying period of his policy, or to accelerate its maturity in case of an endowment policy, the surplus so applied is not a "dividend," within the meaning of the act, but represents nothing more than the excess of loading of the premium, which is returnable in some form to the policy holder.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, First and Second Series, Dividend.]

2. INTERNAL REVENUE (§ 9*)—EXCISE TAX ON CORPORATIONS—INSURANCE COMPANIES—"INCOME RECEIVED."

Items of "non-ledger assets," shown in the annual report of a life insurance company, made pursuant to a state statute, as "uncollected and deferred premiums" and "interest due and accrued," but no part of which had been received, were not a part of the company's "income received * * * during such year," within the meaning of, and taxable under, Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

3. WORDS AND PHRASES—"INCOME."

"Income" may be defined as the gain derived from capital, from labor, or from both combined.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

At Law. Action by the Connecticut General Life Insurance Company against Robert O. Eaton, as Collector of Internal Revenue for the District of Connecticut. Trial to court. Judgment for plaintiff.

Lucius F. Robinson, of Hartford, Conn., for plaintiff.

Francis H. Parker and Frederick A. Scott, U. S. Dist. Atty., both of Hartford, Conn., for defendant.

THOMAS, District Judge. In this action the plaintiff seeks to recover from the defendant certain taxes which it claims were illegally assessed against it under and by virtue of the provisions of the act of Congress approved August 5, 1909 (36 Stat. 112, c. 6, § 38 [Comp. St. 1913, §§ 6300, 6301]), entitled "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes." The case was heard by the court without the intervention of a jury, in accordance with a stipulation entered into by the attorneys of record, wherein it was agreed that a jury be waived and the case determined by the court in accordance with sections 649 and 700 of the United States Revised Statutes. A finding of facts, in the nature of a special verdict, has been made by the court and filed with the clerk.

For a thorough understanding of this case it is essential to set forth, at the very beginning, a somewhat lengthy statement of the plan of operation adopted by the plaintiff in the conduct of its business, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

well as a statement of the claims of the parties and the facts disclosed by the evidence.

The Connecticut General Life Insurance Company was chartered by the General Assembly of Connecticut, by an act approved June 22, 1865 (5 Private Laws of Connecticut, page 693), and is a stock company doing a life insurance business on both participating (mutual) and nonparticipating plans. The charter provision of the company relating to these plans is contained in the fourth section thereof and reads:

"Policies may be issued, stipulated to be with or without participation in profits, and all dividends which shall be allotted to such participating policies which are not claimed and called for within two years after the same shall have been declared shall be forfeited to said company."

Plaintiff commenced business in October of the year it received its charter, and has since continued, with its main office at Hartford. For a number of years plaintiff has kept the accounts of the mutual and nonparticipating departments of its business entirely separate, so that the mutual policies do not now, nor have they for many years past, been contributing directly to any payments made to the stockholders of the company. The company has been operating on the so-called "level premium plan," which is the plan adopted by practically all of the large life insurance companies, "mutual" as well as "stock."

The level premium plan contemplates a uniform maximum annual contribution by the policy holder during the life of the policy, the amount of payment during the earlier years being in excess of the current cost of his insurance, and the excess being applied to the creation of a reserve fund, which serves to maintain the insurance in the later years, when the stipulated level premium would otherwise be insufficient to meet the current cost of such insurance.

In the case of nonparticipating policy holders, the premium is definitely fixed by the contract, while in the case of a participating policy holder a maximum premium is stipulated, with a contract provision for its annual reduction as determined by the company. The stipulated maximum premium in a mutual or participating policy is invariably greater than the fixed premium in a nonparticipating policy issued at the same age and upon the same terms, other than as concerns the insured's right of participation.

The plaintiff now conducts its participating or mutual department so as to secure to the participating policy holders their insurance at cost, and this result is accomplished by an annual reduction in the stipulated premium, the amount of such reduction being determined from year to year by the company.

The calculation of premium rates by a life insurance company involves, first, the adoption of a table of mortality showing the probable death rate for each age of life; second, the adoption of an assumed rate of interest, such as the company may reasonably expect to realize upon its invested assets during the lifetime of the policy. These two factors determine what is technically known as the "net"

or "mathematical" premium, and are the sums considered sufficient and necessary to pay all outstanding policies as they become claims, provided deaths occur exactly in accordance with the table of mortality adopted, and the rate of interest earned on the investment of the reserve fund proves to be exactly equal to the rate assumed. To the "net premium" there is then added a sum, technically known as "loading," for the purpose of meeting unforeseen contingencies, as also the necessary expenses of conducting the company's business.

Premium rates so computed have, in the experience of mutual life insurance companies, been generally found to be in excess of their requirements; but as such excess constitutes the margin of safety, and must be liberal, the stipulated rate must therefore be sufficiently large to insure, beyond peradventure, the company's ability to pay its claims as they accrue. Some of the policy contracts are likely to run for periods as long as 75 years, but the stipulated premium cannot be increased after once the policy is issued.

In the experience of the plaintiff, as with most other life companies, the actual death rate has been considerably lower than the expectancy shown in the table of mortality which was assumed in the computing of its stipulated premiums, and the interest rate which it has realized upon its investments has proved considerably higher than the assumed rate. The "loading" is also somewhat greater than that ordinarily required to cover the expense of conducting the business and to meet contingencies, and with the margin of safety involved each year has resulted in an excess of income over disbursements and the amount required to be set aside for increase of the so-called reserve.

It has, therefore, been the practice of the plaintiff at the end of the year to take into consideration the results obtained by its participating or mutual department during that year, and with the information at hand to determine the amount of the premiums necessary to be collected from participating policy holders during the succeeding year. In making this estimate the ascertained cost of the insurance for a given year has been taken broadly as the basis upon which to estimate the probable cost for the succeeding year, and upon this estimate the amount of the reduction to be made, or to be credited to policy holders on their stipulated premiums when paying the succeeding year's renewals, is determined. For the purpose of technical solvency, however, a small surplus is always maintained.

The premium reductions allowed by the plaintiff to the several policy holders are apportioned as near as can be upon an equitable basis with respect to their ages and plans of insurance. The policy holder, however, is permitted to pay the full stipulated premium, instead of the difference between the stipulated premium and the amount of the reduction, and in such case the overpayment beyond the amount actually required to continue the policy in force is applied, at the election of the policy holder, either to the purchase of additional insurance or pure endowment, or to shorten the endowment or premium-paying period of the policy. A comparatively small number of the policy holders avail themselves of this privilege, as also of a further option to allow the amount of excess payment to draw interest.

In the case of paid-up policies, the policy holder may annually receive in cash such amount as the company determines to be properly apportionable to him out of the savings of the current year; his share thereof representing principally the excess in interest earnings upon the invested policy reserve over the interest earnings which were assumed in fixing the stipulated premium. The plaintiff also pays in cash, in connection with the settlement of a small class of policies issued years ago upon a semi-tontine plan, dividends which represent accumulated savings upon this class of policies.

The right of the participating policy holder to reductions in annual premiums is evidenced in the outstanding policies of the company. The policies issued prior to July, 1903, contained merely the clause "with participation in the surplus," in distinction from the policies issued by the company containing the clause "without participation in the surplus." The applicant for insurance indicated his preference for a participating policy by answering a question contained in the application: "Kind of insurance applied for, policy, on the mutual plan?" From July, 1903, to January, 1907, the participating policies issued contained the following provision:

"(9) Dividends are declared annually after the second year and may at the option of the insured be applied in any one of the following plans: First. In reduction of premium. Second. To purchase additional full-paid insurance. Third. To accelerate the time of maturity of the policy. Fourth. To purchase pure endowment payable in 10, 15, or 20 years."

The application during this period contained the words "stock" and "mutual," one of which was crossed out to indicate the applicant's election that the policy to be issued should be participating or nonparticipating.

From January, 1907, to June, 1910, the participating policies issued contained the following:

"Dividends. Reduction of premiums as determined by the company will be made annually beginning at the second year, or the insured may pay the full premium and instruct the company to apply the amount of reduction apportioned to him in any one of the following plans: 1. To purchase additional full-paid insurance. 2. To purchase pure endowment payable in 10, 15, or 20 years. 3. As a deposit with the company at 3½ per cent. compound interest, computed annually. 4. To accelerate the time of maturity of the policy. This policy, after full payment of all premiums as therein provided, will participate in an annual division of surplus earnings as apportioned by the company, such dividends to be applicable under any one of the above four options, otherwise payable in cash. The insured may by written notification to the company change the method of dividend application to take effect on any anniversary of the policy, and on any such anniversary may surrender for cash any accumulations under options 1, 2, or 3."

The application contained the following:

"Plan Participating or
Nonparticipating."

Also the question:

"If dividends are not desired in reduction of premiums, how shall they be applied?"

From June, 1910, the policies issued contain the following provision:

"Dividends. Reduction of premiums as determined by the company will be made annually beginning at the second year, or the insured may pay the full premium and instruct the company to apply the amount of reduction apportioned to him in any one of the following plans: 1. To purchase additional full-paid participating insurance which may be surrendered at any time for a cash value of the full reserve. 2. To purchase participating pure endowment which may be surrendered at any time for a cash value of the full reserve. 3. As a deposit with the company at not less than $3\frac{1}{2}$ per cent. compound interest, computed annually. Such deposit may be withdrawn at any time. 4. To convert the policy into an endowment payable at a gradually decreasing age. 5. To shorten the premium-paying period. This policy, after full payment of all premiums as therein provided, will participate in an annual division of surplus earnings as apportioned by the company, such dividends to be applicable under any one of the first four options named above, otherwise payable in cash. The insured may by written notification to the company change the method of dividend application to take effect on any anniversary of the policy."

No change in the application was made at this time in respect of the participating feature.

These cover all of the provisions existing in the participating policy contracts of the plaintiff outstanding in the years 1909 and 1910.

According to the plaintiff's practice a notice is given to policy holders previous to the date premium is due. The material portion of the notice is as follows:

Please send or bring this notice with the cash payment.

Connecticut General Life Insurance Company,
Hartford, Conn.

Mr.

Dear Sir: The annual premium on Policy No. in this company will be due on the day of, 191..., and payable as per statement below.

Premium, — \$.....	Make remittance payable to Agent,
Less Dividend \$.....	
Cash Payment \$.....	

Upon payment of the premium required a premium receipt is given, in form as follows:

Renewal Receipt, Form 3.

Premium \$.....	Connecticut General Life Insurance Company, Hartford, Conn.
Dividend Applied \$.....	
Amount Due \$.....	
Policy No.	

Received, as per margin, \$...../100, continuing in force the above numbered policy on the life of for months, from the day of, 19...

Not valid, unless countersigned by, Agent.

George E. Bulkley, Secretary.

Countersigned at
this day of, 19...
....., Agent.

During the period of time covering the items in controversy complainant had about 37,000 policies, representing about \$44,568,000 of insurance, outstanding, of which about \$19,374,000 represented par-

ticipating policies. About \$164,000 of this was written on the "tontine" or "semi-tontine" plan. At the time of hearing this case the tontine policies outstanding numbered less than 100, and the amount of insurance represented thereby was about \$35,000.

Section 3529 of the General Statutes of Connecticut (as amended by Pub. Acts 1903, c. 19, § 2) provides among other things that:

"Payments in the form of dividends, or otherwise, shall not be made to its stockholders by any life insurance company organized under the laws of this state, unless its assets exceed by the amount of such payment the amount of its paid-up capital stock and all of its liabilities, including its reinsurance reserve upon policies issued before January 1, 1901, computed upon the basis of the actuaries' or combined experience table of mortality with compound interest at four per centum per annum, and upon policies issued after said date computed upon the American experience table of mortality with compound interest at three and one-half per centum per annum; and no payment shall be made to the policy-holders of any such company except for matured claims and in the purchase of surrendered policies, unless the assets of such company exceed by the amount of such payments its liabilities, including its reinsurance reserve, computed as above provided in this section."

In section 3538 of said General Statutes (as amended by Pub. Acts 1907, c. 193, § 1) it is provided that:

"No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insureds of the same class and expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent, subagent, broker, or any other person, make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent, subagent, broker, or any other person, pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy of insurance."

Section 3527 of the General Statutes of Connecticut provides that:

"Every life insurance company chartered by this state shall, on or before the first of March in each year, render to the insurance commissioner a report, signed and sworn to by its president and secretary, of its condition upon the preceding thirty-first of December, which shall include a detailed statement of its assets and liabilities on that day; the amount and character of business transacted, moneys received and expended during the year; a descriptive list of all policies and contracts of insurance in force on that day; and such other information as the commissioner may deem necessary."

Under this last section of the statutes the plaintiff is required, as are all other life insurance companies doing business in Connecticut, to make an annual statement to the state insurance commissioner, upon blanks prepared and furnished by him, covering in detail its financial condition and business operations. In the statement of income and disbursements, as called for on said forms, the companies are required to report various facts which include duplications and cross-entries. Said form also requires a statement of "Ledger Assets," "Non-Ledger Assets," and "All Liabilities, Surplus, and Other Funds."

In its report upon this form to the state insurance commissioner for the years 1909 and 1910 plaintiff reported under 28 heads the following income items, viz.:

	1909.	1910.
1. First year's premiums on original policies without deduction, less first year's reinsurance	\$209,332 87	\$219,694 78
2. Surrender values applied to pay first year's premiums	1,710 65	1,135 59
3. Dividends applied to purchase paid-up additions and pure endowments.....	17,677 00	17,813 95
4. Surrender values applied to purchase paid-up insurance	14,054 03	13,322 92
5. Consideration for original annuities involving life contingencies.....	1,426 61	1,848 82
6. Total new premiums.....	\$244,201 16	\$253,816 06
7. Renewal premiums, without deduction, less reinsurance	\$1,150,933 75	\$1,260,812 93
8. Dividends applied to pay renewal premiums	59,772 43	70,608 63
9. Dividends applied to shorten the endowment or premium paying period.....	411 14	547 94
10. Surrender values applied to pay renewal premiums	2,500 32	1,478 52
11. Total renewal premiums.....	\$1,213,617 64	\$1,333,448 02
12. Total premium income.....	\$1,457,818 80	\$1,587,264 08

Additional items in the income columns of said reports were:

	1909.	1910.
13. Dividends left with the company to accumulate at interest.....	\$4,353 99	\$5,188 35
14. Gross interest on mortgage loans.....	207,678 56	249,157 64
15. Gross interest on bonds and dividends on stocks	120,890 91	122,221 99
16. Gross interest on premium notes, policy loans, or liens.....	50,990 35	62,148 79
17. Gross interest on deposits in trust companies and banks.....	8,471 93	3,809 46
18. Gross interest on other debts due the company	2,234 26	
19. Gross interest on contract of sale.....		171 33
20. Gross interest on capital stock.....		18
21. Gross interest on premium.....		2,129 04
22. Gross discount on claims paid in advance...	58 01	94 52
23. Gross rents from company's property, including \$5,000.00 for company's occupancy of its own buildings.....	22,711 60	22,201 04
24. Void premium notes restored.....	63 50	
25. Agents' balances previously charged off....		10 45
26. Gross profit on sale or maturity of ledger assets, viz.:		
Real estate.....	300 00	388 15
Bonds	810 79	2,675 00
Stocks	2,010 75	3,960 00
27. Unlisted assets, Arizona Water Company bonds	645 00	
28. Gross increase, by adjustment, in book value of ledger assets, viz.:		
Bonds for accrual of discount.....	1,532 00	1,666 00
	\$1,875,570 45	\$2,063,086 02

The second, fourth, and tenth items of each of the income columns of the plaintiff's reports for these years represented no actual receipts

by the company, and were offset by corresponding cross-entries on the disbursement side of the account.

The amounts represented by the third item, "Dividends applied to purchase paid-up additions and pure endowments," and by the thirteenth item, "Dividends left with the company to accumulate at interest," were also included in the seventh item, "Renewal premiums, without deduction," with the result that, although the company actually received these several amounts but once, they are twice accounted for in the footing of total income; the duplication being corrected by cross-entries on the disbursement side of the account.

The eighth item, "Dividends applied to pay renewal premiums," entered both in the income and disbursement columns of the respective reports, represents as a matter of fact no pecuniary transaction, and merely shows the amount of reductions of which participating policy holders availed themselves when making payment of their renewal premiums during these years. In other words, it is the amount of the difference between the maximum premiums contained in their policy contracts and the amounts required of them and which they actually paid as renewal premiums, and the amounts represented thereby appear in the respective reports purely as a matter of bookkeeping.

Among other entries on the disbursement side of plaintiff's said respective reports the following items appear, viz.:

	1909.	1910.
Gross decrease, by adjustment, in book value of ledger assets, viz.: Bonds for amortization of premiums....	\$ 6,201 79	\$ 6,655 29
Gross loss on sale or maturity of ledger assets, viz.:		
Real estate.....	192 50	3,750 00
Bonds	182 74	1,237 84
Stocks		690 67
Dividends paid policy holders in cash.....	17,990 56	32,254 53
Dividends and interest thereon held on deposit surrendered during the year.....	537 78	1,086 89
Paid stockholders for interest or dividends.....	13,500 00	15,000 00

Also under the head of "Non-Ledger Assets" the following items, with others, are entered, viz.:

	1909.	1910.
Interest on mortgages:		
Due	\$ 2,178 67	\$ 2,678 40
Accrued	85,632 71	94,542 03
Interest on bonds:		
Due	400 00	
Accrued	37,686 22	40,374 01
Interest on premium notes, policy loans, or liens:		
Due	11,467 70	9,388 45
Accrued	8,592 68	8,364 84
Market value of bonds and stocks over book value....	29,437 63	24,626 48
Gross premiums due and unreported, on paid-for policies in force December 31:		
New business.....	4,304 46	4,649 21
Renewals	57,033 53	62,786 49
Gross deferred premiums:		
New business.....	24,620 61	31,065 82
Renewals	181,079 19	191,706 26
Net uncollected and deferred premiums:		
New business.....	23,568 24	29,005 42
Renewals	197,393 42	210,573 75

Under the head "Liabilities, Surplus, and Other Funds" there are several entries of items, and among them the following, viz.:

	1909.	1910.
Premiums paid in advance.....	\$5,452 22	\$7,224 54

While in the reports made to the insurance commissioner of Connecticut for the years mentioned plaintiff stated its total income as \$1,875,570.45 in 1909 and as \$2,063,086.02 in 1910, nevertheless, when it came to make its return for the year 1909 to the United States Internal Revenue Commissioner in conformity to the act in question, plaintiff then stated that its total income was \$1,779,180.35, and in its return for 1910 that it was \$1,955,509.71. I find that the difference between the amounts appearing in the reports to the state insurance commissioner and the Internal Revenue Commissioner is practically accounted for by the method of reporting adopted by the insurance commissioner of Connecticut, which, as before stated, has resulted in duplication and cross-entries.

The Commissioner of Internal Revenue, however, as a first amendment to the plaintiff's 1909 return, added to the \$1,779,180.35, returned by it as the gross income from all sources for the year 1909, the amounts covered by the following items:

(1) Dividends applied to pay renewal premiums.....	\$59,772 43
(2) Dividends applied to purchase paid-up additions and pure endowment	17,677 00
(3) Dividends applied to shorten the endowment or premium paying period.....	411 14

The Commissioner deducted \$1,532, representing the income item, "Bonds for accrual of discount," and disallowed \$6,201.79, representing the item "Bonds for amortization of premiums," appearing on the disbursement side of plaintiff's report to the insurance commissioner of Connecticut for that year, which amount plaintiff had claimed as an item of deduction for depreciation when estimating its net income in the return which it made to the Commissioner of Internal Revenue, and thereby he increased the amount of net income to the extent of the difference between these two items, viz., \$4,669.79. He further increased the amount of net income by disallowing \$1,105 of the sum which plaintiff had claimed for deduction on account of its reserve for that year.

Subsequently the Commissioner made a second amendment to plaintiff's gross income for that year by adding thereto an assumed premium income of \$22,536.41, which represents the difference between the amount of "gross premiums due and deferred" on December 31, 1909, appearing in plaintiff's report to the insurance commissioner of Connecticut, and the amount of similar items set forth in plaintiff's report to the insurance commissioner of Connecticut for the year ending December 31, 1908, less \$5,452.22, the amount of the item "Premiums paid in advance" during the year 1909.

The Commissioner also, by his second amendment, added to the gross income the sum of \$9,168.01, which sum represents the difference between the amount of interest reported as "due and accrued" on December 31, 1909, and the amount stated by plaintiff in its report to

the state insurance department as being due and accrued on December 31, 1908. He further added two items which plaintiff does not now dispute, viz.: "Gross discount on claims paid in advance, \$58.01," "Void premium notes restored, \$63.50"—and then added \$1,532, the amount of the item "Bonds for accrual of discount," which he had previously deducted from the amount of gross income stated in plaintiff's original return, and \$14,054.03, representing the item "Surrender values applied to purchase paid-up insurance"; but he offset this last item by allowing the amount thereof as a deduction item in computing plaintiff's net income. He also allowed as a deduction the item "Bonds for amortization of premiums, \$6,201.79," which he had previously disallowed, and the result was that the gross income return for 1909, as amended, was increased from \$1,779,180.35 to \$1,902,920.88.

The plaintiff's return of gross income for the year 1910 was \$1,955,509.71, and to this amount the Commissioner added the following items:

(1) Dividends applied to pay renewal premiums.....	\$70,608 63
(2) Dividends applied to purchase paid-up additions and pure endowments	17,813 95
(3) Dividends applied to shorten the endowment or premium paying period.....	547 94

The Commissioner, however, in said amendment deducted from plaintiff's income return \$1,666, the amount represented by the income item "Bonds (for accrual of discount)," which plaintiff had included as part of its gross income for 1910; but, on the other hand, he disallowed the disbursement item, "Bonds (for amortization of premiums), \$6,655.29," which plaintiff had claimed as a deduction allowance for depreciation when computing its net income, with the result that plaintiff's net income was thereby increased to the extent of the difference between those two items, viz., \$4,989.29.

By his second amendment to the 1910 return the Commissioner added to the gross income a premium item of \$21,397.67, which represents the difference between the "uncollected and deferred premiums" reported by plaintiff to the Connecticut insurance commissioner as of December 31, 1910, and the amount of like items stated in its previous report as of December 31, 1909. He also added, for interest, \$6,599.71, which amount is the difference between the total amount of "Interest due and accrued" reported by plaintiff as of December 31, 1910, and that so reported as of December 31, 1909 (less \$32,669.19, the amount of the item "Premiums paid in advance" during that year), and also \$94.52, being the amount of the item "Gross discount on claims paid in advance"; but by disallowing the item "Increase in net addition to reserve, \$441.54," which plaintiff had claimed as a disbursement and deduction item in computing its net income, he thereby made further addition to plaintiff's net income of the amount of the difference between these two items, viz., \$347.02.

He likewise added to the amount of gross income \$13,322.92, representing the item "surrender values applied to purchase paid-up insurance"; but the effect of the addition of this last item was offset by the allowance of a like sum as a deduction item in the estimating of plaintiff's net income for that year. He, however, added the sum of \$1,-

666, representing the income item, "Bonds (for accrual of discount)," which he had previously deducted from the amount of plaintiff's return of gross income, and then allowed as a deduction item \$6,655.29, "Bonds (for amortization of premiums)," which he had previously disallowed. In this way plaintiff's original gross income return for 1910 was amended and increased from \$1,955,509.71 to \$2,085,895.05.

For the purpose of making clear the matters in dispute between them, counsel for the parties entered into the following stipulation:

United States District Court, District of Connecticut.

The Connecticut General Life Insurance Company v. Robert O. Eaton,
Collector.

At Law—No. 1907.

Stipulation.

In the above entitled cause it is stipulated and agreed that the following is a correct statement of the amounts of the several items as to which the parties are at issue and of the several amounts which the complainant would be entitled to recover if its respective claims be sustained:

In connection with complainant's income for year 1909:

Commissioner's First Amendment of Return.

Amount added to gross income on account of item described in complainant's financial statement made to the insurance commissioner of Connecticut, as contained in Connecticut Insurance Report of 1910 (Government's Exhibit I), page 65, as "Dividends applied to pay renewal premiums".....\$59,772 43

Amount added to gross income on account of items described in complainant's financial statement made to the insurance commissioner of Connecticut as contained in Connecticut Insurance Report of 1910 (Government's Exhibit I), page 65, as "Dividends applied to purchase paid up additions and pure endowment," \$17,677, and "Dividends applied to shorten the endowment or premium paying period," \$411.14..... 18,088 14

Net amount of correction by Commissioner due to exclusion from gross income of item "Accrual of discount," \$1,532, and to exclusion from amount of depreciation of item "Amortization of bond values," \$6,201.79..... 4,669 79

Commissioner's Second Amendment of Return.

Net amount added to gross income as result of computing net income on so-called revenue basis, to wit: Premiums, \$22,536.41; Interest, \$9,168.01..... 31,704 42

Net amount of increase of net income by items whose correctness is not disputed: Discount on claims paid in advance, \$58.01; notes restored, \$63.50; deduction from reserve, \$1,105. 1,226 51

Net amount of items—"Accrual of discount," \$1,532; and "Amortization of bond values," \$6,201.79—excluded in previous amendment and reinstated by Commissioner..... 4,669 79

On account of the first three items above the complainant paid an additional tax on June 29, 1911, of \$825.30, and, if complainant's respective claims as to said items are sustained, complainant would be entitled to recover on account of said items, respectively, \$597.72, \$180.88, and \$46.70, with interest thereon from said June 29, 1911 (except that the item of \$46.70 is not recoverable in the event that it be held that the Commissioner in his second amendment correctly included the so-called revenue basis items).

The complainant paid on February 3, 1912, on account of the corrections in the second amendment, \$282.61, of which the assessment and collection of \$12.27 is not disputed. If the inclusion of the revenue basis items was in accordance with law, there should be no recovery on account of this second payment; but otherwise the complainant would be entitled to recover, by

reason of its payment under the second amendment, \$270.34, with interest from said February 3, 1912.

In connection with complainant's income for year 1910:

Commissioner's First Amendment of Return.

Amount added to gross income on account of item described in complainant's financial statement made to the insurance commissioner of Connecticut, as contained in Connecticut Insurance Report of 1911 (Government's Exhibit II), page 61, as "Dividends applied to pay renewal premiums".....	\$70,608 63
Amount added to gross income on account of items described in complainant's financial statement made to the insurance commissioner of Connecticut, as contained in Connecticut Insurance Report of 1911 (Government's Exhibit II), page 61, as "Dividends applied to purchase paid up additions and pure endowments," \$17,813.95, and "Dividends applied to shorten the endowment or premium paying period," \$547.94.....	18,361 89
Net amount of correction by Commissioner due to exclusion from gross income of item "Accrual of discount," \$1,666.00, and to exclusion from amount of depreciation of item "Amortization of bond values," \$6,655.29.....	4,989 29

Commissioner's Second Amendment of Return.

Net amount added as result of computing net income on so-called revenue basis: Premium, \$21,397.67; Interest, \$6,599.71	27,997 38
Net amount of correction by Commissioner due to inclusion in gross income of item "Discount" \$94.52, and increase in "Net addition to reserve," \$441.54.....	347 02
Net amount of items "Accrual of discount," \$1,666, and "Amortization of bond values," \$6,655.29, excluded in previous amendment and reinstated by Commissioner.....	4,989 29

On account of the first three items above the complainant paid an additional tax on June 29, 1911, of \$939.60, and, if complainant's respective claims as to said items are sustained, complainant would be entitled to recover on account of said items, respectively, \$706.09, \$183.62, and \$49.89, with interest thereon from said June 29, 1911 (except that the item of \$49.89 is not recoverable in the event that it be held that the Commissioner in his second amendment correctly included the so-called revenue basis items).

The complainant paid on February 3, 1912, on account of the corrections in the second amendment, \$226.61. If the inclusion of the revenue basis was in accordance with law, there should be no recovery on account of this second payment; but otherwise the complainant would be entitled to recover, by reason of its payment under the second amendment, \$226.61, with interest from said February 3, 1912.

Complainants,

By Robinson, Robinson & Cole, Its Attorneys.

Frederick A. Scott, U. S. Attorney.

Francis H. Parker, Assistant Attorney.

This case resembles in its main features the case of Mutual Benefit Life Insurance Co. v. Herold, decided by the United States District Court of New Jersey, Cross, J., reported in 198 Fed. 199-218, and confirmed by the Circuit Court of Appeals for the Third Circuit, 201 Fed. 918. That case, however, concerned a purely mutual company without capital stock, whereas this case concerns a company with a paid-up capital stock of \$300,000, although, on the other hand, it appears that the plaintiff, while a stock company, conducts and for a long time has conducted its mutual department solely for the benefit of the holders of its participating policies, and that they have had all the advantages of a purely mutual company, with just so much additional

protection and security as is represented by the paid-up capital of the company. So that it would seem as though the same principles of law are applicable to both cases.

Whatever return stockholders receive from their investments in the stock of the plaintiff company comes, and of necessity, therefore, must come, from the company's nonparticipating department; but, judging from the reports which the plaintiff has submitted to the insurance commissioner of Connecticut, the owners of the plaintiff's stock have had thus far no reasonable cause of complaint as to results affecting their investments.

The essential parts of section 38 of the said act of Congress approved August 5, 1909, are as follows:

"That every * * * insurance company, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such * * * insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, * * * subject to the tax hereby imposed. * * *

"Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, * * * (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to the reserve funds."

[1] The controversy herein has been waged mainly over the question as to whether said section was intended to apply to the so-called "dividends" of a life insurance company operating on the mutual plan, or one conducting a mutual insurance department under conditions such as have obtained in the participating department of the plaintiff company; and before deciding the question thus presented it becomes necessary to consider the different claims of the parties pertaining to this feature of the case.

Briefly stated, the plaintiff claims that the so-called "dividends" in this controversy represent nothing more than a simple reduction allowed to its participating policy holders when paying their renewal premiums, and that consequently the amounts represented by these items are not "dividends" as that term is usually understood, and, further, that Congress must have passed the act with a full knowledge of this fact, therefore the act was not intended to apply to the so-called "dividend" items which form the subject of this controversy.

On the other hand, the gist of the defendant's claim is that the amounts of the disputed items termed "dividends" represent portions of plaintiff's profits or surplus no longer needed to provide for the cost of insurance, expense of management, or as a guaranty fund against future losses, which equitably belong to the mutual policy holders of the company, in proportion to their contribution to the company's funds; that when the plaintiff decides as to the amount of reduction to be allowed to its participating policy holders on their renewal pre-

mium payments, it in fact declares a dividend in their favor for their equitable proportion of said profits or surplus, and that such portion thereby vests in the policy holder, to be divested only in accordance with the provisions of his policy contract; that when the mutual policy holder avails himself of the reduction allowed in making payment of his renewal premium, or pays the full amount of his stipulated premium, and has the amount of such reduction applied by the company either to the purchase of additional insurance, the shortening of the premium-paying period of his policy, or the acceleration of the payment of his endowment, as the case may be, the allowance availed of, or if applied in either of the manners stated, is a payment to the company of the amount of his dividend (or allotment of profits or surplus), and that the payment so received is in each case "income received within the year" by the plaintiff company, within the provisions of section 38 of said act.

The defendant, to sustain his contention, quotes from the case of *Fuller et ux. v. Metropolitan Life Insurance Co. of New York*, 70 Conn. on pages 664, 665, and 666, 41 Atl. 11, wherein the Supreme Court of Connecticut has said:

"This sum, * * * called profits, * * * is in fact a surplus resulting from overpayments by policy holders. This surplus is derived from money paid by the insured and received by the company for a particular purpose; i. e., providing for cost of insurance and expense of management. If not needed for that purpose, it should in equity be returned to the policy holders. They do not, however, own it, or have any legal control over its distribution; part of it, indeed, is derived from contributions of policy holders who are dead; but the equity is recognized, and it is the duty of the company, when a surplus is ascertained, to return such portion as it does not deem proper to keep as a guaranty fund to the existing policy holders in equitable (i. e., as nearly as practicable) proportion to their overpayments or contributions. Such return of overpayments, whether in cash, or by application on future premiums, or by increase of the amount insured, is a dividend. This is the meaning of 'dividend,' and the only meaning it has or can have in connection with mutual insurance." And "when a policy lapses the portions of prior premiums invested and held in reserve can no longer be applied to the purpose for which they were made, and, to the extent of the net gain by the lapse, become overpayments, and in equity should be returned to the holder of the lapsed policy, or to the surplus for the benefit of all. A dividend, therefore, is a distribution of existing overpayments resulting mainly from savings on the annual cost of insurance and expense of management, and in part from savings on the future cost of insurance, i. e., the net gain from lapsed policies."

But it should be remembered that the Fuller Case concerned the construction to be given to certain insurance contracts issued on the so-called "tontine plan," and that the dispute therein mainly arose as to the rights of certain ones of a class of policy holders to obtain a portion of a fund which had been accumulated over a period of ten or more years under what was termed the "reserve dividend plan," in accordance with which those insured in the different classes were to be entitled to receive their proportionate part of the amount thus accumulated only in the event of their surviving for such period as was named in their policy contracts; while the evidence in this case is that the items termed "dividends," on which defendant has collected an additional tax (because they were added by the Commissioner of

Internal Revenue to the gross income of the return which plaintiff made to him), do not represent an accumulated fund, but represent merely the total amount of reductions (or rebates) allowed to certain classes of policy holders of plaintiff's mutual department in accordance with a plan put into operation by the company's executive officers, whereby annually a sum decided upon has been allowed as a reduction or rebate to be availed of by each policy holder of the class when making payment of the renewal premium required by his contract of insurance, and the benefit of which reduction he can elect to receive in either of the ways permitted him by his contract.

It also should be borne in mind that, during the time covered by the matters sought to be litigated herein, the plaintiff has outstanding from \$100,000 to \$164,000 of insurance written on the "reserve dividend plan," and that to this class of policy holders, as well as to a much larger class, such as the holders of "paid-up policy contracts," etc., plaintiff did in fact pay large sums in cash as dividends (\$17,990.56 in 1909, and \$32,254.53 in 1910), and that for the cash dividends thus paid plaintiff has made no claim for reduction in its said reports to the Commissioner of Internal Revenue. Neither has plaintiff made claim of a right to a deduction of the amounts of the disbursement items "Dividends and interest thereon held on deposit surrendered during the year," \$537.78 in 1909 and \$1,086.89 in 1910.

It would appear, therefore, that under the conditions disclosed by the evidence as to the method of operation adopted and pursued by plaintiff in conducting the mutual or participating department of its business the items reported as "Dividends applied to pay renewal premiums," "Dividends applied to purchase paid-up additions and pure endowment," and "Dividends applied to shorten the endowment or premium-paying period," represent nothing more than the amount of the excess of the loading of the policy holders' premiums, over and above the cost to the company of such policy holders' insurance, and that the application made by the said policy holders in either of the ways stated is not such a payment of dividends as contemplated in section 38 of the said act of August 5, 1909.

In arriving at this conclusion the claim made by defendant's counsel as to the rule which should govern in the construction to be given the matter has not been overlooked, but has been applied, in that the court has endeavored to ascertain fairly the meaning and will of Congress as expressed in the particular enactment, to the end that the enforcement of the same might be upheld.

In coming to its conclusion the court adopts to a certain extent the reasoning of the learned judge in the case of Mutual Benefit Life Insurance Co. v. Herold, *supra*. Still, from another point of view which might be had of the question under consideration, one is strongly inclined to believe that the Sixtieth Congress, when passing said act, must have been of the opinion that the term "dividends," when applied to mutual life insurance companies under conditions such as obtain here, would without question be construed as a previous Congress had said it should be construed. In Act June 30, 1864, c. 173, § 120, 13 Stat. 223, 283, and the amendment thereto (Act July 13, 1866, c. 184, 14 Stat. 98, 138), it was provided:

"That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable; nor shall the proportion of premiums returned by mutual life insurance companies to their policy holders, nor the annual or semiannual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends."

It will be noticed that Congress, in the law of 1864, differentiated between "dividends payable by life insurance companies" and so-called "dividends" representing portions of premiums returned to their policy holders.

It therefore seems fair to assume that, Congress having once declared that a distinction should be drawn between these two kinds of dividends in an act of legislation intended to accomplish practically the same purpose as the act now in question, the members of a later Congress, when considering the enactment of the new legislation, were of the opinion that the distinction so clearly stated in the previous enactment would still be held to apply in the interpreting of the same term appearing in the new enactment, until such time as Congress would see fit, by positive action, to disclose a change of intention in relation to that subject.

"The true meaning of a statute is discovered, not merely from its words, but also by comparison with other parts of the act, by reference to previous legislation upon the same subject, and by ascertaining the cause and occasion of the passage of the act, and the purpose intended to be accomplished thereby." *City of Middletown v. N. Y., N. H. & H. R. R. Co.*, 62 Conn. 492, 496, 27 Atl. 119, 120.

Upon the above point the following quotations from the opinion of Judge Cross in the case of *Mutual Benefit Life Insurance Co. v. Herold* (D. C.) 198 Fed. 199, seem quite appropriate. On pages 211 and 212 he says:

"In seeking to ascertain the intention of Congress, it seems but reasonable to assume, in the absence of anything to the contrary, that it used the word 'dividends,' as applied to insurance companies, in the sense it had long and generally borne in insurance matters, which sense had, moreover, been confirmed by repeated judicial decisions. The term should, in other words, be given what might not inappropriately be called its trade signification. *Hedden v. Richard*, 149 U. S. 346, 13 Sup. Ct. 991, 37 L. Ed. 763. Hence, when it refers to dividends 'paid,' it means dividends paid, and not an application of excess premium payments in abatement or reduction of subsequent premiums. The word 'paid,' as used by Congress, is highly significant. It clearly shows that it had cash payments in mind. * * *

"If, therefore, a policy holder by the express provision of his policy elects to have a previous overpayment of premium applied in reduction of a succeeding stipulated premium, what he pays, and all that he pays, or can be required to pay, is the reduced premium, and that is all that the company receives by way of income, and all that it is liable to be taxed for. Such a construction of the act in no wise contravenes its purpose, which was to subject to taxation cash dividends, which, as statistics show, form a very large item in insurance business. Since, then, there is subject-matter which the clause of the act plainly embraces, there is neither reason nor propriety in broadening its scope of construction, so as to make it include that which, by strong implication, at least, it excludes. * * *

"Dividends of the kind under consideration should not be confused with dividends declared in the case of a full-paid participating policy, wherein the policy holder has no further premium payments to make. Such payments having been duly met, the policy has become at once a contract of insurance and of investment. The holder participates in the profits and in-

come of the invested funds of the company. His case is, therefore, radically different from that of a policy holder whose dividend represents merely the excess cost of his insurance, which excess at his request, and pursuant to the terms of his policy, has been applied in abatement or reduction of a future premium. But it may be urged that the fund for which the so-called dividends are declared on mutual policies is likewise largely derived from interest on the company's investments, and that this shows that in a real sense such dividends are, after all, declared from the earnings, profits, or income of the company. This proposition might be entitled to weight, were it not for the fact that, in so far as the fund from which such dividends are declared is produced from interest on the company's invested funds, it has already been subjected to, and has paid, taxes under the act in question."

The amounts of the items "Bonds for amortization of premiums," which plaintiff listed in the disbursement columns of its said reports, should have been allowed as a disbursement, because the testimony shows that the method of annually scaling down the book values of bonds purchased at a premium, and making additions to the book value of bonds purchased below par (represented by the items "Bonds for accrual of discount," found in the income columns of plaintiff's said returns), is in accordance with the law and the requirements of the insurance departments of the different states. Under these circumstances it would seem as though the Commissioner, by adding the net amount of the difference between these two items, committed an error, and that therefore the tax paid by the plaintiff on the amount of this net difference should be recovered; but it is fair to add that in the second amendment for both years the Commissioner conceded the propriety of the deduction of items "Bonds for amortization of premiums" in connection with the inclusion in income of "Bonds for accrual of discount."

[2] As to the net amount of the items "Uncollected and deferred premiums" and "Interest due and accrued," which the Commissioner has added to the amounts of the gross income returned by plaintiff, it was shown by testimony in the case that these items were listed in the reports which the plaintiff made to the state insurance commissioner of Connecticut as "Non-Ledger Assets," because required by the forms furnished plaintiff upon which to make such reports; but that, notwithstanding the fact that these items were so entered, the items themselves did not represent any income for the year in which they were reported, and that they could not be considered as "ledger assets," because there is always a question as to how much thereof will ever be received, due to the peculiar status of insurance policy contracts, in so far as compelling policy holders to pay any portion of the stipulated premiums mentioned therein in the event of the policy holder refusing to make payment. It was further testified that plaintiff duly entered as income and made return for such portion of these items as it received during the years wherein they were paid.

[3] Income may be defined as the gain derived from capital, from labor, or from both combined (*Stratton's Independence v. Howbert*, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285); and as no appreciable gain or benefit could accrue to the plaintiff on account of these items until the same were paid or realized on, this fact, taken in conjunction with the fact that, when payments thereon were made to plaintiff,

such payments were duly accounted for and included in plaintiff's returns of gross income for the year they were received, the Commissioner of Internal Revenue was in error in adding any portion of the amount of these items to the returns for the years under consideration, and therefore the amount of the tax which was exacted from plaintiff because of such addition should be returned.

In view of the agreement contained in the stipulation of counsel relating to the amount of increase to the net income, by the addition of items aggregating \$1,226.51 in the Commissioner's "Second Amendment of Return" for the year 1909, the amount of tax collected upon these items is to be retained by defendant.

The issues having been found in favor of the plaintiff upon the items "Dividends applied to pay renewal premiums," "Dividends applied to purchase paid-up additions and pure endowments," "Dividends applied to shorten the endowment or premium paying period," "Bonds for amortization of premiums," "Premiums due and deferred," and "Interest due and accrued, but not collected," judgment will be entered, pursuant to the terms contained in the stipulation of counsel, in favor of the plaintiff, as follows:

First. To recover from the defendant the sum of \$825.30, with interest from June 29, 1911;

Second. To recover the sum of \$270.34, with interest from February 3, 1912;

Third. To recover the sum of \$939.60, with interest from June 29, 1911; and

Fourth. To recover the sum of \$226.61, with interest from February 3, 1912.

Decree accordingly.

CONNECTICUT MUT. LIFE INS. CO. v. EATON, Internal Revenue Collector.

(District Court, D. Connecticut. October 27, 1914.)

No. 1710.

1. INTERNAL REVENUE (§ 9*)—EXCISE TAX ON CORPORATIONS—MUTUAL LIFE INSURANCE COMPANY—"DIVIDEND"—"INCOME RECEIVED."

In the case of a mutual life insurance company doing business on the level premium plan, which at the end of a year, when the actual cost of carrying a policy is ascertainable, credits the policy holder with the surplus premiums paid, which may be applied in payment of renewal premiums or in other ways provided, such surplus does not represent "income received" by the company during the year, nor "dividends" paid to policy holders, and is not taxable under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300, 6301).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, First and Second Series, Dividend.]

2. INTERNAL REVENUE (§ 9*)—EXCISE TAX ON CORPORATIONS—DEDUCTIONS FROM GROSS INCOME—EXPENSES OF BUSINESS.

Amounts expended by a business corporation in enlarging or making improvements in its office or premises, not in the nature of permanent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

improvements to the property, but to facilitate the transaction of a growing business, should properly be deducted as necessary expenses of the business in computing the taxable net income of the corporation, under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300, 6301).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

3. INTERNAL REVENUE (§ 9*)—EXCISE TAX ON CORPORATIONS—"NET INCOME."

The "net income" of a corporation for any year, taxable under Corporation Tax Act of Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300, 6301), is limited to such income, less allowable deductions, as was actually received during that year, and does not include items which may have been earned, or have become due, but have not been collected.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, First and Second Series, Net Income.]

4. INTERNAL REVENUE (§ 9*)—EXCISE TAX ON CORPORATIONS—PROFITS AND LOSSES ON REAL ESTATE.

A mutual life insurance company from time to time acquired real estate through foreclosure of mortgages securing loans made thereon, which property was carried on the books at a valuation equal to its original cost to the company, and was listed as assets at such valuation in reports to the various state commissioners. In its reports to the Commissioner of Internal Revenue under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300, 6301), the company listed as profits or losses, as the case might be, the difference between the book value and the selling price of such of the real estate as it had sold during the year. *Held* that, under the provision of the act for the deduction from gross income of "all losses actually sustained within the year and not compensated by insurance or otherwise," in the absence of evidence to the contrary, the profits and losses on such sales should be treated as having been made or sustained during the year, and the company was chargeable in its gross income with the profits made, and entitled to a deduction of the full amount of the losses.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

At Law. Action by the Connecticut Mutual Life Insurance Company against Robert O. Eaton, as Collector of Internal Revenue for the District of Connecticut. Trial to court. Judgment for plaintiff.

Lucius F. Robinson, of Hartford, Conn., for plaintiff.

Francis H. Parker and Frederick A. Scott, U. S. Dist. Atty., both of Hartford, Conn., for defendant.

THOMAS, District Judge. This case, like that of Connecticut General Life Insurance Co. v. Eaton, Collector (D. C.) 218 Fed. 188, was brought to recover taxes paid under protest to defendant as Collector of Internal Revenue for the district of Connecticut, which plaintiff claims were illegally assessed against it under and by virtue of the act of Congress approved August 5, 1909 (36 Stat. 112, c. 6, § 38 [Comp. St. 1913, §§ 6300, 6301]), entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes." The essential provisions of the act, for the purpose of considering this case, are:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rev'r Indexes

"That every * * * insurance company * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such * * * insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations * * * subject to the tax hereby imposed. * * *

"Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, * * * (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to the reserve funds. * * *

The parties having waived a jury, the case has been heard and determined by the court in accordance with the stipulation entered into by counsel. A finding of facts, in the nature of a special verdict, has been made by the court and filed with the clerk.

The plaintiff's claim is that the Commissioner of Internal Revenue erred in making certain additions to its respective returns of gross income for the years 1909 and 1910, as well as in disallowing the amount of certain items in said returns which plaintiff says were allowable as deductions under the act to which reference has been made. It will therefore be seen that the court is called upon to decide questions very similar to those presented in the case of *Connecticut General Life Insurance Co. v. Eaton*, Collector, although some of the items herein are somewhat different from some considered in that case.

The plaintiff is a mutual life insurance company, without capital stock, incorporated and operating under a charter issued by the General Assembly of Connecticut in 1846 (*Private Laws of Connecticut*, vol. 3, pp. 646, 647), and is managed by a board of directors chosen by vote of its members, the policy holders; the board of directors in turn choosing the executive officers of the corporation. Plaintiff conducts its business upon the so-called "level premium plan," for an explanation of which see *Connecticut General Life Insurance Co. v. Eaton*, Collector (D. C.) 218 Fed. 188.

Section 14 of the company's original charter provides that:

"On the first Wednesday of January after the organization of said company, or within one month thereof, and in like manner and at like time in each succeeding year, the said company shall cause an estimate to be made of the profits and true state of their affairs for the preceding year; * * * and shall thereupon cause a balance to be struck of the affairs of said company, in which they shall charge each member with a proportionate share of the losses and expenses, according to the original amount of premiums paid by him or her (but in no case shall such share exceed the amount of such premium); and such member shall be credited with his or her proportionate share of the amount of the premiums earned, after deducting the losses and expenses, and of the profits of said company derived from investments, which share of profits so derived shall be credited to each member for his or her proportionate share of the premiums earned, and he or she shall be entitled to a certificate on the books of the company, such certificate to contain a proviso that the amount named therein is liable at any future time for any future losses of the said company."

In the second section of an amendment to the charter obtained in 1856 (3 Priv. Laws, p. 649) it is provided:

"That section fourteenth of said charter be further amended as that dividends or earned premiums may be credited to the members of the company, at the discretion of the directors, and that such dividend credits or certificates may be made due and payable at such times and in such manner as the directors, by their votes, shall determine; and nothing in said section shall require a dividend to be credited to a member, until he or she shall have been insured for the period of one year, and have paid two premiums to said company."

Section 16 of the company's original charter provides that:

"Whenever the net profits of said company shall exceed in amount the sum of two hundred thousand dollars, the excess may be applied from year to year towards the redemption of each year's certificates in the order of their dates and according to their respective priorities."

Section 17 provides:

"That in case any person entitled to a certificate of profits shall be indebted to said company, they may withhold the certificate and deduct such indebtedness therefrom or cancel the same, according to the amount of said indebtedness. * * *

Section 18 provides:

"If a loss accrues under any policy, the certificates of profits issued under the same shall become payable at the same time with such policy; if such policy expires by lapse of time without loss, then the certificates issued under the same shall remain outstanding and liable to assessments, and entitled to payment, according to the provisions of this resolution."

With the view of conforming to the language of section 14 of the charter as amended, the directors of the company each year have met and passed votes substantially the same as the following, which was passed on January 8, 1909:

"Voted: That the estimate made of the profits and true state of affairs of this company for the year 1908, this day submitted by the actuary for the consideration of this board, be, and the same is, accepted and adopted as the estimate required by section 14 of the charter of this company.

"Voted: That in accordance with said section 14 of the charter of this company and the amendments thereto, and the contracts of this company, from the earned premiums and profits as ascertained by said estimate, dividends be credited to the members of this company, and to the payees under participating installment contracts, payable at the time and on the conditions following:

"To members insured by participating policies on the payment, or nonpayment when due, of the third or any subsequent annual premium due in 1909, or the first installment thereof; but if only certain installments of the third or any subsequent annual premium due in 1908 were or shall be paid on participating policies, and nothing on account of premiums thereafter, only the corresponding fraction of such dividend shall be credited on the next anniversary of the due date of the annual premium if the policy be then in force; or, upon the absolute termination in 1909 of any participating premium-paying policy upon which certain installments, or the whole, of the third or any subsequent annual premium due in 1908 or 1909 were or shall be paid, the then present worth of such fraction, or of the whole, of such dividend discounted back from the next anniversary at the rate of 5 per cent. per annum shall be payable; and on payment of the whole or a semiannual or

quarterly installment of the second annual premium the whole, one-half, or one-fourth of the annual dividend shall be allowed.

"To members insured by participating single premium or paid-up policies or additions, upon the anniversary in 1909 of the date thereof, or, in case of continuing automatic insurance, of the due date of the annual premium named in the policy if then in force, except that in case of automatic paid-up insurance which became, or shall become, paid up after the anniversary in 1908 and prior to the anniversary in 1909 only a proportional part of such dividend shall be credited.

"To payees under participating installment contracts, on payment in 1909 of an annual installment certain other than the first or the first fractional payment thereon.

"To persons legally entitled thereto, upon such participating policies as may be received as claims by death or maturity during the year 1909, upon payment of such claims.

"The amount of each such dividend to be ascertained in accordance with the suggestions and recommendations submitted by the actuary this day with the said estimate, which suggestions and recommendations are hereby adopted, and ordered to be spread upon this record, and referred to as a part of this vote.

"This vote is to be construed as of January 1, 1909, and as applying only to policies then in force, or which may be reinstated in 1909."

Whatever references the forms of policies issued by plaintiff have contained as to the right of policy holders to participate in profits or surplus have been varied, as will be seen from the following:

Policies issued from July 1, 1870, to October 31, 1872, provide:

"That, in case of default in the payment of any annual premium when due hereon, if there shall then be a sum sufficient to meet said premium credited by this company upon this policy, by way of dividends or surplus premiums, then, if there be no other indebtedness to this company on account of this policy, said premium shall be considered and receipted as paid, by the cancellation of an equal amount of such dividends or surplus premiums, and that all such dividends or surplus premiums remaining in the custody of this company at the maturity of this policy shall then be payable with the sum herein insured."

On the back of the policy forms in use from December 31, 1887, to April 23, 1904 (with the possible exception of an occasional form used in the latter part of that period), there was this notice:

"The insured under this policy is a member of the company. Members share in its surplus as provided in its charter."

Policies issued between July 1, 1896, and April 23, 1904, contained this additional clause:

"That in case of default in the payment of any premium or installment of premium when due hereon, if a sum sufficient to fully meet said payment, or a quarterly installment of the annual premium, shall have been previously credited by this company on account of this policy by way of dividends or surplus premiums, then if there be no other indebtedness to this company on account of this policy, said premium or installment of premium shall be considered and receipted as paid by the application and cancellation of an equal amount of such previous credit; but such dividends or surplus premiums shall not be so applied unless sufficient to pay in full the required payment or the quarterly cash installment of the annual premium; and any balance of such dividends or surplus premiums declared and credited, remaining in the custody of this company at the maturity of this policy, shall then be payable with the sum herein insured."

Those issued from April 25, 1904, to August 31, 1906, provide that:

"This policy will participate in the distribution of surplus as provided in the charter of the company."

"That in case of default in the payment of any premium or of any installment of premium when due hereon, if a sum at least equal to such payment or to a quarterly cash installment of the annual premium shall have been previously credited by the company on account of this policy by way of dividends or surplus premiums, then if there be no other indebtedness to the company on account of this policy, and unless otherwise directed by the insured, said premium or installment of premium shall be paid by the application and cancellation of an equal amount of such previous credit; but such credit shall not be so applied unless sufficient to pay in full the required payment or at least a quarterly cash installment of the annual premium, and any balance of such credit remaining in the custody of the company at the maturity of this policy shall be payable with the sum herein insured."

Those issued from September 1, 1906, to December 31, 1907, provide that:

"This policy, upon payment of the second annual premium and during its continuance thereafter either as a premium-paying or a paid-up policy, will participate in annual dividends as declared and respectively apportioned by the company's directors. Dividends declared and credited may be applied on premiums due hereon, or drawn in cash, or left with the company to accumulate at such rate of interest as the directors may determine. Any dividends due on account of this policy at its maturity shall be payable with the sum herein insured."

"If any premium or installment of premium be not paid as herein provided, and if there be at that time accumulated dividends credited on account of this policy at least equal to the cash payment required, then, unless previously directed to the contrary in writing by the payee of such accumulations, said payment shall be made by the application and cancellation of an equal amount of such credit; and if such credit be less than the required payment, then out of such credit, if sufficient, shall be paid a semi-annual or quarterly cash installment of the annual premium."

Those issued from January 2, 1908, to February 19, 1913, provide that:

"This policy, upon payment of the second annual premium and during its continuance thereafter either as a premium-paying or a paid-up policy, will participate annually in the divisible surplus which shall be determined and apportioned by the company. The dividend (1) shall be payable in cash to the insured or his assigns, or (2) at the option of the payee thereof, if the company be directed in writing by said payee prior to the expiration of thirty-one days after such dividend becomes payable, may be * * * (2) left with the company, subject to withdrawal, to accumulate at such rate of interest, credited annually at not less than three per centum, as the company may determine, or (3) applied on a premium due hereon, or (4) converted into a paid-up addition to the sum insured hereunder. Any dividends due and unpaid at the maturity of this policy shall be payable with the sum herein insured to the payee of such insurance."

"Whenever the reserve hereon, with any accumulated dividends credited and the cash value of any paid-up additions hereto, shall equal the reserve on a fully paid-up policy of this same kind and amount for the then age of the insured at nearest birthday, upon request by the insured or his assigns and release of such dividends and paid-up additions, if all premiums then due shall have been paid as herein provided, the company will indorse this policy as fully paid up upon presentation hereof at its office in Hartford, Connecticut. Whenever the cash value of this policy and of any paid-up additions hereto, together with any accumulated dividends credited hereon, shall equal the full amount of this policy, then or thereafter, during the lifetime of the insured, upon surrender hereof and release of such dividends and paid-up

additions at such office, the company will pay to the insured or his assigns the face of the policy as a matured endowment, less any indebtedness to the company on or secured hereby.

"If any premium or installment of premium be not paid as herein provided, and if there be at the expiration of the time herein provided for such payment accumulated cash dividends credited on account of this policy at least equal to the payment required, if the company be so previously directed in writing by the payee of such accumulations, said payment shall be made by the application of an equal amount of such credit, or if such credit be less than the required payment then out of such credit, if sufficient, shall be paid a semiannual or quarterly installment of the annual premium."

From July 1, 1910, to February 19, 1913, the words "extended insurance" replace the words "a paid up" in policies which provide for extended insurance rather than paid-up insurance.

The plaintiff has been sending and now sends a premium notice to its members prior to the due date of the premium, the material part of which notice is as follows:

"The next payment on policy No. will be due on the day of, 19.., as follows:

Amount of installment of premium due.....\$
Less dividend (allowed only if renewed).....

Cash payment.....\$....."

Upon payment of the required premium the following form of statement of account and receipt is executed:

No.		Due the Connecticut Mutual Life Insurance Company,	
Annual premium,	\$	in cash, at its office in Hartford, Conn., on the day of, payment as stated in the margin to continue policy No., subject to its terms and conditions, on the life of in force for one year from that date.	
Less dividend,			
Cash payment,	\$		
Received amount as above, and the charge for delay of \$....., this day of, 19..		Authority is hereby given to to receive the stated amount, and receipt for the same hereon.	
		Wm. H. Deming, Secretary.	

Plaintiff on December 31, 1909, had outstanding insurance amounting to \$175,348,671.21 written on the annual dividend plan, \$8,843,658 on the nonparticipating, and \$355,522 with post mortem dividend only. Its business had so increased that on December 31, 1910, it had outstanding \$183,846,413.72 of annual dividend business, \$7,669,841 nonparticipating, and \$352,022 with post mortem dividend only, represented by 77,369 policy holders in 1909 and 80,097 policy holders in 1910. The company, however, for several years past has written and now writes only participating policies; the nonparticipating policies now in force being confined to policies issued for paid-up insurance upon surrender of premium-paying policies where premiums were defaulted, and certain policies of so-called "term insurance."

Section 3529 of the General Statutes of Connecticut (as amended by Pub. Acts 1903, c. 19, § 2) provides among other things that:

"Payments in the form of dividends, or otherwise, shall not be made to its stockholders by any life insurance company organized under the laws of this state, unless its assets exceed by the amount of such payment the amount of its paid-up capital stock and all of its liabilities, including its reinsurance reserve upon policies issued before January 1, 1901, computed upon the basis of the actuaries' or combined experience table of mortality with compound interest at four per centum per annum, and upon policies issued after said date computed upon the American experience table of mortality with compound interest at three and one-half per centum per annum; and no payment shall be made to the policy holders of any such company except for matured claims and in the purchase of surrendered policies, unless the assets of such company exceed by the amount of such payments its liabilities, including its reinsurance reserve, computed as above provided in this section."

Section 3538 (as amended by Pub. Acts 1907, c. 193, § 1) provides that:

"No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insureds of the same class and expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent, subagent, broker, or any other person, make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent, subagent, broker, or any other person, pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy of insurance. No person shall receive or accept from any company or agent, subagent, broker, or any other person, as inducement to insurance, any such rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement not specified in the policy of insurance."

Section 3527 of the General Statutes of Connecticut provides that:

"Every life insurance company chartered by this state shall, on or before the first of March in each year, render to the insurance commissioner a report, signed and sworn to by its president and secretary, of its condition upon the preceding thirty-first of December, which shall include a detailed statement of its assets and liabilities on that day; the amount and character of business transacted, moneys received and expended during the year; a descriptive list of all policies and contracts of insurance in force on that day; and such other information as the commissioner may deem necessary."

In compliance with the last-mentioned section of the statutes the plaintiff has been accustomed to file an annual statement with the insurance commissioner of Connecticut upon blanks prepared and furnished by him, covering in detail its financial condition and business operations. In the statement of income and disbursements, as called for on said forms, plaintiff has been required to report various facts which include duplications and cross-entries. Said forms also provide for statements under headings, "Ledger Assets," "Non-Ledger Assets," and "Liabilities, Surplus, and Other Funds."

In its reports to the state insurance commissioner for the years 1909 and 1910, plaintiff reported the following income and sources thereof, viz.:

	1909.	1910.
1. First year's premiums on original policies without deduction.....	\$543,926 42	\$626,831 57
2. Surrender values applied to pay first year's premiums	1,196 31	1,528 95
3 Dividends applied to purchase paid-up additions and annuities.....	892 71	2,220 67
4 Surrender values applied to purchase paid-up insurance and annuities.....	46,811 50	26,700 29
5. Consideration for original annuities involving life contingencies.....	28,175 19	8,392 25
6. Consideration for supplementary contracts involving life contingencies.....	398 25	469 06
7. Total new premiums.....	\$621,400 38	\$666,142 79
8. Renewal premiums, without deduction.....	\$4,428,125 65	\$4,583,723 47
9. Dividends applied to pay renewal premiums..	918,293 08	906,860 57
10. Surrender values applied to pay renewal premiums	3,000 55	1,291 46
11. Total renewal premiums.....	\$5,349,419 28	\$5,491,875 29
12. Total premium income.....	\$5,970,819 66	\$6,158,018 29
13. Consideration for supplementary contracts not involving life contingencies.....	2,010 88	5,677 95
14. Dividends left with the company to accumulate at interest.....	197,411 88	204,331 50
15. Gross interest on mortgage loans.....	1,169,867 89	1,231,088 90
16. Gross interest on land contracts.....	14,418 07	38,595 69
17. Gross interest on deferred cash payments on real estate sold.....		166 30
18. Gross interest on bonds, and dividends on stocks	1,292,333 36	1,206,846 29
19. Gross interest on premium notes, policy loans, or liens.....	208,993 98	249,607 05
20. Gross interest on deposits in trust companies and banks.....	20,686 84	18,503 86
21. Gross discount on claims paid in advance....	4,503 19	1,035 41
22. Gross interest on other debts due the company	489 11	
23. Gross rents from company's property, including \$35,000 for company's occupancy of its own buildings.....	379,788 63	309,329 65
24. Total gross interest and rents.....	\$3,091,081 07	\$3,055,173 15
25. Payments made to agents corrected.....		446 52
26. Suspense account, unadjusted monthly payments on land contracts.....	24,921 51	
27. Refund on surety bond.....	57 06	
28. Agents' balances previously charged off.....	1 88	
29. Gross profit on sale or maturity of ledger assets, viz.:.....		
Real estate.....	60,225 39	23,573 12
Bonds	8,251 77	164,094 62
30. Gross increase, by adjustment, in book value of ledger assets, viz.:.....		
Bonds (for accrual of discount).....	7,643 96	5,583 19
31. Total income.....	\$9,362,425 06	\$9,616,898 34

The second, fourth, tenth, and thirteenth items of each of the income columns of the plaintiff's reports for these years represented no

actual receipts by the company and were offset by corresponding cross-entries on the disbursement side of the account.

The amounts represented by the third item, "Dividends applied to purchase paid-up additions and annuities," and by the fourteenth item, "Dividends left with the company to accumulate at interest," were also included in the eighth item, "Renewal premiums without deduction," with the result that, although the company actually received these several amounts but once, they were twice accounted for in the footing of total income; the duplication being corrected by cross-entries on the disbursement side of the account.

The ninth item, "Dividends applied to pay renewal premiums," entered both in the income and disbursement columns of the respective reports, represents as a matter of fact no pecuniary transaction, and merely shows the amount of reductions of which participating policy holders availed themselves when making payment of their renewal premiums during these years. In other words, it is the amount of the difference between the maximum premiums contained in their policy contracts and the amounts required of them and which they actually paid as renewal premiums, and the amounts represented thereby appear in the respective reports purely as a matter of bookkeeping.

Among the entries made on the disbursement side of plaintiff's said reports were the following items, viz.:

	1909.	1910.
Gross decrease, by adjustment, in book value of ledger assets, viz.:		
Real estate.....	\$132,971 22	
Bonds (for amortization of premium).....	16,383 05	\$12,987 03
Gross loss on sale or maturity of ledger assets, viz.:		
Real estate.....	239,661 06	182,850 00
Bonds	2,348 41	5,590 98
Mortgage loan.....	200 00	
Dividends paid policy holders in cash.....	301,856 06	293,711 74
Dividends and interest thereon held on deposit surrendered during the year.....	33,474 05	73,716 60
Furniture, fixtures, and safes.....	7,934 09	1,872 73
Repairs and expenses (other than taxes) on real estate	230,035 35	174,440 74

Under the head of "Non-Ledger Assets" the following items, with others, are entered, viz.:

	1909.	1910.
Interest on mortgages:		
Due	\$ 15,121 46	\$ 13,621 81
Accrued	573,852 72	772,840 82
Interest on bonds:		
Due	291,825 40	248,317 63
Accrued		
Interest on premium notes, policy loans, or liens		
Due	149,214 50	149,023 57
Accrued	9,379 21	7,484 57
Interest on land contracts:		
Due	2,895 18	2,601 83
Accrued	12,740 06	11,843 29
Market value of bonds and stocks over book value..	197,566 62	434,165 75

	1909.	1910.
Gross premiums due and unreported, on paid-for policies in force December 31st:		
New business.....	\$ 3,387 10	\$ 6,658 12
Renewals	126,391 39	151,705 75
Gross deferred premiums:		
New business.....	54,220 44	62,448 91
Renewals	417,833 29	437,665 20
Net uncollected and deferred premiums:		
New business.....	46,086 03	55,285 62
Renewals	435,379 74	471,496 76

Under the heading "Liabilities, Surplus, and Other Funds" there are several entries of items, among them the following, viz.:

	1909.	1910.
Premiums paid in advance.....	\$31,542 73	\$ 32,669 16
Unearned interest and rent.....	95,544 52	115,786 45

Although plaintiff, in its reports to the insurance commissioner of Connecticut, stated its total gross income for 1909 as \$9,362,425.06, and for 1910 as \$9,616,898.34, nevertheless in the return which it made to the Commissioner of Internal Revenue for these years it stated its gross income for 1909 as only \$8,034,874.12, and for 1910 as \$8,238,554.09. But in the return for 1909 it failed to include the amounts of certain items which it had listed as income in its report to the state insurance commissioner for that year, viz., the item:

Gross profit on sale or maturity of ledger assets, viz.:		
Real estate.....	\$60,225 39	
Bonds	8,251 77	\$68,477 16

—the amount of which profit items represents the difference between their book value and the amount that plaintiff received from sale thereof (though, in relation to the bonds, the amount received on sale was but \$1,433 above their market value on December 31, 1908); the item, "Gross increase, by adjustment, in book value of ledger assets, viz.: Bonds (for accrual of discount), \$7,643.96"; the item, "Dividends applied to pay renewal premiums, \$918,293.08" (entered on both income and disbursement sides of the report to the state insurance commissioner for that year); and the amount of \$15,320.27, representing certain dividends left with plaintiff in previous years by policy holders, on deposit (and subject to be withdrawn in cash at any time), and the amount of which plaintiff during the year 1909 applied to the payment of premiums at the request of the policy holders, although the amount of this item plaintiff included in the item "Renewal premiums, without deduction," appearing in its report made to the state insurance commissioner in 1910.

The Commissioner of Internal Revenue, however, by a first amendment to plaintiff's gross income return, added the amounts of the items, "Dividends applied to pay renewal premiums, \$918,293.08;" "Dividends left with plaintiff" (in previous years and applied in 1909 to the payment of premiums), "\$15,320.27;" "Gross profit on sale of ledger assets, \$68,477.16;" and "Dividends applied to purchase paid-up additions and pure endowment, \$892.71" (although this last item had been accounted for in plaintiff's return)—thereby increasing the amount of plaintiff's gross income for 1909 to \$9,037,857.34.

Plaintiff in its return for that year had claimed deduction items totaling \$8,233,192.52 (exclusive of the \$5,000 exemption allowed by the act), among which were the following items, appearing on the disbursement side of its statement to the Connecticut insurance commissioner, as "Gross loss on sale or maturity of ledger assets, viz.: Real estate, \$239,661.06; Bonds, \$2,348.41; Mortgage loan, \$200.00;" "Gross decrease, by adjustment in book value of ledger assets, viz.: Real estate, \$132,971.22" (representing the claimed depreciation on a piece of property in Milwaukee known as the "Goldsmith property," which the plaintiff had agreed to sell at that much less than its cost to the company, who had acquired it by foreclosure proceedings in 1905); and \$7,934.09, disbursed for furniture, fixtures, safes, and repairs to plaintiff's home office; but of these the Commissioner refused to allow as deductions the amount of the disbursement for furniture, fixtures, safes, and repairs, \$7,934.09; \$227,437.06 of the \$239,661.06 claimed for loss on sale of real estate; and \$99,728.42 of the claimed depreciation on the "Goldsmith property." He did however, allow as a reduction \$16,383.05, representing the item "Gross decrease, by adjustment, in book value of ledger assets, viz.: Bonds (for amortization of premium)," which item, although entered on the disbursement side of plaintiff's report to the insurance commissioner of Connecticut, plaintiff had failed to claim as a deduction item in its return of income to the Internal Revenue Commissioner, which would make a net disallowance of claimed deductions to the extent of \$318,716.68, but this was figured by the Commissioner as \$318,726.52.

By a second amendment the Commissioner of Internal Revenue added to the gross income the sum of \$5,583.19 on account of the item "Gross increase, by adjustment, in book value of ledger assets, viz.: Bonds (for accrual of discount)," although the actual amount thereof for 1909 was \$7,643.96; \$21,705.04 on account of the "Non-Ledger Assets, deferred and uncollected premiums," and \$63,035.09 for "Interest due and accrued" and "premiums and interest paid in advance"; the amount of the last two items having been accounted for in the income column of plaintiff's statement to the insurance commissioner of Connecticut for the year 1908. The Commissioner of Internal Revenue also made a further change in the return by reducing the amount of \$60,225.39, which he had by his first amendment added to the gross income on account of the item "Gross profit on sale or maturity of ledger assets, viz.: Real estate," to \$7,383.39, having deducted therefrom \$52,842 by prorating the profits over the number of years which the company had held the several pieces of real estate sold by it at a profit in 1909. In this way the amount of gross income was increased to \$9,075,338.21, and its net income for that year for taxation purposes made to appear as \$1,155,862.66.

In its return made to the Commissioner of Internal Revenue for 1910 plaintiff did not include as part of its gross income for that year certain items appearing in the income column of its statement for 1910 to the insurance commissioner of Connecticut, viz.: "Dividends applied to pay renewal premiums, \$906,860.57" (entered once as an item of income and also as a disbursement item in said report);

"Gross profit on sale or maturity of ledger assets, viz.: Real estate, \$23,573.12; Bonds, \$164,094.62;" "Gross increase, by adjustment, in book value of ledger assets, viz.: Bonds (for accrual of discount), \$5,583.19," and "Payments made to agents corrected, \$446.52."

To the \$8,238,554.09 returned as gross income for 1910 the Commissioner added the amounts of the items "Surrender values applied to pay new premiums, \$1,528.95;" "Dividends applied to purchase paid-up additions and annuities, \$2,220.67;" "Surrender values applied to purchase paid-up insurance and annuities, \$26,700.29;" "Dividends applied to pay renewal premiums, \$906,860.57;" "Surrender values applied to pay renewal premiums, \$1,291.46;" "Consideration for supplementary contracts not involving life contingencies, \$5,677.95" (representing a death claim and accumulations left with plaintiff to be paid in installments as requested by a policy holder before death), an item appearing on both income and disbursement sides of plaintiff's report to the insurance commissioner of Connecticut; "Gross discount on claims paid in advance, \$1,035.41;" "Rent from company for occupancy of its own buildings, \$35,000;" "Gross profits on sales of real estate, \$6,767" (amount of this item in report to insurance commissioner being \$23,573.12); "Gross profits on sales of bonds, \$164,314.62" (appearing as \$164,094.62 in the statement to the commissioner of insurance); "Bonds (for accrual of discount), \$5,583.19;" "Deferred and uncollected premiums" and "Premiums paid in advance," \$28,864.95; "Accrued and overdue interest" and "Interest paid in advance (in 1909 and accounted for in that year's report to the insurance commissioner of Connecticut), \$127,963.85;" "Surrender values applied to pay renewal premiums, \$1,291.46;" "Surrender values applied to purchase paid-up insurance and annuities, \$26,700.29," and \$226.52, supposed to represent the item "Payments made to agents corrected, \$446.52," entered in the income column of plaintiff's report to the insurance commissioner of Connecticut—the amount of these additions being \$1,314,035.43, making the total gross income for 1910, as amended, \$9,552,589.52.

In its return of income for 1910 plaintiff had claimed for deduction items amounting to \$8,090,744.58 (exclusive of the \$5,000 exemption allowed by the act), among which were the items "Loss on sale of real estate, \$182,850," and "Loss on bonds sold, \$5,590." The Commissioner, however, disallowed \$166,357.72 of the deduction claimed for loss on sale of real estate and the whole of the amount claimed for loss on bonds sold. He also disallowed \$1,383.49 of the deduction claimed on "addition to reserve," but by then deducting \$35,103.89 of the amount which he had previously added as gross income, covering the items of surrender value applied to payment of premiums, and the purchase of paid-up insurance and annuities amounting to \$29,520.70, and the item, "Bonds (for accrual of discount), \$5,583.19," the net amount of items disallowed was \$138,228.30, and the amount of net income for taxation purposes for that year was computed at \$1,595,072.24.

So as to avoid any misunderstanding as to the items in dispute, and as to the amounts and dates of payment of the taxes sought to

be recovered, counsel for the parties entered into the following stipulation:

United States District Court, District of Connecticut.

The Connecticut Mutual Life Insurance Company v. Robert O. Eaton,
Collector.

At Law—No. 1710.

Stipulation.

In the above-entitled cause it is stipulated and agreed that the following is a correct statement of the amounts of the several items as to which the parties are at issue and of the several amounts which the complainant would be entitled to recover if its respective claims be sustained:

In connection with complainant's income for year 1909:

Commissioner's First Amendment of Return.

Amount added to gross income on account of item described in complainant's financial statement made to the insurance commissioner of Connecticut as contained in Connecticut Insurance Report of 1910 (Government's Exhibit II), page 81, as "Dividends applied to pay renewal premiums: 1 (\$933,613.35—\$15,320.27).....	\$918,493 08
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Amount added to gross income on account of item described in complainant's financial statement made to the insurance commissioner of Connecticut as contained in Connecticut Insurance Report (Government's Exhibit II), page 81, as "Dividends applied to purchase paid-up additions and annuities".....	892 71
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Items added to gross income, which the complainant does not contest:

1 Amount of premiums paid by application to cash credits	\$ 15,320 27	
Book profits on sale or maturity of bonds.....	8,251 77	
Book profit on sale of real estate (prorated in second amendment and reduced to \$7,383.39).....	60,225 39	83,797 43

Amount expended by complainant in office repairs, etc., and excluded by the Commissioner from the item of "the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation" (including \$5,318.82 for alterations in home office). Balance, \$2,615.27, not contested by government.....	7,934 09
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Commissioner's Second Amendment of Return.

Net amount added to gross income as result of computing net income on so-called revenue basis: Premiums, \$21,705.04; interest, \$63,035.09.....	84,740 13
Net amount of decrease in net income due to inclusion of items "Accrual of discount," \$5,583.19, and "Amortization of bond values," \$16,383.05, not contested.....	10,799 86
Net amount of increase in net income due to prorating losses on sales of real estate (\$227,437.06) plus prorated book loss on one parcel contracted for sale (\$99,728.42), less prorated profits on sales of real estate (\$52,842.00).....	\$274,323 48

¹ Note of Explanation.—The total amount of the item added by the Commissioner, to wit, \$933,613.35, included \$15,320.27, dividends credited to policy holders in prior years and left with the company on deposit, subject to withdrawal at any time in cash. These cash credits were at the request of policy holders applied to the payment of premiums paid in 1909, and the complainant does not contest the inclusion in the company's gross income of these cash credits so applied. In the complainant's financial statement as contained in Connecticut Insurance Report of 1910 (Government's Exhibit II) the amount of \$15,320.27 is included in the item "Renewal premiums without deduction."

On account of the first amendment to the complainant's return, the complainant, on May 3, 1911, paid a tax of \$8,075.99, and if the above described item of \$918,293.08 was erroneously included, then the complainant is entitled to recover the amount so paid, to wit, \$8,075.99, with interest from said May 3, 1911.

On account of the second amendment, the complainant, on February 5, 1912, paid an additional tax of \$3,482.64. If all the complainant's claims are sustained the complainant would be entitled to recover the amount so paid with interest from said February 5, 1912 (as the corrections in the return which are conceded by the complainant would not have resulted in any taxable net income), or if all the complainant's claims are sustained except the claims as to revenue basis items (\$84,740.13), as to item of office repairs, etc. (\$7,934.09), and as to item described as "Dividends applied to purchase paid-up additions, etc." (\$892.71), or as to any of said three items, then the complainant would be entitled to recover the amount so paid, to wit, \$3,482.64, as the disallowance of the complainant's claims as to all of said three items would not result in any taxable net income.

If the complainant is not entitled to deduct its full book losses on sales of real estate, and the Commissioner's method of prorating the book losses and profits on sales of real estate is sustained (the complainant's other claims being sustained), then the taxable net income of the complainant, less specific deduction of \$5,000, would be \$144,002.65, and complainant should recover on account of its second payment the difference between said second payment of \$3,482.64 and the correct amount of its liability, \$1,440.03, to wit, \$2,042.61, with interest from February 5, 1912.

If the Commissioner's method of prorating the real estate losses and profits is sustained, and the claims of the complainant as to the following items, or any of them, are disallowed, the amount so recoverable by the complainant on account of its second payment should be said amount of \$2,042.61, less the amounts set opposite said items respectively:

Item described as "Dividends applied to the purchase of paid-up additions, etc." (\$892.71).....	\$ 8 92
Item of office repairs, etc. (\$7,934.09 less \$2,615.27, not contested by government).....	53 19
Item resulting from computation on so-called revenue basis (\$84,740.13)	\$847 40

If the government's claim as to the inclusion in gross income of the above described item of \$318,293.08 is sustained, and if any of the complainant's claims as to any of the following items are allowed, then the amounts recoverable would be the respective amounts set opposite said items, with interest thereon from the date of the payment covering the particular items:

Item described as "Dividends applied to purchase paid-up additions, etc." (\$892.71).....	\$ 8 92
Item of office repairs, etc. (\$7,934.09).....	79 34
Item resulting from computation on so-called revenue basis (\$84,740.13)	847 40
Item resulting from prorating losses and profits on sale of real estate, etc. (\$274,323.48).....	2,743 23

In connection with the complainant's income for 1910:

Amount of addition to net income conceded by complainant (excepting all cross-entries):	
Book profit on sale of real estate.....	\$ 6,767 00
Agents credit balances.....	226 52
Reduction in net addition to reserve.....	1,383 49
Book profit on sale of bonds.....	164,314 62 172,691 63

Amount of addition to net income on account of the following items, the complainant's claims as to which are not contested by the government:

Consideration for supplemental contracts, etc....	\$ 5,677 95
Gross discount on claims paid in advance.....	1,035 41
Home office, book rental.....	35,000 00
Loss on bonds sold.....	5,590 98 47,304 84

Amount added to gross income on account of item described in complainant's financial statement made to the insurance commissioner of Connecticut as contained in Connecticut Insurance Report of 1911 (Government's Exhibit III), page 77, as "Dividends applied to pay renewal premiums".....	\$906,860 57
Amount added to gross income on account of item described in complainant's financial statement made to the insurance commissioner of Connecticut as contained in Connecticut Insurance Report of 1911 (Government's Exhibit III), page 77, as "Dividends applied to purchase paid-up additions and annuities"	2,220 67
Net amount added to gross income as result of computing net income on so-called revenue basis: Premiums, \$28,864.95; Interest, \$127,963.85.....	156,828 80
Net amount of increase in net income due to prorating losses on sale of real estate.....	166,357 72

On account of the amendment to the complainant's return, the complainant on February 5, 1912, paid a tax of \$14,522.64.

By reason of the items not contested by the government, to wit, \$47,304.34, the complainant is entitled to recover \$473.04, with interest from said February 5, 1912.

If the above described item of \$906,860.57 was erroneously included, then the complainant would on account thereof be entitled to recover \$9,068.60, with interest as above.

If the item described as "Dividends applied to purchase paid-up additions and annuities," to wit, \$2,220.67, was erroneously included, then the complainant would on account thereof be entitled to recover \$22.20, with interest as above.

If the so-called revenue basis items (net addition, \$156,828.80) were erroneously included, the complainant would on account thereof be entitled to recover \$1,568.28, with interest as above.

If the complainant is entitled to deduct the full amount of its book losses on sales of real estate, and the Commissioner's method of prorating such losses is erroneous (net increase, \$166,357.72), then the complainant would on account thereof be entitled to recover \$1,663.57, with interest as above.

The Connecticut Mutual Life Ins. Co.,

By Robinson, Robinson & Cole, Its Attys.

The Defendant,

By Frederick A. Scott, U. S. Attorney.

It will be noticed that the plaintiff in this case is, like the plaintiff in *Mutual Benefit Life Insurance Co. v. Herold* (D. C.) 198 Fed. 199, 218, and 201 Fed. 918, a strictly mutual company, and conducts its business in a manner very similar to the plaintiff in that case, except that it makes no book charge against itself of the amounts of the so-called "dividends" in favor of policy holders who only obtain the benefit of these allowed reductions (for prior excessive premium payments) when making payments of renewal premiums, at which time the amount of these dividends are credited to them in either of the ways permitted by their policy contracts, and in that case, as in *Connecticut General Life Ins. Co. v. Eaton*, Collector, *supra*, a good share of the controversy herein has centered around the questions as to what are and what are not "taxable dividends" under the act in question.

Notwithstanding the claims of the parties set forth in the pleadings, in view of the stipulation which the parties have entered into, it becomes necessary for the court to pass only upon those questions which

have been raised concerning the controverted items shown by the stipulation.

[1] The items, "Dividends applied to pay renewal premiums," amounting to \$918,293.08 in 1909, and \$906,960.57 in 1910, do not represent "income received by plaintiff," nor do they represent "dividends paid to policy holders," as the term "dividends" was intended to be understood by the act in question, and therefore the Commissioner erred in adding these items to the plaintiff's respective returns of gross income. *Mutual Benefit Life Insurance Co. v. Herold*, *supra*; *Connecticut General Life Insurance Co. v. Eaton*, *Collector*, *supra*.

The amount of the items, "Dividends applied to purchase paid-up additions and annuities," \$892.71 in 1909, and \$2,220.67 in 1910, represent "income received," and were properly included in plaintiff's respective original returns of gross income for those years. Having been thus once accounted for as income, it was error on the part of the Commissioner to again add the amounts thereof to the plaintiff's gross income returns.

[2] The amount of \$5,318.82 expended for alterations in plaintiff's home office appears to have been disbursed solely with a view of facilitating the carrying on of plaintiff's business, and to have been well within the provisions of the first part of the second paragraph of section 38 of the act.

The changes made in the office do not appear to have been such as to be properly included under the head of "permanent improvements," "alterations," or "betterments," tending to enhance the rental or market value of the building in case of sale. It should be remembered, also, that in these days of up-to-date business method requirements it often becomes necessary for business concerns to change the layout and appointments of the places wherein they carry on business, with a view to economy in space, a saving of unnecessary labor, and the bettering of working conditions of employees, to the end that a net saving of running expenses will result. In view of the consistent expansion of plaintiff's business, which the evidence shows, it would seem that the amount expended for the changes made in the office ought not, under the circumstances, to be considered unreasonable or unusual, and that therefore the amount claimed might well have been allowed as an item of deduction.

It seems to the court that business concerns, in matters of this kind, should be allowed a reasonable discretion, and the law so enforced as to help rather than to hinder them in making reasonable progress in the development of their business, for it must appear to any one giving the matter a moment's consideration that the more successful the business the larger the results, even from the standpoint of taxes accruing to the government.

[3] In relation to the items "due and deferred, though uncollected, premiums" and "premiums paid in advance," on account of which the Commissioner added to the plaintiff's gross returns, \$21,705.04 for 1909, and \$28,864.95 for 1910, which, as well as those covering the items concerning "overdue and accrued, though uncollected, interest and rents," and "interest paid in advance," represent in the first instance the difference in the balances shown by the plaintiff's report to

the insurance commissioner of Connecticut as of December 31, 1908, and the balance of like items shown by its report as of December 31, 1909, and in the second instance the difference between the balance of December 31, 1909, and that of December 31, 1910, the testimony is that, in so far as concerns the amount added on account of the "uncollected premium" items for 1909, no income in fact was received thereon by the company during that year, nor any part of the like addition for 1910 during that year. It also appears that the company still stands a chance of never receiving a large part of the amount of the additions so made, although the items and the amounts thereof are required to be reported in plaintiff's annual statements to the insurance commissioner as "non-ledger assets," because of the form of reports which the insurance commissioner furnishes. The testimony further shows that, whatever payments are received from these sources of revenue, such payments are duly entered and returned as income for the year when received, that the "advance premium payments" made in 1908 on policy premium payments due in 1909 were included in the income reported for 1908, and that all advance payments made in 1909 on account of premiums due in 1910 were included in plaintiff's income return for 1909.

The same is likewise true of the amounts of the items of "overdue, accrued and uncollected, interest and rents," and of the item "interest paid in advance," on account of which the Commissioner added \$63,-035.09 to the income return for 1909 and \$127,963.25 for 1910; for, while plaintiff is obliged to include a statement concerning these items in its annual reports to the insurance commissioner of the state, they actually form no part of its income until paid, at which time the payments are duly entered and reported as income.

In all but the first one of the acts which Congress has passed relative to taxing income (viz., Act August 5, 1861, c. 45, 12 Stat. 292, 309, confined to incomes of individuals), it was provided that the tax be levied upon either the "gross amount of receipts," the "annual gains, profits or income," the "annual gains, profits and income," or upon the "gains, profits and income"; while the act now being considered provides that the tax be levied upon the "entire net income over and above five thousand dollars received during such year." It will also be noticed that in such prior acts provision was made that "interest received or accrued" upon notes, bonds, mortgages, or other forms of indebtedness bearing interest, "whether paid or not, if good and collectible," be included in estimating the "annual gains, profits or income" on which to levy the tax, while the section of this act contains no such provision.

In view of this fact it would seem as though the intention of Congress was that the levying of the tax be confined to such gross income only, i. e., receipts, less allowable deductions, as were actually received during the year, and that therefore the amounts added by the Commissioner covering items stated (because they do not represent income actually received during the respective years) were erroneously added. *Mutual Benefit Life Ins. Co. v. Herold*, supra; *Connecticut General Life Ins. Co. v. Eaton*, Collector, supra.

[4] The Commissioner's action in adding to the gross income returns which plaintiff filed certain amounts on account of profits realized upon sales made of real estate during the years 1909 and 1910, and disallowing a large portion of the deductions claimed for losses on like sales of real estate, including the amount claimed as loss for depreciation of the "Goldsmith property," presents for solution quite a difficult question.

Some of the previous acts passed by Congress, similar to the one in question, contained provisions relating to the estimating as income profits realized from sales of real estate, and some of them also provided for an allowance as a deduction of the losses resulting from sales of real estate, as witnessed by Act June 30, 1864, c. 173, § 116, 13 Stat. 281, wherein it was provided that in estimating income the "net profits realized by sales of real estate purchased within the year for which income is estimated, shall be chargeable as income"; Act March 3, 1865, c. 78, § 1, 13 Stat. 479, that "net profits realized by sales of real estate purchased within the year for which income is estimated shall be chargeable as income, and losses on sales of real estate purchased within the year for which income is estimated shall be deducted from the income of such year"; Act March 2, 1867, c. 169, § 13, 14 Stat. 478, that "profits realized within the year from sales of real estate purchased within the year or within two years previous to the year for which income was (is) estimated;" shall be assessed as part of the income for that year; Act July 19, 1870, c. 255, § 7, 16 Stat. 257, that "in estimating the gains, profits and income * * * there shall be included * * * profits realized within the year from sales of real estate purchased within two years previous to the year for which income is estimated"; and Act Aug. 28, 1894, c. 349, § 28, 28 Stat. 553, that "in estimating the gains, profits, and income of any person there shall be included * * * profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated"—while the only provision contained in the act now in question (in so far as concerns deductions allowed for losses) reads "all losses actually sustained within the year, and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any." It therefore becomes necessary to ascertain just what was intended by the wording of this part of the statute.

Plaintiff acquired title to all of the real estate in question (about 132 parcels) through foreclosure proceedings, and had held title to some of it for as long a time as 30 years before making sale; the title to the "Goldsmith property" having been obtained some time during the year 1905, and the title to none of these places after the year 1908. The properties represented the security given for mortgage loans which plaintiff had originally made thereon, and therefore were not properties purchased by plaintiff for use in the conducting of its business, nor obtained by it for speculation or investment purposes. The several pieces were, until sold, carried on the books of the company at a valuation shown by their cost to plaintiff on the books, and plaintiff always received therefrom, after taking title thereto, a net return on

the investment represented, although on some pieces this return did not average quite 2 per cent. a year. The properties were also listed as real estate forming a part of the company's assets when making annual reports to the insurance commissioners of the several states, at the valuation shown by the company's books, and no exception has ever been taken thereto by any state insurance commissioner, and the testimony shows that an appraisal of these properties was made under the direction of the insurance commissioner for the state of Connecticut in 1907, which appraisal shows slight advance over the book value of the properties.

While the act does provide for the deduction allowance of a reasonable sum for such depreciation of property as has actually taken place within the year, it seems hardly reasonable to believe that such a piece of property as the testimony shows the "Goldsmith property" to have been did depreciate in value to the extent of \$132,971.22 within the year 1909, and especially is it so when it is remembered that plaintiff had acquired that piece of property only about four years previous to the time of sale at a cost so largely in excess of the selling price.

The court is therefore obliged to conclude that the amount thus claimed for deduction was unreasonable, and that the action of the Commissioner in allowing only \$33,242.80 of the claim was fair and just under the circumstances, and that this action in relation thereto should be upheld.

There seems to be no limitation provided in the act as to the amount of deductions to be allowed for losses actually sustained from any source during the year, and whether due to conditions of business, the sale of property, or anything else, and the court must therefore assume that the statute contemplated that the full amount of all losses sustained within the year would be allowed.

The testimony having failed to disclose that the respective amounts claimed for deduction on account of losses sustained by the sales of real estate did not in fact represent actual losses caused to plaintiff thereby within the respective years for which they were claimed, the court must assume that the claimed losses were actually sustained, and for this reason plaintiff must be allowed deductions to the full amount of these losses.

Were the plaintiff a stock corporation, the question might arise as to whether the profits which plaintiff had realized from sales of real estate, the title to which it had obtained previous to the time the act came into operation, should be considered as an addition to its capital, or a part of its yearly income, and, on the other hand, whether the losses sustained by like sales did not in fact represent a diminution of capital, and not such items of actual loss within the year as the act intended should be allowed as deductions when ascertaining the yearly net income for taxation purposes.

The plaintiff being a strictly mutual life insurance company, without capital stock, and no question arising in the case concerning division of any profits accruing from the sales of real estate, the court has not been called upon to decide questions like those which were

raised before Judge Lowell in the United States Circuit Court, District of Massachusetts, in the case of Merchants' Insurance Co. v. McCartney, Fed. Cas. No. 9,443.

In view of the above the issues are found in favor of the plaintiff on the following contested items, viz.: "Dividends applied to pay renewal premiums, \$918,293.08," under the first count, and the like item of \$906,806.57, under the second count; "Dividends applied to purchase paid-up additions and annuities, \$892.71, under the first count, and the like item of \$2,220.67, under the second count; "Disbursements for alterations and furnishings in plaintiff's home office, \$5,318.82," under the first count; "Premiums, rents, and interest due and accrued, though uncollected," and "Premiums and interest paid in advance," computed on a revenue basis as \$84,740.13, under the first count, and the like item of \$156,828.80, under the second count; "Losses on sales of real estate, \$239,661.06," under the first count, and \$182,850, under the second count. And in favor of the defendant on these contested items, viz.: "Profits realized from sale of real estate during the year 1909, \$60,235.39," under the first count, and the like item during 1910, \$23,573.12, under the second count, and on account of "Depreciation claimed on 'Goldsmith property,' \$99,728.42," under the first count.

On the following uncontested items the issues are found for the plaintiff, viz.: "Disbursements made for furnishings, alterations, etc., in plaintiff's home office, \$2,615.27," under the first count (being the balance of that item); "Consideration paid for supplemental contracts \$5,677.95," under the second count; "Gross discount on claims paid in advance, \$1,035.41," under the second count; "Rentals paid for use of home office, \$35,000," under the said count; and "Losses by book on sale of bonds, \$5,590.98," under said second count. And for the defendant on these items, likewise uncontested, viz.: "Premiums paid by application of cash credits (previously left with plaintiff), \$15,320.27," under the first count; "Bonds for accrual of discount, \$5,583.19," under the first count, and "Book profits on sale or maturity of bonds, \$8,251.77," under the first count; "Agents' credited balances, \$226.52," under the second count; "Reduction in net addition to reserve \$1,383.49," under the second count; and "Book profits on sale of bonds, \$164,314.62," under the second count.

It will be noticed that, notwithstanding the Commissioner of Internal Revenue ultimately decided to add to the respective gross income returns only the prorated amounts of the profits which plaintiff realized by sales of real estate in the years 1909 and 1910, instead of the full amount of profits accruing from such sales, this decision has given the government the benefit of the full amount of such profits, and this appears but simple justice, if the plaintiff, on the other hand, is to have the benefit by way of deduction items to the full extent of the losses which it sustained by like sales during these years, although the result will be the same to the plaintiff under the terms of the stipulation of counsel.

Most of the points raised in this case having been fully discussed in *Mutual Benefit Life Insurance Co. v. Herold*, *supra*, as well as in

Connecticut General Life Ins. Co. v. Eaton, Collector, which latter case was decided at this term of court, it hardly seems necessary to do more than to say that the opinion in the latter named case controls and should be read in connection with this decision.

Therefore the judgment of the court is that \$1,894.98 of the amount which was paid as a tax on plaintiff's income for 1910 on account of items added to its return for 1910 by the Commissioner of Internal Revenue be retained, and that plaintiff recover of the defendant the remainder of the taxes thus paid, to wit, \$12,627.66, with interest from February 5, 1912; also that plaintiff recover of the defendant the tax which it paid on account of items which the Commissioner of Internal Revenue added to its income return for 1909 (by his first amendment thereto), viz., \$8,075.99, with interest from May 3, 1911, and that the plaintiff recover of the defendant the tax paid by plaintiff on account of items which the Commissioner of Internal Revenue added to its income return for 1909 (by his second amendment thereto), to wit, \$3,482.64, with interest from February 5, 1912. Under the foregoing rulings, the plaintiff had no taxable income for 1909, and defendant can retain no part of the tax collected.

Decree accordingly.

UNITED STATES v. WETMORE et al.

(District Court, W. D. Pennsylvania. November 24, 1914.)

No. 23.

1. INDICTMENT AND INFORMATION (§ 34*) — FEDERAL COURTS — VALIDITY OF BILL—REQUISITES—INDORSEMENT—PROSECUTOR'S NAME.

Since the forms of indictments for federal offenses are governed by federal law, an indictment for conspiracy to defraud the United States, obtained at the instance of a grand jury, without a private prosecutor, was not defective because a prosecutor's name was not indorsed on the back thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 138-143; Dec. Dig. § 34.*]

2. INDICTMENT AND INFORMATION (§ 9*)—INVESTIGATION BY GRAND JURY—ACCUSATION BEFORE COMMITTING MAGISTRATE OR COMMISSIONER.

Where an indictment was drawn and submitted to the grand jury by order of court, based on a presentment of the grand jury, it was not objectionable because not based on an accusation made before a committing magistrate or commissioner, supported by oath or affirmation.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 34; Dec. Dig. § 9.*]

3. INDICTMENT AND INFORMATION (§ 10*)—FINDING OF INDICTMENT—BASIS—PROCEEDINGS OF GRAND JURY.

Where the grand jury was requested by the United States attorney to investigate a charge of fraud alleged to have been committed against the United States, and in the conduct of such investigation witnesses were called before the grand jury and examined, with the result that a presentment was made against certain persons, accompanied with the request that an indictment be presented against such persons by the district attorney, and the court having so ordered, the indictment was presented, and a true bill found against the defendants, it was not objec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tionable because not based on the personal knowledge or observation of its members, or on the testimony of witnesses who had been previously examined under oath, orally or in writing, by the court, and by it sent to the grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50-61; Dec. Dig. § 10.*]

4. WITNESSES (§ 305*) — PRIVILEGE — INCRIMINATION — TESTIMONY BEFORE GRAND JURY.

Declaration of Rights Pa. § 9, provides that in all criminal prosecutions accused cannot be compelled to give evidence against himself, and Const. U. S. Amend. 5, declares that no person shall be compelled in any criminal case to be a witness against himself; but in the courts of the United States, and in those of Pennsylvania, the disability of a defendant to testify in a criminal case has been removed by statute. *Held*, that the right of a defendant to refuse to testify is a personal privilege, which he may waive; and hence, where defendants were called to testify in a grand jury investigation, concerning an alleged fraud committed by them against the United States, before any proceeding against them had been instituted, or indictment found, and they made no objection to testifying, and did not claim their privilege, an indictment subsequently found against them was not subject to a motion to quash because they testified without notice or warning that they were testifying against themselves and that they were not compelled to do so.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.*]

5. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS—DISTRICT ATTORNEY—CONDUCT BEFORE GRAND JURY.

It was no ground for quashing an indictment that the United States attorney, examining a witness before the grand jury, asked him whether he had been told what to say by a person against whom an indictment was subsequently returned, and whether the witness had been coached by his employers.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

Samuel M. Wetmore and others were indicted for conspiracy with intent to defraud the United States. On motion to quash the indictment. Denied.

E. Lowry Humes, of Meadville, Pa., for the United States.

W. S. Dalzell, of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. The defendants, through their counsel, have filed a motion to quash the indictment. A rule being granted to show cause, the district attorney made answer, and both sides were fully heard on oral argument, affidavits on the part of defendants, and briefs filed.

The indictment charges the defendants with a conspiracy to defraud the United States. It is alleged that the United States, on the date mentioned, had under construction the Panama Canal, and that the Isthmian Canal Commission, appointed under the act of Congress, caused to be issued a circular, being an invitation for proposals to furnish and erect certain mitred lock gates, and for furnishing and delivering certain repair parts, including, among other things, the furnishing of certain specified nickel steel parts to be used in the construction of said gates; that the Isthmian Canal Commission awarded to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McClintock-Marshall Construction Company the contract for the nickel steel, which was by it sublet to the Wheeling Mold & Foundry Company, and by the latter sublet to the Carbon Steel Company, which company accepted said contract and undertook to manufacture and furnish the nickel steel in accordance with the contract and specifications; that the defendants, being officers and employes of the Carbon Steel Company, combined together to defraud the United States, by deceiving the inspectors of the Isthmian Canal Commission, stationed at the mill of said company to inspect the nickel steel so to be furnished to the government; that they were thereby deceived and induced to accept material which was not in accordance with the contract and specifications.

The government instituted an investigation by the grand jury of this district, under which a large number of witnesses were called before it and examined, among them being Samuel M. Wetmore, James E. Lacy, and Henry Lutz, three of the defendants. This investigation resulted in a presentment by the grand jury against the above-named five defendants, the grand jury therein requesting the court that the United States attorney be instructed to lay before the grand jury a bill or bills of indictment against said defendants. Thereupon the court made the following order:

"And now, to wit, May 21, 1914, the foregoing presented in open court and ordered to be filed: and it is further ordered that the United States attorney prepare and present an indictment to the grand jury as recommended."

A bill of indictment was accordingly prepared and presented to the grand jury, on which a true bill was found and returned to the court. The reasons assigned in the motion to quash the indictment are as follows:

"(1) Because the name of the prosecutor is not indorsed upon the indictment, as required by law.

"(2) Because the indictment is not based upon an accusation before a committing magistrate or commissioner, founded upon probable cause and supported by oath or affirmation, as required by law.

"(3) Because the indictment is not based upon a presentment by the grand jury, made from the personal knowledge or observation of its members, or upon the testimony of witnesses who had been previously examined under oath, orally or in writing, by the court, and by the court sent before the grand jury.

"(4) Because the offense charged in the indictment is not of such a nature as that the grand jury, at the instance of the court, should be directed to proceed to its investigation.

"(5) Because three of the defendants named in the indictment namely, Samuel M. Wetmore, J. E. Lacy, and Henry Lutz, were brought before the grand jury under legal process, and compelled to testify, without any notice or warning that they were testifying against themselves, which is contrary to the Bill of Rights of the commonwealth of Pennsylvania, and to the fifth amendment of the Constitution of the United States.

"(6) Because the United States attorney acted in an illegal and highly improper manner, and in derogation of the defendants' rights, in demanding to know of a witness, in the presence of the grand jury, and who was under oath, whether he had been told what to say by Lacy, one of the above-named defendants, who had just preceded the witness before the grand jury, and, further, in demanding to know of another witness, in the presence of the grand jury, and who was under oath, whether he had been coached as to what to say by his employers."

These will be considered in their order.

[1] The first raises the question whether it is essential to the validity of a bill of indictment in the United States court that a prosecutor's name be indorsed on the back thereof. The practice in the state courts on this subject is regulated by Act of Assembly of March 31, 1860 (P. L. 437) § 27, providing as follows:

"No person shall be required to answer to any indictment for any offense whatsoever, unless the prosecutor's name, if any there be, is indorsed thereon, and if no person shall avow himself the prosecutor, the court may hear witnesses, and determine whether there is such a private prosecutor, and if they shall be of opinion that there is such a prosecutor, then direct his name to be indorsed on such indictment."

This section was taken from a clause of the act of 1705 (1 Smith's Laws, p. 56), under which legislation it was held that no indorsement was necessary where no person was active in carrying on the prosecution. *King v. Lukens*, 1 Dall. (Pa.) 5, 1 L. Ed. 13. The indorsement of the name is not conclusive, and the petit jury in imposing costs may designate the actual prosecutor. *Commonwealth v. Ream*, 1 Pa. Co. Ct. R. 33. It was held that, where an indictment was based on a constable's return in the discharge of his official duty, it is not required that the name of the prosecutor be indorsed thereon. *Com. v. New Bethlehem*, 15 Pa. Super. Ct. 158.

The practice in formulating indictments in the United States courts is regulated by federal statutes, and not by state laws. Atwell on Federal Criminal Law, p. 35, at section 17, says:

"It is entirely immaterial what provisions the various states make with reference to the forms of indictments therein; the federal statutes control in the enforcement of the federal criminal law."

Under a statute requiring an indictment to be indorsed "by the prosecutor," such indorsement is necessary only in case there is in fact an existing prosecutor. *King v. Lukens*, 1 Dall. (Pa.) 6, 1 L. Ed. 13. If in fact there were a private prosecutor in this case, which does not in any manner appear, the failure to indorse his name upon the bill would be at most a formal defect, such as would not vitiate the indictment or be ground for quashing the same. Section 1025 of the Revised Statutes (Comp. St. 1913, § 1691) provides:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

We think the first reason is without merit.

[2] Second. Is it essential to the validity of an indictment that it be based upon an accusation made before a committing magistrate or commissioner, supported by oath or affirmation? It was said in *McCullough v. Commonwealth*, 67 Pa. 30:

"It has never been thought that the ninth section of the ninth article of the Constitution, commonly called the Bill of Rights, prohibits all modes of originating a criminal charge against offenders, except that by a prosecution before a committing magistrate. Had it been so thought, the court, the Attorney General, and the grand jury would have been stripped of powers uni-

versally conceded to them. In that event the court could give no offense in charge to the grand jury, the Attorney General could send up no bill, and the grand jury could make no presentment of their own knowledge; but all prosecutions would have to pass first through the hands of inferior magistrates, for in all the instances mentioned the defendant could not be heard by himself or his counsel, demand the nature or cause of accusation, or meet the witnesses face to face, until after the bill had been found by the grand jury.

"In the federal courts, and in some of the states, it has been held that the grand jury alone may call witnesses and institute all prosecutions of their own motion, and without the agency of the district attorney. 1 Whart. C. L. (Ed. 1868) §§ 453, 458. In this state the power of the grand jury is more restricted, and the better opinion is that they can act only upon and present offenses of public notoriety, and such as are within their own knowledge, such as are given to them in charge by the court, and such as are sent up to them by the district attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the Bill of Rights. 1 Wh. C. L. (Ed. 1868) § 458, and note. It has, therefore, been held not to be allowable for individuals to go before the grand jury with their witnesses and to prefer charges. Such conduct is looked upon as a breach of privilege on part of the grand jury, and as a highly improper act on part of such volunteers. Its effect is to deprive the accused of a responsible prosecutor, who can be made liable in costs, and also to respond in damages for a false and malicious prosecution. It is in violation of the act authorizing the defendant to refuse to plead until the name of a prosecutor be indorsed on the bill of indictment. The usual course, where a presentment is thus surreptitiously procured, and bill founded upon it, has been to quash the indictment on motion, and before plea pleaded. It is the only way to reach the wrong. But when the bill has been regularly sent up by the district attorney, under the sanction of the court, upon the return of a proper officer, as in this case, the bill cannot be quashed unless for matters apparent on the face of the record. The court was, therefore, right in refusing to quash the indictment, and the sentence of the defendant is affirmed."

Brown v. Commonwealth, 76 Pa. 319: Indictments were found against Brown, one for the murder of Kraemer and the other for the murder of Kraemer's wife. On the indictment for the murder of the husband he was convicted, sentenced to be hanged, and on appeal the judgment was reversed. The district attorney then sent a new bill of indictment to the grand jury for the murder of the wife, which was returned "A true bill." A motion to quash was made, which was overruled, the prisoner convicted, and an appeal taken. On this assignment of error Chief Justice Agnew said:

"That a bill of indictment may be sent up to the grand jury by the Attorney General, or now, by the district attorney, with the sanction of the court, is shown in *McCullough v. Commonwealth*, 67 Pa. 30. It does not appear that the bill before us was sent up surreptitiously."

In *Harrison v. Commonwealth*, 123 Pa. 508, 16 Atl. 611, the defendant was convicted upon an indictment which did not properly charge the offense, and a new trial was granted. A new bill was sent to the grand jury by the district attorney, with the consent of the court. This indictment charged a different offense, although it referred to the same transaction intended to be charged in the first. The Supreme Court (123 Pa. at page 515, 16 Atl. 612) said:

"It was urged that this charge did not conform to the information, which was for receiving stolen goods. This is true, but the indictment was what is sometimes called a district attorney's bill; that is, a bill sent to the grand jury by that officer, upon his official responsibility, and by leave of court. A

bill so sent cannot be quashed, unless for matters appearing upon its face. *McCullough v. Commonwealth*, 67 Pa. 30."

Under the authorities, we could not quash the indictment because it was not based upon an accusation before a committing magistrate or commissioner, as it was drawn and submitted to the grand jury by order of court, based upon a presentment of the grand jury.

[3] The third reason assigned is that the presentment of the grand jury, upon which the indictment was based, was not made from the personal knowledge or observation of its members, or upon the testimony of witnesses who had been previously examined under oath, orally or in writing, by the court, and by the court sent before the grand jury. This reason assigned is closely akin to the second which has been considered. It is very true that the usual and ordinary course of proceeding is by information, upon which the defendant is given a hearing. But under the authorities this is by no means always a legal prerequisite to an indictment. *Rolland v. Commonwealth*, 82 Pa. 405, 22 Am. Rep. 758.

In *Commonwealth v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894, cited and strongly urged by defendants' counsel in support of their motion, the Supreme Court, after referring to a complaint under oath as the usual method of instituting a criminal proceeding, says:

"Whilst this is the usual method pursued in criminal procedure, there are certain exceptions or extraordinary modes of preferring criminal charges, well recognized in practice. These extraordinary modes of criminal procedure are very well defined and set forth in the footnotes of Wharton's Criminal Law at page 458."

The three exceptions referred to are: First, "where criminal courts of their own motion call the attention of grand juries to, and direct the investigation of, matters of general public import, which from their nature and operation in the entire community, justify such intervention;" second, "where the Attorney-General, ex officio, prefers an indictment before a grand jury, without a previous binding over or commitment of the accused;" and, third, that which is originated by the presentment of a grand jury.

In this case the grand jury was requested by the United States attorney to make an investigation of a certain charge of fraud alleged to have been committed against the United States while the latter was engaged in the construction of a great public work, for the purpose of determining the parties properly chargeable with such fraud. In the conduct of such investigation witnesses were called before the grand jury and examined, with the result that a presentment was made by the grand jury against certain persons, accompanied with a request that an indictment be presented against such persons by the district attorney. The court having so ordered, the indictment was presented, and a true bill found against the defendants. While it is certainly true that this procedure is not the usual method, under the authorities we cannot condemn it as illegal, and we are not prepared to say that the circumstances of the case and the public interests did not reasonably require such action to be taken. See *Hale v. Henkel*, 201 U. S.

43, 26 Sup. Ct. 370, 50 L. Ed. 652, where the authorities are fully reviewed.

The fourth reason assigned in the motion is covered by the discussion of the second and third reasons, and the conclusion therein reached.

[4] The fifth reason raises a very broad and important question. It is urged that Samuel M. Wetmore, J. E. Lacy, and Henry Lutz were brought before the grand jury under legal process and compelled to testify, without any notice or warning that they were testifying against themselves, contrary to the Bill of Rights of the commonwealth of Pennsylvania and to the fifth amendment of the Constitution of the United States. As the law of the case usually depends upon the facts, these must be stated.

The motion to quash is supported by certain *ex parte* affidavits, and is replied to by answer of the District Attorney. From the indictment itself, and affidavits in support of defendant's motion, and the answer thereto, the following facts appear:

At the request of the United States attorney an investigation was instituted by the grand jury of an alleged fraud claimed to have been perpetrated upon the government in the furnishing of certain steel by the Carbon Steel Company to the United States in the construction of the Panama Canal. Witnesses were called before the grand jury, being regularly summoned by subpoena issued out of this court, and examined by the district attorney, among others, the three above named, who were afterwards indicted. These men, and none of the other witnesses, so far as appears, were not notified by the district attorney that they were the subjects of inquiry in the investigation then proceeding. It is not alleged, nor does it in any manner appear, that the said defendants, or any of them, claimed any immunity or privilege from testifying as witnesses, that they made any objection to being sworn or testifying, nor is it shown that the testimony elicited from them tended to incriminate them. On the other hand, it is alleged in the answer of the district attorney that they were not compelled to testify as to any matters which might tend to incriminate them, and that the said three named persons gave to the grand jury no material testimony relative to the matters and things charged in the indictment in this case, but, on the contrary, denied all knowledge of the matters under investigation.

We are then confronted with the broad question whether the mere fact that these men were called, among others, as witnesses in an investigation, which later resulted in an indictment against them and others, renders such indictment invalid. It is urged with great force by defendant's counsel that this proceeding violates section 9 of the Declaration of Rights of the Constitution of Pennsylvania, which declares that "in all criminal prosecutions the accused * * * cannot be compelled to give evidence against himself"; and that it also violates the fifth amendment to the Constitution of the United States, which provides that "no person * * * shall be compelled in any criminal case to be a witness against himself."

In the courts of the United States, and in those of Pennsylvania,

the disability of a defendant to testify in a criminal case has been removed by statute. These statutes are in his interest solely. He may stand mute, or testify, as he will. This right does not arise under the Constitution, but under the statutes, which remove his disability. Before they were passed he could not be compelled to testify adversely to his own interest, because he was not competent to testify at all. The disability continues, unless he chooses to waive it. The prosecution cannot even ask him to be sworn, as this would compel him to make choice in the presence of the jury, which might tend to prejudice his rights.

This protection, under the statutes and the Declaration of Rights in the Constitution of Pennsylvania, relates solely to defendants. On the other hand, the provision in the Constitution of the United States is not confined, or even directed, to defendants. It is for the protection of witnesses, without respect to their connection with the proceedings. This amendment to the Constitution was adopted at a time when defendants could not testify, either for or against themselves, and therefore it could not be construed as referring to defendants as such. It of course includes defendants, if they belong to the class of competent witnesses. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. When the disability with reference to defendants was removed by statute, they then came within the constitutional provision, not because they were defendants, but because they were witnesses.

It has been held that a person cannot be regarded as a defendant, so as to render him such an incompetent witness, until some process is directed against him. *United States v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671; *United States v. Reed*, 2 Blatch. 435, Fed. Cas. No. 16,134. A case very much like the present one is *United States v. Kimball et al.* (C. C.) 117 Fed. 156, in the Southern district of New York. The failure of a national bank was under investigation by the grand jury, there being no formal complaint or accusation, and certain officers of the bank, together with a large number of other witnesses, were called before the grand jury and were examined. Kimball, the president, Rose, the paying teller, and Poor, an officer of the bank, were afterwards indicted and a motion was made similar to the motion here, to quash the indictment on the ground that they had been compelled to give testimony against themselves. Affidavits were filed in support of the motion which were replied to simply by the answer of the district attorney. It seems that Rose, before he testified, had been advised by counsel. Kimball was advised by the United States attorney that he was at liberty to refuse to answer any questions, and that whatever he said would not be used against him elsewhere, whereupon he willingly gave his testimony. Poor was not advised by the United States attorney, but raised no objection to testifying. In a very exhaustive opinion, Thomas, District Judge, overruled the motion to quash the indictment. In the opinion he says:

"The defendants' position that, if the present defendants were not such during the investigation, they became later specific subjects of consideration, and that the evidence taken during the general investigation could not, un-

der section 860, be used to indict them, is untenable. They did not become defendants in the matter before the grand jury until the indictment was found, and the evidence taken prior to such indictment was at all times a part of the same proceeding. Had they been arrested upon warrant issued by a court or commissioner, they would have been defendants under that warrant, and, had they been held under any legal process, they might have been regarded as such. But that a person not even the subject of a complaint is a defendant is the merest chimera."

The court quotes approvingly the position taken in that case by the United States attorney with reference to the defendants' construction of the constitutional provision as follows:

"(1) It would mean that the grand jury as an inquiring body has no right to issue its process to any person who might know or have knowledge concerning any crime to be investigated, if there should be any chance that the person so subpoenaed might in any way become criminally involved in the crime under investigation, and therefore subject to an indictment, and would entail upon that body the impossibility of ascertaining in advance whether there could be any chance of the witnesses' culpability becoming apparent.

"(2) It would mean that an indictment would be invalid if the person against whom it was found had been subpoenaed to appear before the grand jury, had appeared, and had been interrogated concerning the participation of any other person in the charge.

"(3) It would absolutely destroy the usefulness of a grand jury to inquire into crimes generally, or into violations that have been brought to their notice, other than cases that had been held for the grand jury by the respective committing magistrates.

"(4) It would mean that the compulsion denounced in the constitutional amendment begins the moment the process of the grand jury is actually served upon the party to whom it is directed, provided he is in any way connected with the event."

In discussing the question of the compulsion referred to in the constitutional provision, the same judge said:

"The provision means that no person shall be forced to be a witness against himself against his free will. This does not mean that he may not be a witness against himself; otherwise, an accomplice could not testify. It does not mean that any person may not be called and sworn (barring persons under known legal disability). It is an exception that leaves all persons competent to be witnesses, subject to a call to testify, but enables any of such persons to exempt himself from the whole class by pleading that certain evidence which he is called upon to give will tend to show that he has committed an offense. Hence those competent and free-willed to do so may give evidence against the whole world, themselves included; but those unwilling may not be coerced, if it appear that the unwillingness arises from incriminating evidence which they are asked to give. But willingness or unwillingness is subjective, and may be known alone by act, conduct, speech, or perhaps, in extreme cases, by condition. Unless the witness exhibit his unwillingness in some manner, it cannot be presumed to exist. This is especially true, if his conduct be that of a man untrammelled, if he be free from bodily restraint or physical duress, untrifled by menace, and uninfluenced by cajolery or fraud. Presumptively the person summoned belongs to the general body of citizens, competent to testify, and so he may be considered. If he elect to be excepted from this class, he must speak, or his condition or relation to the proceeding must speak for him; for exemptions are allowed only to those who ask for them. Nor is this statement the less true because, as will later appear, he should have a fair opportunity to speak. From this it follows that in a legal sense the doctrine of waiver has no application. The Constitution intends that a person shall not give incriminating evidence under compulsion. Immunity from compulsion is the right reserved."

As a result of the discussion the learned judge said:

"This leads to the further conclusion that all persons, unless incompetent to be witnesses (and named defendants in criminal proceedings are under such disability), may be summoned and sworn and examined; that if one of such class be unwilling to testify, upon the ground that he would become a witness against himself, he must express his unwillingness in some form, and bring himself within the rule that he who would have the benefit of an exemption or privilege must claim it."

It seems to me that under the various decisions in the federal courts the distinction turns, in the case of a witness who is not named as a defendant, on the question whether the witness has or has not claimed the privilege of refusing to testify, on the ground that his testimony would tend to criminate him. In *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, the grand jury in attendance upon the District Court of the United States for the Northern District of Illinois, was investigating certain alleged violations of an act of Congress entitled "An act to regulate commerce," by the officers and agents of the Chicago, Rock Island & Pacific Railroad Company, and those of the Chicago, St. Paul & Kansas City Railroad Company, and other lines of railroad in that district. Counselman appeared before the grand jury in response to a subpoena, was sworn, asked certain questions, and was then asked if he had obtained a rate for the transportation of grain on any of the railroads coming to Chicago at less than the tariff or open rate. He declined to answer, on the ground that it might tend to incriminate him. Other similar questions were asked, which he declined to answer on the same ground. The court, after hearing, held him to be in contempt. A writ of habeas corpus was then taken out, was heard by the Circuit Court, and the writ discharged. On appeal to the Supreme Court of the United States the judgment was reversed. The court in its opinion quoted section 860 of the Revised Statutes as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The Supreme Court held that this section was not as broad as the constitutional amendment; that, while it was true that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence, or used against him or his property, in any court of the United States, in any criminal proceeding, this protected him simply against the use of his testimony against him or his property, but had no other effect; that it could not prevent the use of his testimony to search out other testimony to be used in evidence against him, or his property, in a criminal proceeding in such court; that it could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer,

he could not possibly have been convicted; that legislation cannot detract from the privilege afforded by the Constitution; and that the protection of section 860 is not coextensive with the constitutional provision. The court used this language:

"The manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness."

And again:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. * * * In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It would seem to follow, from this and other opinions, that if no such compulsion exists there is no violation of the constitutional provision.

In *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, the defendant had been subpœnaed before a grand jury in the District Court for the Western district of Pennsylvania, in relation to a charge under investigation against certain officers and agents of the Allegheny Valley Railroad Company, which was alleged to have violated the Interstate Commerce Act. Comp. St. §§ 8563-8604. Brown, after testifying that he was auditor of the railway company, was asked concerning his knowledge as to whether the railway had transported coal, for a certain company, at a less rate than the established rates in force, to which he answered:

"That question, with all respect to the grand jury and yourself, I must decline to answer, for the reason that my answer would tend to accuse and incriminate myself."

He refused to answer other questions on the same ground. Being adjudged in contempt, he took out a writ of habeas corpus from the Circuit Court, and the writ being dismissed, he appealed. The judgment was affirmed by a majority of the court, on the ground that the act of Congress of February 11, 1893, affords absolute immunity against prosecution, federal or state, for the offense to which the question relates, and deprives the witness of his constitutional right to refuse to answer.

In *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Hale, a member of a firm, was subpœnaed to produce certain books and papers of his company, to testify before the grand jury, in a certain action between the United States and the American Tobacco Company and the McAndrews & Forbes Company. An investigation was pending, but no information or other formal action had been taken. He refused to answer certain questions for several reasons, one being that the answer might tend to incriminate him. He was held in contempt, ordered to answer, a writ of habeas corpus sued out by him was discharged, and the petitioner remanded, whereupon he appealed. The judgment was affirmed. As the petitioner had denied the power of the grand jury, in the absence of any prior or

formal accusation, to compel him to testify, the opinion deals first with the general powers of the grand jury. Quoting Justice Brewer in the case of *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657, the opinion states:

"In this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment."

The court further said:

"We deem it entirely clear that, under the practice in this country at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge, or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed, that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them."

This case held that the fifth amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away; that a witness cannot refuse to testify before a federal grand jury in face of a federal statute granting immunity from prosecution as to matters sworn to, although the immunity might not extend to prosecutions in a state court.

In the case under consideration, there being no proof that the testimony given by the three defendants before the grand jury incriminated or tended to incriminate them, and it appearing that they made no objection, or claimed any immunity from testifying on the ground that their testimony might tend to incriminate them, we think there was no violation of the constitutional provisions which protect a witness from testifying against himself, and therefore the fifth reason assigned in the motion to quash cannot be sustained.

[5] There is nothing in the questions complained of in the last reason which would justify us in quashing the indictment. These were directed to a witness, not a defendant, in his separate examination before the grand jury.

In denying the defendants' motion to quash, we do not wish to be considered as lending our sanction generally to the practice of instituting criminal prosecutions by an investigation before a grand jury. The right of a defendant to a preliminary hearing before a magistrate or commissioner, to be informed of the nature of the charge against him, to be confronted with his accuser, and to meet the witnesses against him face to face—these are high prerogatives of the citizen, established by immemorial usage and precedent in the interest of individual freedom; and they should only be departed from in those exceptional or extraordinary cases where the public interest, always paramount, would seem to justify or demand it.

The defendants' motion to quash the indictment is overruled.

BLACK v. CANADIAN PAC. RY.

(District Court, W. D. New York. November 27, 1914.)

1. MALICIOUS PROSECUTION (§ 69*)—DAMAGES—EXCESSIVENESS.

Plaintiff, having been employed by defendant railroad company in the fall of 1911 as station agent in the Canadian Northwest at a salary of from \$90 to \$100 a month, obtained leave of absence in March, 1912, and afterwards resigned without returning to his station. Shortly thereafter he was arrested in Buffalo at the instance of one of defendant's detectives on the charge of being a fugitive from justice; it being claimed that his accounts with the railroad company were short and that he had fled the jurisdiction. When arrested, he protested his innocence, and his sister offered to deposit in any bank an amount sufficient to cover his alleged defalcation pending a re-examination of his accounts. The extradition proceeding was dismissed, however, on plaintiff's agreement to return to Canada and there go over his accounts; it being agreed that during the journey he should be treated as a free man, sleep in a sleeping car, have his meals in the diner, be treated as an ordinary passenger, and have medical treatment, if necessary, for an injured hand. As soon as the detective got him into Canada, however, he was thrust into jail, confined in a cell, refused an opportunity to communicate with his attorney or the American consul, was carried to destination in a coach, handcuffed, compelled to buy his own meals, sleep in the coach, and was refused medical assistance for his hand. On arriving at his destination he was promptly discharged. Defendant's traveling auditor, as a witness for the crown, admitted that there had been a mistake and that there was no case. Plaintiff applied to defendant for return transportation, which was denied, in violation of the previous agreement, and for nine months after he returned he was unable to obtain employment. He testified that he had lost weight and that his health was impaired from mental strain. *Held*, that a verdict awarding him \$25,000 was not excessive.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 158; Dec. Dig. § 69.*]

2. MALICIOUS PROSECUTION (§ 67*)—COMPENSATORY DAMAGES—ELEMENTS.

The elements of compensatory damages in an action for malicious prosecution include loss of time, peril to life and liberty, injury to fame, reputation, and health, mental suffering, and decrease in earning power.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.*]

3. APPEAL AND ERROR (§ 979*)—REVIEW—EXCESSIVE VERDICT.

The correction of an excessive verdict in a federal court is solely a question for the trial court on a motion for a new trial, the granting or refusal of which will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

At Law. Action by David J. Black against the Canadian Pacific Railway. Verdict for plaintiff. Defendant moves for a new trial. Denied.

George Clinton, Jr., of Buffalo, N. Y., for the motion.

Joseph Wechter, of Buffalo, N. Y., opposed.

MAYER, District Judge. [1] The action is for malicious prosecution, and the jury has rendered a verdict in favor of the plaintiff for the sum of \$25,000. At the conclusion of the trial a motion was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made to set aside the verdict on several grounds, and has been disposed of, except in respect of the question as to whether the verdict is excessive. I have not the transcript of the testimony, but from my own minutes I think I can set forth an outline of the facts as they must be assumed to have been found by the jury. Indeed, there was practically no controversy as to the important facts, and the differences in the testimony were merely as to certain details.

Black obtained employment from the defendant in the fall of 1911 as a station agent at Wycliffe in the Canadian Northwest. His salary and commissions amounted to between \$90 and \$100 monthly. He was the sole person there in charge, and, in addition to the customary duties of an agent selling transportation tickets, he had charge of incoming and outgoing freight, also of the business of the Dominion Express Company, was responsible for three flag stations, received and transmitted the contents of telegrams by telephone to the telegraph office, was required to keep certain records in connection with a mine, and to perform certain duties in relation to freights of lumber from a lumber company, which made shipments over the line, and which sometimes, as the evidence shows, remitted direct to the head office of defendant at Montreal.

For a period of time during his incumbency Black had difficulty in obtaining the necessary stationery upon which to make his records, and for a time, at the beginning of his employment, he was compelled to carry the money received by him on his person, because defendant had not furnished him with a safe. It was his duty to make out certain reports on forms somewhat extensive in detail. Some of these reports were required to go forward on the 7th, 14th, 21st, and last day of each month, and were known as weekly reports, and were to be accompanied with such cash and checks as came into his hands. His monthly reports were a résumé of the business of the month, and were copied in impression copy books given to him for that purpose.

In detail the reports contained, not only those items which had to do with the collection of money, either in currency or checks, but also with certain purely record or bookkeeping entries, such as entries in regard to freight of the railroad, consisting of its own material. It was established beyond question that the only accurate method of ascertaining the correctness of the reports of Black was to check up his weekly reports, and check up in connection therewith on his actual receipt of moneys, and to take into account in any calculation those items where no money passed through his hands, and which related solely to bookkeeping or record entries.

In March, 1912, Black obtained a leave of absence for the purpose of attending the funeral of his father. He later returned, and on or about October 10, 1912, requested a leave of absence in order to enable him to visit his mother in Buffalo; it being believed that she was critically ill at that time. Under date of November 15, 1912, he communicated in writing with his superintendent, stating that he was delayed on account of illness, and in due course received his pay check for the month of October. In this communication he stated his correct address, and, having thereafter moved, he gave his new and cor-

rect address when he returned the receipted voucher for his pay. He decided not to return to the employ of the defendant, and obtained employment in Buffalo, and on and for some time prior to August 11, 1913, was employed at the Pierce Motor Works in that city.

On or about July 17, 1913, the index finger of his left hand was taken off in an accident at the motor works, and at the times hereinafter referred to the wound was still healing and required attention. On August 11, 1913, he was arrested at the Pierce Motor Works by a detective of the Buffalo police force, who was accompanied by one Cadieux, a detective of the defendant, on the charge that he was a fugitive from justice. The warrant obtained from the Buffalo court was based on appropriate papers, which, in effect, set forth that Black was charged with the larceny of \$334.02 from the defendant company, that a warrant had issued from the appropriate county court in Canada, and that Black had fled the jurisdiction.

Black was then taken to the jail in Buffalo, where he remained until August 16th. When arrested he protested his innocence, and insisted that his accounts were right, but that, if there was any error, such error was due to inadvertence. He retained an attorney, and certain interviews and negotiations took place between his attorney, himself, and his sister on the one hand, and Cadieux and counsel for defendant on the other, although all of these parties were not present at all of these interviews.

It is insisted on behalf of Black that his sister offered to deposit the amount of his alleged defalcation in any bank in Buffalo named by defendant, pending a re-examination of his accounts. Defendant gave another version of the conversations in this respect, but apparently the jury concluded that the version testified to on behalf of Black was correct. As this offer was not accepted, the negotiations finally resulted in the following arrangement:

The proceeding in Buffalo was to be dismissed; Black was to go voluntarily and without process to Cranbrook, some 2,400 miles away, the county seat at which Judge Thompson of the Canadian court had issued his warrant, and there go over his accounts; throughout the journey Black was to be treated as a free man, and, according to his account, was to sleep in a sleeping car, and have his meals in a dining car, and, in a word, to be treated as an ordinary passenger; in addition he was to have medical treatment if the condition of his hand required; and the testimony of himself and his witnesses to the whole agreement is corroborated in every substantial particular by Cadieux. Cadieux, who seemed to be a well-mannered and kindly disposed man, had stated that he would accompany Black from Buffalo to Cranbrook.

It appeared, however, from a letter received in evidence toward the end of the trial, that this agreement was not intended to be carried out, for Cadieux had written to his chief (the head of the detective department of the railway), after the arrangement was made, detailing the situation and stating in substance, or by fair inference, that he would get Black to Canada and then that Black could be placed under restraint. The evidence fully warranted the conclusion that Black was to be tricked across the border on a promise which was to be broken.

It is hardly necessary to add that this scheme of deception was not made known to the reputable counsel who represented defendant in the matter.

On August 16, 1913, Cadieux and Black started for Toronto, Canada, and during that trip Black was not subjected to any physical inconvenience; but on arrival at Toronto, and in plain violation of the agreement, Black was thrust into the jail at the police station, confined there in a cell until the evening of August 19th, and during that time was not permitted to communicate with his attorney in Buffalo, or with the American consul at Toronto, and, more than that, was not able to obtain medical service, although he had requested the same. He paid for his own meals, and was compelled to undergo considerable hardship, so far as his physical comfort was concerned, not to speak of his great mental distress. Cadieux, pursuant to instructions, went elsewhere and left no word as to the arrangement with Black, and I am satisfied that it was intended that he should not leave word.

Thus a prisoner, cut off from communication with his friends, prevented from reaching the consular representative of his own country, treated in every way as if a criminal, he was taken in charge by another Canadian Pacific detective, named Newton, haled through the streets to the railway station, and there taken aboard of a day coach at about 9:30 in the evening. From the time Newton took Black in charge at the police station he handcuffed him, and on the train, where no sleeping accommodations were afforded to Black, Newton handcuffed his two wrists, and kept him in this condition, and would not remove the handcuff until the pain was so great that Black threatened to appeal to the passengers if Newton did not relieve him. At 1 o'clock in the morning Newton released the sore hand, but thereupon chained Black's right hand to the seat, and, with some few intervals, such as when Black went in to his meals, Newton kept Black chained to the seat day and night. Black requested the services of a doctor for his hand, but this was not accorded to him, and, without elaborating details, I may observe that while he was in Newton's custody Black was treated about as brutally and outrageously as one man can treat another, and worse, if anything, than if he had been a dangerous desperado.

At Winnipeg, Newton turned Black over to another Canadian Pacific detective, named Adams. Adams seems to have been a humane man, and made the remainder of the journey as comfortable as circumstances would permit, and obtained brief medical treatment for Black at a place called Brandon. It may be remarked, in passing, that on this journey with Newton Black did not obtain all of his meals.

Arriving at Cranbrook, Black was taken to the provincial jail there, and remained in the jail until about September 17th. During his incarceration in the jail he was permitted to be out of his cell during the day, although of course, detained in the jail, and his impression copy books were placed at his disposal; but no information was given to him in respect of what items it was claimed constituted the details of his alleged defalcation.

When the case came on before Judge Thompson on September 17th, the judge dismissed the same on the showing of the crown, and there

was not even any necessity of calling Black to the stand. The traveling auditor of defendant, a witness for the crown, admitted in substance to Judge Thompson that a mistake had been made and that there was no case. Black had paid \$50 to a local attorney to represent him, and after his acquittal applied to the proper official of the defendant for transportation home in accordance with the agreement, made in Buffalo with Cadieux, that if the charge turned out to be erroneous then Black was to have transportation back to Buffalo. The transportation was refused, and Black, on his own resources, in due course of time returned to Buffalo.

This outline, in cold type, hardly does justice by way of description to the experiences which this man was compelled to undergo through no fault of his own, and through a course of conduct manifestly careless and reckless on the part of defendant from the beginning to the end. For nine months after Black returned home he was unable to obtain employment, and after that he seems to have taken any job he could in order to earn a living for his family. He testified that he had lost weight and that his sleep was restless, and certainly his appearance justified the conclusion that he had suffered some severe mental strain.

Phillips, the traveling auditor, was in court at this trial, but did not take the stand. The defendant did not produce, upon its behalf, the weekly reports, nor was any attempt made to controvert, not merely the innocence of Black, but lack of probable cause, by showing that he had converted a single penny to his own use. It appeared that the auditor had merely examined Black's books at the Wycliffe station, and had there found an aggregate of errors and omissions mainly of a bookkeeping character, both in favor of Black and against him. In other words, Black had made certain mistakes by which he had credited himself with more than he was entitled to, and had made certain other mistakes by which he had charged himself with more than he was liable for. In some of his monthly reports his detailed items were correct, but his additions were erroneous, so that in this regard he had clearly and honestly shown what had come into his hands, but had made some purely clerical errors in addition—for instance, one as trifling as 76 cents in adding a column of figures.

Further, one of the largest items charged against him was, as I recall, a matter of \$554.85 in relation to waybills for freight of the lumber company, where the money did not pass through his hands, but, on the contrary, was remitted direct by the lumber company to the head office at Montreal. A person exercising, not merely ordinary intelligence, but the slightest degree of intelligence, after examining Black's impression copy books, would at once conclude that if the man had made any mistakes, and had thereby received \$334.02 of defendant's money which did not belong to him, then those mistakes must have been the result of clerical errors or omissions, without any intent to do a wrong.

The total mistakes on one side of the account made by Black aggregated \$1,083.58, while on the other side of the account, and against himself, his mistakes footed up \$749.56. A man intending to steal money hardly makes a mistake against himself of nearly \$800. The

very least that should have been done, before the warrant was issued and the arrest made, was to check up against the reports and accounts at the head office in Montreal, for it must be concluded on the evidence that that checking up would have demonstrated that Black had not stolen anything. Upon this state of facts the jury was charged that it would award compensatory, but not punitive, damages, as actual malice had not been shown.

[2] The elements of compensatory damage include, among other things, loss of time, peril to life and liberty, injury to fame, reputation, and health, mental suffering, and decrease in earning capacity. See 26 Cyc. (Ed. 1907) p. 62 et seq. This case belongs to a class where the jury is peculiarly the proper judge of the amount of damages, and, before a verdict may be set aside or remitted in part, the court, under well-known rules, must be satisfied that the result was influenced by passion or prejudice, or that the amount was grossly disproportionate to the wrong inflicted.

Neither on the evidence, nor because of the manner and method of the trial, can I say that the verdict was arrived at by other than calm, orderly processes. The extraordinary story of plaintiff turned out to be true, and was told in quiet, dignified fashion, without any attempt on the part of himself or his attorney to be dramatic, as sometimes happens in a courtroom. The jury, if observation of faces and manner counts for anything, was an attentive, sober-minded, and hard-headed set of men.

[3] The correction of an excessive verdict is solely a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the federal appellate courts. (*Erie Railroad Co. v. Winter*, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71; *Northern Pacific R. R. Co. v. Charless*, 51 Fed. 562, 579, 580, 2 C. C. A. 380); and therefore I have considered it desirable to state somewhat fully, not merely the testimony, but as well the human characteristics, of the trial.

The verdict is substantial, but cases of this character stand on their own facts, as illustrated by the verdicts in malicious prosecution actions collated in 26 Cyc. pp. 65, 66. As far back as the Michaelmas term of the Court of Common Pleas in 1779, Sir William Blackstone and his associate judges said:

"That in cases of tort the court will not interpose on account of the largeness of the damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury."

And the court sustained a verdict for £10,000. *Leith, Baronet, v. Pope*, W. Bl. 1327.

In *Mexican Central Railway Co. v. Gehr*, 66 Ill. App. 173, a verdict for \$40,000 was sustained in favor of a railroad employé receiving a salary of \$115 per month, who was wrongfully imprisoned in Mexico.

I have not been able to find any case in the books, except the *Leith* and *Gehr* Cases, which approaches in gravity the case at bar, and in some respects this case is more serious than the *Gehr* Case. Mr. Justice Shepard, delivering the opinion of the court in the *Gehr* Case, said:

"The only remaining question which we feel called upon to discuss is that of the amount of judgment recovered. When verdicts are so large, it is always a subject of difficulty, there being no possible rule by which to measure compensation in such cases. * * * What shall be the estimate of his good name? * * * What is a fair return for his injured health, or, if his life be shortened because of the imprisonment, what sum of money will make that loss good? Numerous questions may be asked that bear upon the question of what is just compensation in such a case, but no satisfactory answer to any of them can be made. The law has provided that the jury shall decide the question, and unless their verdict is based upon undue partiality, passion, or prejudice, or is such as to shock the conscience of the court, it must stand. The judge before whom the cause was tried required nothing to be remitted from the verdict as a condition that it should not be set aside altogether, and it would be a mere assumption of superior wisdom in such respect for us to measure out a less sum and say that it is sufficient. We might think that a less judgment would be enough, but it would be a guess that we are not called upon to make."

In the case at bar two of the important elements of damage were mental suffering and injury to reputation. Upon a state of facts such as here disclosed, can it be said that the mental distress of an intelligent, industrious, and honest man earning \$1,200 per annum is to be measured by a standard different than would apply to a man of larger earning capacity? Or can any one tell with exactitude the extent to which a man's reputation is injured by a wrongful prosecution, and in such a way, among other things, as to interfere anonymously, as it were, with his opportunity to earn a living in his accustomed vocation or walk of life. *Blunk v. Atchison Co.* (C. C.) 38 Fed. 317; *Sheldon v. Carpenter*, 4 N. Y. 579, 55 Am. Dec. 301; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; *Ambs v. Atchison Ry. Co.* (C. C.) 114 Fed. 317.

Indeed, if there were to be distinctions in such respects in cases of this character, they would more likely be in favor of the humbler man, because he probably would have much greater difficulty in overcoming the effects of a prosecution than would a man of greater force and power.

For the reasons outlined, the verdict will not be disturbed, and the motion for the new trial is denied.

UNITED STATES v. RUBIN et al.

(District Court, D. Connecticut. October 27, 1914.)

No. 247.

1. INDICTMENT AND INFORMATION (§ 140*)—MOTION TO QUASH—GROUNDS—ILLEGAL TESTIMONY.

On a motion to quash an indictment, because hearsay and incompetent testimony was introduced before the grand jury, it is not necessary to show that the grand jury was influenced by such testimony to find the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 474, 475, 478; Dec. Dig. § 140.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 10*)—INVESTIGATION BY GRAND JURY—RECEIPT OF EVIDENCE—CHARACTER OF EVIDENCE.

It is improper for a grand jury, in investigating an alleged offense, to receive hearsay testimony, and an indictment founded thereon is invalid.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. 50-61; Dec. Dig. § 10.*]

3. ATTORNEY AND CLIENT (§ 32*)—PRIVATE ATTORNEYS—PROFESSIONAL INVESTIGATORS.

Private attorneys should not act as detectives and professional investigators, and thus prepare themselves as alleged competent witnesses in judicial investigations to accomplishing any desired result.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 45; Dec. Dig. § 32.*]

4. GRAND JURY (§ 34*)—SESSIONS—PERSONS ENTITLED TO ATTEND—STENOGRAPHERS—"ATTORNEY AT LAW ESPECIALLY APPOINTED."

Act Cong. June 30, 1906, c. 3935, 34 Stat. 816, provides that the Attorney General, or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General, may, when specially directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings, which district attorneys now or hereafter may be by law authorized to conduct. *Held*, that a stenographer for the United States district attorney, duly appointed and sworn, was not an attorney at law specially appointed by the Attorney General, under any provision of law, and hence was improperly permitted to attend sessions of the grand jury at which indictments were found, and to take down the testimony of witnesses before such grand jury, for the information of the district attorney.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 73, 85; Dec. Dig. § 34.*]

Philip Rubin and others were indicted for conspiracy to conceal the assets of a bankrupt, and they move to quash the indictment. Sustained.

See, also, 214 Fed. 507.

Frederick A. Scott, U. S. Dist. Atty., of Hartford, Conn.

Benjamin Slade, of New Haven, Conn., Edward Seery, of Waterbury, Conn., and Alfred Frankenthaler and Max Monfried, both of New York City, for all defendants except Rubin and Glickman.

William Kennedy, of Naugatuck, Conn., for Rubin.

THOMAS, District Judge. The grand jury found an indictment against the defendant Philip Rubin and nine others, charging them with a conspiracy to conceal the assets of a bankrupt, which offense is claimed to be covered by section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. 1913, § 10201]) and section 29b (1) of the Bankruptcy Act approved July 1, 1898 (30 Stat. 554, c. 541 [U. S. Comp. St. 1913, § 9613]). Motions in behalf of all defendants, represented by various attorneys (excepting defendant Louis Glickman), were made for an order of court to inspect the minutes of the grand jury, which motion this court denied. 214 Fed. 507.

In support of the above motions the moving defendants filed affidavits which alleged certain facts as a basis for the granting of said motions. Pursuant to the suggestion of the court made in denying

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the above motions, the district attorney has filed an answer to the allegations contained in those motions, thus raising an issue of fact. After the denial of the motions and within the time allowed by law the same defendants filed a plea in abatement, a motion to quash, and a motion to dismiss the indictment, and in support of said plea and motions rely upon the facts set out in the moving papers and additional facts set out in the motion to quash. Evidence was offered to prove the facts thus alleged.

From the pleadings, the evidence and statements of counsel it appears that an agent from the Department of Justice was assigned to investigate the transactions which preceded the filing of the petition in bankruptcy and upon which the indictment is founded. This agent investigated the various transactions which led up to the bankruptcy proceedings, and this work took him into various cities in New York and Connecticut, where he examined various memoranda and persons other than the accused. When the grand jury was in session this agent appeared before it and testified generally with reference to the alleged facts which he learned as aforesaid in the course of his investigation, much of which was hearsay testimony. His examination disclosed the fact that he had no personal knowledge of many of the facts pertaining to the subject-matter under investigation, yet he testified before the grand jury, giving it such information as he had received as the result of his investigations. Upon this feature of the case the defendants move to quash the indictment, on the ground that it was obtained, in part at least, as the result of incompetent testimony given before the grand jury.

Upon this proposition the federal decisions are not entirely uniform. One line of decisions seems to hold that the court has no power to review the proceedings before the grand jury for the purpose of ascertaining whether competent evidence was presented to it, and that if it had such power it would result in a rehearing of the whole proceedings before it, and that it would be difficult to find an indictment in any case under such conditions. These decisions further hold that it is immaterial that hearsay or incompetent evidence was presented, unless it be shown that the indictment was founded upon that testimony to the exclusion of testimony which was relevant and competent, and in order to ascertain that fact all grand jurors would have to be summoned before the court to determine which of the two kinds of testimony influenced them to find a true bill against a defendant, which on its face is impractical.

[1] There is another line of federal decisions which hold that it is not necessary to show that the grand jury was influenced by hearsay and incompetent testimony to find an indictment; that the policy of the law is to protect the individual against any invasion of his rights, and that when the law says there shall be no invasion of those rights, who shall say, or assume to say, where the line shall be drawn, and where the end must be as to who shall be in the grand jury room at its session, when considering the testimony touching a proposed indictment, or what kind of testimony shall be considered by the grand jury.

Mr. Justice Field, in a charge to the grand jury of the Circuit Court of the United States for the District of California at a term of court held at San Francisco on the 26th of August, 1872, said in part:

"The government has appointed the district attorney to represent its interest in the prosecution of parties charged with the commission of public offenses against the laws of the United States. He will, therefore, appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws which the government deems to have been violated, and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct.

"In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused."

[2] This general proposition of law relating to the kind and character of evidence proper for consideration by the grand jury has been generally followed in the better considered cases in the federal courts. Under this rule hearsay evidence is improper, and an indictment founded upon it is invalid. In denying the defendants' motion for an inspection of the grand jury minutes, this court took occasion to say (214 Fed. 507, on page 508):

"The complete protection of the rights of citizens must necessarily commence and does commence at the inception of any criminal proceeding. * * * These reasons are sufficient to sustain the doctrine that the grand jury is forbidden to make an accusation against a person without legal evidence to support it."

In *Jacob Sharp's Case*, 107 N. Y. 476, 14 N. E. 348, 1 Am. St. Rep. 851, the court, through Judge Peckham (later of the Supreme Court of the United States), said:

"That law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law all are innocent until convicted in accordance with the forms of law and by a close adherence to its rules."

With this doctrine I am in accord. The evidence before me further disclosed the fact that one John M. Sweeney, a lawyer who was acting as attorney for a certain bank, which was a creditor of the bankrupt, accompanied the agent of the Department of Justice and assisted in procuring further information of a hearsay character. Said Sweeney also appeared and testified before the grand jury that found the indictment now under consideration. While it did not appear, and, of course, it could with difficulty even be shown, that any harm resulted to these defendants from the hearsay testimony of these witnesses, yet I cannot approve of this method employed before a grand jury.

[3] Private attorneys should not act as detectives and professional investigators, and thus prepare themselves as alleged competent witnesses in judicial investigations, for the purpose of accomplishing any

desired result. The possibility of resulting injury to a defendant is too great, and is not in accord with the better considered federal decisions. *U. S. v. Farrington* (D. C.) 5 Fed. 343. In *U. S. v. Kilpatrick* (D. C.) 16 Fed. 765, on page 768, the court said:

"The grand jury is an institution that had its origin in the early periods of the common law. It has always been highly estimated and venerated in England and in this country, as it has been considered as a safeguard of the liberties of the people against the encroachments and oppressions of political power, and against unfounded accusations prompted by private malice, personal animosity, or other improper motives."

Again on page 771 the court said:

"Investigations before grand juries must be made in accordance with the well-established rules of evidence, and they must have the best legal proof of which the case admits. In this respect they are judicial tribunals. The prosecuting officer is presumed to be familiar with the rules of evidence, and it is his duty to take care that no evidence is received by the grand jury which would not be admissible in a court upon the trial of a cause. 1 Whart. Crim. Law, § 493."

Along the same lines the court further says on page 777:

"It is all-important to the best interests of the government and of society that willful offenders should be speedily tried and punished, but it is equally important that the citizen should not be deprived of those guaranties which the law affords for securing his personal rights and liberties. Perhaps the most important protection to personal liberty consists in the mode of trial which is secured to every person accused of crime. From its initiation until guilt is established beyond a reasonable doubt by the verdict of a jury, a trial is surrounded by certain safeguards which the government cannot dispense with. Cooley, Const. Lim. 309. Courts cannot administer justice unless they enforce the well-settled principles and observe the due forms of law. Any other mode of trial would be a mockery of justice and judicial oppression, and would soon render courts objects of public distrust and aversion."

[4] It also appeared from the allegations in the motion, from the evidence, and from statements of counsel that a stenographer was present in the grand jury room and took shorthand notes of the testimony given before it by the various witnesses. In this connection the defendants allege:

"That at the sitting of said grand jury, and while they were considering said complaint recited in the indictment, and while it was hearing testimony concerning the same, there was present in said grand jury room and within the hearing of what transpired and listening to what was said, with the consent of the district attorney, a person who was not an attorney or representative of the government, nor a witness in said cause, nor was such person authorized by law to be in said grand jury room at said time."

With reference to this allegation the answer of the government is as follows:

"The allegations contained in paragraph 3 of said motion are denied, except that it is admitted that a stenographer for the United States district attorney, duly appointed and sworn, was present at the sitting of said grand jury."

If there could be any doubt about the first reason for granting the defendants' motion, it seems to me that the second reason is con-

clusive, in view of the statutes and the decisions of the federal courts touching this matter.

Act June 30, 1906, c. 3935, 34 Stat. 816, provides:

"That the Attorney General, or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

I find that this stenographer was not an attorney at law specially appointed by the Attorney General under any provision of law.

After a careful consideration of the cases of *U. S. v. Edgerton* (D. C.) 80 Fed. 374, *U. S. v. Rosenthal* (C. C.) 121 Fed. 863, and *U. S. v. Heinze* (C. C.) 177 Fed. 770, where the present question was fully discussed and various decisions commented upon, further discussion to sustain defendants' contention seems only cumulative.

In the *Edgerton* Case it was well stated on page 375, where the court said:

"It is beyond question that no person, other than a witness undergoing examination, and the attorney for the government, can be present during the sessions of the grand jury. The rule is inherent in the grand jury system with all the force of a statutory enactment. The cases where bailiffs and stenographers have on occasions been temporarily present in the grand jury room are only apparent exceptions. The rule, in its spirit and purpose, admits of no exception. * * * If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury?"

The general rule was discussed at length in *U. S. v. Rosenthal*, 121 Fed. 862, and the *Edgerton* Case cited with approval.

In the recent case of *U. S. v. Heinze*, 177 Fed. 770, decided in this circuit and under the act of June 30, 1906, above quoted, Judge Hough, in sustaining the same doctrine, referred to the act and said, on page 773:

"It is in my judgment entirely clear that the intent of the act of 1906 was plainly not to authorize the introduction into the grand jury room of previously unauthorized laymen, but to enlarge the number of office-holding lawyers who might attend before the jury to render assistance in matters of law alone."

The learned district attorney relies upon *U. S. v. Simmons* (C. C.) 46 Fed. 65, decided in 1891, to sustain his contention upon this point, but at the time that case was decided the act of 1906 was not in force, and, of course, no construction could be placed upon it.

In view of the decision of the court in the *Heinze* Case, I am constrained to grant the motions to quash the indictment.

THE THIELBEK.

(District Court, D. Oregon. November 16, 1914.)

Nos. 6111, 6116, 6129, 6130.

1. COLLISION (§ 91*) — STEAM VESSELS MEETING — FAILURE TO COMPLY WITH PASSING AGREEMENT.

A collision in the Columbia river off Astoria, in the early morning, between two meeting steamships, the one passing up in tow alongside of a tug, *held* due solely to the fault of the downbound vessel, which, after her signal for passing starboard to starboard had been assented to, instead of carrying out the agreement, stopped and reversed without signal to the other vessel, and swung around directly in the course which the tug with her tow was required to take to comply with the agreement.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. § 91.*]

2. COLLISION (§ 125*)—LIABILITY—SUFFICIENCY OF EVIDENCE.

Where the fault of one vessel is clear, and sufficient to account for a collision in order to hold the other liable, in whole or in part, her negligence must be clearly shown.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266-279; Dec. Dig. § 125.*]

3. ADMIRALTY (§ 19*) — COLLISION (§ 115*) — JURISDICTION — NEGLIGENCE OF PILOT—LIABILITY OF PORT OF PORTLAND.

The port of Portland, a municipal corporation, with authority under the laws of Oregon (L. O. L. § 6106) to maintain a pilotage service, is liable for a collision due to the negligence of one of its pilots, and its liability is governed by the general admiralty law, and cannot be limited by state statute.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 233, 234; Dec. Dig. § 19;* Collision, Cent. Dig. §§ 244-247; Dec. Dig. § 115.*]

In Admiralty. Suits by Wilhelm Wilhelmsen against the steamship Thielbek and the Port of Portland, by the steamship Thielbek and Knohr & Burchard against the Port of Portland and the steamship Thode Fagelund, and by E. de Nemour-Du Pont Powder Company and by W. R. Grace & Co. against the Thielbek and the Port of Portland. Causes consolidated. Decree against the Fagelund and the Port of Portland.

See, also, 211 Fed. 685.

W. C. Bristol, of Portland, Or., for Wilhelmsen and Thode Fagelund.

Wirt Minor, of Portland, Or., for the port of Portland.

Erskine Wood, of Portland, Or., for Knohr & Burchard and The Thielbek.

Zera Snow and MacCormack Snow, both of Portland, Or., for cargo.

BEAN, District Judge. About half past 3 o'clock on the morning of August 24, 1913, a collision occurred in the harbor of Astoria between the German bark Thielbek, in tow of the tug Ocklahoma, belonging to the port of Portland, and the Norwegian steamer Thode Fagelund, in charge of one of the pilots of the port. The night was dark, but clear. Both vessels were greatly damaged, and the owners

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Fagelund's cargo suffered loss on account of the collision. The owners of the Fagelund libeled the Thielbek in rem and the port of Portland in personam, the owner of the Thielbek libeled the Fagelund in rem and the port of Portland in personam, and the owners of the cargo libeled the Thielbek in rem and the port of Portland in personam. These actions were, by stipulation of parties, consolidated for trial and heard on the pleadings and proof.

The Thode Fagelund is a steel steamship 350 feet long, 50 feet beam, and 4,355 gross tonnage. At the time of the collision she was proceeding to sea drawing 25 or 26 feet of water, with a cargo of lumber, piling, and other merchandise, in charge of Pilot Nolan, an employé of the port of Portland, who controlled her navigation. She had come down the river the evening before, and anchored in the harbor on the same side of the fairway and about 1,000 or 1,500 feet above the government dredge Chinook, which was riding at anchor opposite the upper end of the O. R. N. dock, and on the opposite side of the channel, leaving a clear passage way of 800 or 900 feet between the stern of the dredge when athwart the stream and the dock.

The evidence of those on board the Fagelund is that about 3:20 in the morning she weighed anchor and started down the harbor against a flood tide and under a slow bell and a starboard helm. At that time the stern of the Chinook was swinging with the tide to the north side of the channel, and it was necessary for the Fagelund to bear to her port in order to get around the dredge and into mid-channel; that she thus proceeded for five minutes, when her helm was steadied and an order given for half speed ahead, and the ship headed to a point on the Astoria side a short distance below the Callendar dock, and to clear the stern of the dredge about 100 feet. She continued on this course and speed until about a ship's length above the dredge, when the lights of the Ocklahama and her tow were observed over the dredge, about one-half or three-quarters of a point off the Fagelund's starboard bow, coming up the river on the Astoria side, showing both red and green lights. The vessels were then about 1,400 or 1,500 feet apart. The pilot of the Fagelund promptly blew two blasts of his whistle and put his helm hard astarboard (where it remained until the collision), but, receiving no answer, stopped his engines, and a few seconds later, estimated to be 10 or 12, repeated the signals, which were promptly answered by the Ocklahama; but, as the Ocklahama did not appear to change her course, the Fagelund, within 5 or 6 seconds after the exchange of signals, ordered her engines full speed astern, causing her bow to swing to starboard, blew four blasts of her whistle, and, after the engines had been backing for about a minute and a half, dropped her port anchor, and almost immediately she was struck on the port bow a few feet from the stern by the bow of the Thielbek which plowed into her some distance almost on a line fore and aft.

The Thielbek is a sailing vessel 300 feet long, 45 feet beam, and was drawing 13 feet 6 inches. About 3 o'clock on the morning of the accident the tug Ocklahama, with the Thielbek lashed to her starboard side, left the anchorage ground in the lower harbor and

started up the river. The evidence of those on board the Thielbek and the Ocklahama is that their course was along the south side of the harbor, 150 or 200 feet from the docks, and 600 or 800 feet south of the stern of the Chinook; that when about 150 feet off, and a short distance below the Callendar dock, the green light and range lights of the Fagelund came into view over the dredge Chinook about two points off the port bow and about 1,200 or 1,500 feet distant; that the Ocklahama was immediately slowed down to half speed; that within the time it would take to count 10 the two blasts of the Fagelund's whistle were heard, but were not answered, because the signals were unusual, indicating a starboard to starboard passage, and it was thought wise to wait for her to come out from behind the dredge, in order to more accurately ascertain her position and intention; that at the time the first signals were given the Ocklahama with her tow was swinging slightly to port; that as soon as the Fagelund came out from behind the dredge two whistles were given by her and promptly answered by the Ocklahama; that the helm of the Ocklahama was immediately put to starboard and she began to swing to port; that at the time the Fagelund was sighted she showed her green light, and her range lights were open; that the range lights began to close up, whereupon the engines of the Ocklahama were stopped and put full speed astern under a port helm, in order to give the Fagelund time to make the passage before the Ocklahama would come up to the Chinook; that just shortly before the collision the red light of the Fagelund appeared and her anchor was heard going down; that the engines of the Ocklahama were backing full speed astern at the time, but it was impossible to avoid a collision.

[1] Under these circumstances the Fagelund was, in my judgment, alone at fault. She was navigating in a narrow channel, and, according to the testimony on her behalf, both side lights of the opposing vessel were in view. She therefore should have signaled for a port passage (Pilot Rules 4 and 10), unless the special circumstances rendered a departure from the rules necessary (Pilot Rule 11). It may be and probably is true that her close proximity to the Chinook when the Ocklahama was sighted, the necessity of her going to port to clear the dredge, and the difficulty of thereafter swinging to starboard against the tide, justified a departure from the rules; but the signals given were unusual, and clearly excused the pilot of the Ocklahama from answering them until the Fagelund came out from behind the dredge, and did not justify her in failing to attempt to execute the maneuver agreed on. It was negligence on her part to stop and back after the passing signals (*The Nutmeg State* [D. C.] 62 Fed. 847; *The St. Johns* [D. C.] 34 Fed. 763), and especially without giving the blasts of her whistle indicating that she was so doing as required by the pilot rules.

It is manifest from the testimony, and substantially admitted by Nolan, that at the time of the exchange of the signals there was room to pass safely in accordance therewith, if he had kept on his course and the Ocklahama had obeyed the signals. It is claimed, however, that the Ocklahama did not change her course after the signals had

been exchanged. Conceding that it was her duty to do so in order to assist the Fagelund in executing the passage requested, the testimony of all the witnesses aboard the Ocklahama, as well as the physical facts, shows that she did swing to port. At the time the signals were given and exchanged, the Ocklahama and her tow were passing up the south side of the channel, 150 or 200 feet from the docks, and the point of collision is estimated by the witnesses to have been from 50 to 150 feet off the dredge Chinook, and from 700 to 800 feet from the O. R. N. dock. If the Ocklahama had continued on the course she was pursuing at the time the signals were exchanged, she would have passed at least 300 or 400 feet south of the place of collision, and it is therefore evident she must have changed her course to port to that extent in going a distance of 1,000 or 1,200 feet.

Many other faults are alleged against the Ocklahama, such as that she did not maintain an efficient lookout, that she did not give one blast of her whistle when she first sighted the Fagelund, that she failed to answer the Fagelund's first signal, that her pilot was incompetent and inexperienced, that she had a red light on her own port side and that of her tow, that she was navigating at an unusual rate of speed and on a varying helm, and the like; but these are either not sustained by the testimony or did not contribute to the collision. The evidence shows that her pilot was experienced and competent, that she was excused from answering the first signal, that she observed the Fagelund as soon as she could be seen on account of the Chinook, that she was navigated at an ordinary and reasonable speed, that her failure to give one blast of the whistle when she first sighted the Fagelund was not negligence, and that the red lights on the Ocklahama and Thielbek, if there were more than one, did not in any way confuse or mislead the Fagelund. The collision was due entirely to the fact that the Fagelund, after asking for and receiving permission to cross the bow of the Ocklahama, failed to execute such movement, but, on the contrary, reversed her engines, and swung to her own starboard, directly across the course she had assigned to the Ocklahama a few seconds before. Her fault was sufficient to account for the accident, and she is not permitted to escape liability by raising a doubt regarding the movements of the Ocklahama.

[2] In order to hold the latter liable, in whole, or in part, her negligence must be clearly shown. Any doubt arising from her movements, or the contribution of her faults, if any, to the collision, should be resolved in her favor. *The Victory & The Plymouthian*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; *The North Point* (D. C.) 205 Fed. 958. There is no doubt in my mind that, if the Fagelund had continued on the course she had indicated she desired and intended to take, the collision would have been avoided. She was struck on her port bow almost head-on, showing that if she had gone but a short distance to port, as she signaled she intended to do, the Ocklahama and her tow would have passed in safety. Nor do I think the acts of the pilot of the Fagelund in these respects can be considered mere errors of judgment which any prudent and skillful navigator might have made under the same circumstances. The condition was one of his own seeking. He had asked for and been granted the right to a starboard passage. He did

not execute the maneuver. If he had kept on the course he himself had asked for, and not changed his mind and reversed within five or six seconds after the exchange of signals, he would have had 500 or 600 feet of clear water to go through. He deliberately selected his course, and it was his duty to follow it, and the opposing vessel had a right to rely upon his doing so. He not only failed to execute the maneuver, but reversed and backed, making the carrying out of the passage he had asked for impossible. He did not even warn the Ocklahama that he was backing, as required by the pilot rules. Having thus committed a positive breach of statutory duty, it is incumbent upon the Fagelund to show, not only that her fault did not contribute to the disaster, but that it could not have done so. *Yang-Tsze In. Ass'n v. Furness, Withy & Co.*, 215 Fed. 863, 132 C. C. A. 201; *the Beaver* (D. C.) 197 Fed. 866. She cannot excuse herself by throwing doubt upon the movements of the opposing vessel.

[3] Nolan was an employé of the port of Portland, and it is liable for a maritime injury due to his negligence. *U. S. v. Port of Portland* (D. C.) 147 Fed. 865. *Port of Portland v. U. S.*, 176 Fed. 866, 100 C. C. A. 336. It is claimed, however, that the liability of the port, as far at least as parties with whom it contracts for pilotage or towage service is concerned, is limited to \$10,000 by the statute creating it. *Lord's Laws of Oregon*, § 6108. This question was carefully considered on exceptions to the answer in this case, and the court ruled that the extent of the liability of the port of Portland for negligence of its pilots causing a maritime tort is governed by the general admiralty law and cannot be limited by state statute. *The Thielbek* (D. C.) 211 Fed. 685. Although I have re-examined the question in the light of the argument of the proctor for the port, I find no reason for changing my views.

Decrees may be prepared in accordance with this opinion, the amount of damages to be hereafter determined by the court or through a commissioner, as the parties may elect.

Ex parte TSUIE SHEE et al.**(District Court, N. D. California, First Division. October 23, 1914.)****No. 15687.****1. ALIENS (§ 32*)—EXCLUSION OF CHINESE—APPEAL—AUTHORITY TO DETERMINE.**

A Chinese person, excluded from entry into the United States by an order of local officers, being given the right of appeal to the Secretary of Labor, is entitled to have his appeal determined by such officer, unless, by reason of his death, resignation, absence, or sickness, the Assistant Secretary or some other officer designated by the President is authorized, in accordance with Rev. St. § 177 (Comp. St. 1913, § 259), to perform his duties.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—EXCLUSION OF CHINESE—REVIEW OF ORDER ON WRIT OF HABEAS CORPUS.

A Chinese person, excluded from entry into the United States by local officers, may raise the question by petition for a writ of habeas corpus whether an appeal taken by him was determined by one having legal authority; the determination of such an appeal by one unauthorized being a denial of a fair hearing and of due process of law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

Petition by Quan Wy Chung, on behalf of Tsue Shee and Quan You, for writ of habeas corpus. Applicants discharged on bond.

George A. McGowan, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Walter E. Hettman, both of San Francisco, Cal., for respondent.

DOOLING, District Judge. On October 5th Quan Wy Chung, a native-born citizen of the United States, presented to the court his petition for a writ of habeas corpus on behalf of Tsue Shee and Quan Wy You, asserting that they are his wife and infant son, and were denied the right to land by the local immigration officers; that from the decision of the local officers an appeal had been taken to the Secretary of Labor; that, notwithstanding the fact that the Secretary of Labor and the Assistant Secretary of Labor were present at their posts of duty in the Department at Washington, the appeal was not heard by them, or either of them, but was heard and determined by J. B. Densmore, who signed the decision adverse to them as Acting Secretary of Labor; and that in consequence they had been deprived of a fair hearing, in that their appeal had been heard and determined by one not authorized to do so.

To this petition a return was made, which, instead of denying the averments of the petition that the Secretary and Assistant Secretary of Labor were present and acting as such at the time that the Acting Secretary disposed of the appeal, averred that the Secretary and Assistant Secretary were either actually or "constructively" absent. Evidence was presented to show that the Secretary and Assistant Secretary were not actually absent, and the court struck out from the return, as sham and evasive, the statement therein to the effect that the Secretary and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Assistant Secretary were actually or "constructively" absent, thus presenting for determination the question of the authority of J. B. Densmore to hear and determine appeals to the Secretary of Labor at a time when both the Secretary and the Assistant Secretary are in Washington, at their desks, and performing the duties of their office.

[1] Section 177 of the Revised Statutes provides:

"In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

Section 178 (Comp. St. 1913, § 260) provides:

"In case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, whose appointment is not vested in the head of the department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau, shall, unless otherwise directed by the President, as provided in section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed, or such absence or sickness shall cease."

And section 179 (Comp. St. 1913, § 261) provides:

"In any of the cases mentioned in the two preceding sections, except the death, resignation, absence or sickness of the Attorney General, the President may, in his discretion, authorize and direct the head of any other department or any other officer in either department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease."

In accordance with this last section, on June 5, 1913, the President issued the following executive order:

"Pursuant to the authority contained in section 179 of the Revised Statutes, I hereby authorize and direct J. B. Densmore, Solicitor of the Department of Labor, to perform the duties of the Secretary of Labor, during the absence of the Secretary of Labor and the Assistant Secretary of Labor."

By the terms of this order Mr. Densmore is authorized to perform the duties of the Secretary of Labor only in the absence of the Secretary and the Assistant Secretary. Whenever he does act, the presumption is that he is acting within and according to the authority conferred upon him, and this presumption will prevail until it is overthrown by the clearest proof. From the very fact of his acting the court will presume that both the Secretary and Assistant Secretary were absent, because it is only in their absence that he may lawfully perform the duties which the law casts upon the Secretary, and because any other rule would result in uncertainty and confusion. Whoever, therefore, challenges his right to act, must assume the burden of proving clearly that his action was not had in the "absence of the Secretary and Assistant Secretary." But, however inconvenient it may be, if the Secretary and Assistant are not absent, and particularly if both are present, his performance of the duties of the Secretary is unauthorized, either by the statute, or the order of the President.

In the case at bar it is practically conceded, and conclusively established, that the appeal was not determined by the Acting Secretary

in the absence of the Secretary and Assistant Secretary, but that, on the contrary, both were present and performing the duties of their office at the time the appeal was determined. The appellants were by law entitled to appeal to the Secretary of Labor, and entitled to have their appeal heard and determined by him, except as above stated, and the determination of their appeal by another, not authorized, is neither a fair hearing nor due process of law.

This being the first time that this question had been presented to the court, the petitioners were not discharged; but it was ordered that their deportation be stayed until their appeal had been heard and determined by competent authority, and if such appeal was not so heard and determined within 15 days from October 5, 1914, that they might apply to the court for further relief. The record having been thereupon forwarded to Washington for a determination of the appeal by the proper authorities, both the Secretary and Assistant Secretary declined to consider the appeal; the department apparently electing to stand upon the order theretofore made by Mr. Densmore under the circumstances above briefly detailed. After the expiration of the 15 days allowed by the court for action by the proper authorities, and their failure so to act, petitioner, on October 23d, moved for a judgment discharging Tsue Shee and Quan Wy You from further custody.

[2] The effect of this judgment, if entered, would be, of course, to land the said aliens in this country, in the face of the decision by the local officers that they are not entitled to land. In opposition to this motion, it is now suggested by the United States attorney that the authority of Mr. Densmore to act at the time and under the circumstances as detailed above cannot be drawn in question in this proceeding, that this is a collateral attack upon such action, and that the authority of an officer may not be thus assailed. That this is true ordinarily does not admit of question. But, if the aliens here have the right to have their appeal heard and determined by competent authority, there must be somewhere a method of enforcing that right. They are now held for deportation under an order which, in the judgment of the court, they are legally entitled to have reviewed by the officers of the Department of Labor upon whom Congress has imposed that duty. They are not insisting that a valid order of deportation be made, but that they should not be deported under an invalid one. If they cannot raise this question by a petition for writ of habeas corpus, they are without adequate remedy.

The functions of the writ of habeas corpus have been enlarged by the Supreme Court in these immigration cases, apparently ex necessitate, so as to permit inquiry into the fairness of the proceedings before the immigration officers leading either to deportation or exclusion. I know of no other line of cases in which, upon habeas corpus, the court will look into the question as to whether or not the applicant has had a fair trial. The writ ordinarily deals only with the question of jurisdiction, and not with the method in which it is exercised. If from the necessities of this class of cases, and because the alien has no other remedy, the courts may inquire into the question of mere

irregularities in the exercise of jurisdiction, a fortiori they should look into the deeper question of the existence of such jurisdiction. The case as thus presented is not without difficulty; but I am of the opinion that, in the absence of any other adequate method by which the right of the Acting Secretary to pass upon appeals while both of his superiors are present may be tested, the aliens are not left without remedy, but may question that right by means of the writ of habeas corpus.

But it does not follow from this that the petitioners here are entitled to an absolute discharge. As said by Judge Gilbert in the Case of Way Tai (C. C.) 96 Fed. 484:

"If the Assistant Secretary had not the authority to hear and determine the appeal, the appeal has not been disposed of, but is still pending, and the detention of the petitioner by the officer to whom he was intrusted until the disposition of his case on appeal is not unlawful."

The department, however, while still holding the petitioners in custody for deportation, is apparently indisposed to have the appeal heard by any one whom the court believes to be authorized to hear it. The court is not disposed to land these aliens when the local officers have decided against their right to land, and while, in the language of Judge Gilbert above quoted, their appeal is still pending.

Section 5 of the Chinese Exclusion Act (Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, § 4319]) provides that:

"On an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay."

It does not seem just to the court that the aliens here involved should be indefinitely detained awaiting the determination of their appeal, and just what is meant by the words "in the first instance" in the statute above quoted is not clear.

The order of the court, therefore, will be that the aliens be not landed definitely and finally at this time, but that they be discharged from the custody of the immigration officers upon giving bonds in the sum of \$1,500, conditioned that they will surrender themselves again to the immigration officers when their appeal shall have been heard and determined by the proper authorities, if the decision upon such appeal be adverse to their right to land. One bond will serve for the woman, Tsui Shee, and the infant, Quan Wy You.

CRANE CO. v. LOONEY, Atty. Gen., et al.

(District Court, N. D. Texas, at Dallas. December 15, 1914.)

1. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS WITHIN STATE—FRANCHISE TAX.

A state may impose on particular classes of foreign corporations a franchise or privilege tax as a condition to their right to do business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. § 636.*]

2. CORPORATIONS (§ 648*)—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE—FRANCHISE TAX—AMOUNT.

The validity of a franchise tax imposed on the right of a foreign corporation to do business within a state does not depend on the mode which the state may adopt in fixing the amount which it will exact for the franchise for any year.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2516; Dec. Dig. § 648.*]

3. COMMERCE (§ 69*)—CORPORATE FRANCHISE TAX—DOING BUSINESS WITHIN STATE.

Rev. St. Tex. 1911, arts. 3837, 7394, imposing a franchise tax on any foreign corporation, as a condition to its right to do business in Texas, of a given percentage of all the corporation's capital and surplus, representing all of its property, wherever situated, and all of its business, both intrastate and interstate, thereby placing a tax on the corporation's property rights beyond the jurisdiction of the state for taxation purposes, are unconstitutional.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. § 69.*]

In Equity. Suit by the Crane Company against Ben F. Looney, Attorney General, and another. On application for a temporary injunction. Granted.

Etheridge, McCormick & Bromberg, of Dallas, Tex., for complainant.

Ben F. Looney, Atty. Gen., and C. A. Sweeton and C. M. Cureton, Asst. Attys. Gen., for defendants.

Before WALKER, Circuit Judge, and MEEK and CALL, District Judges.

MEEK, District Judge. This case is brought by the Crane Company, an Illinois corporation, against Ben F. Looney, as Attorney General of the state of Texas, and against F. C. Weinert, as Secretary of State of the state of Texas, for the purpose of restraining the defendants in their official capacities from enforcing against plaintiff the provisions of articles 3837 and 7394 of the Revised Statutes of Texas (1911).

It appears from plaintiff's bill and from the evidence that under its charter it is engaged in the business of manufacturing, buying, selling, and otherwise dealing in various lines of hardware, builders' supplies and material, and agricultural machinery and supplies; that more than 20 years ago plaintiff entered the state of Texas with its goods, wares, and merchandise, selling them through traveling salesmen, who took or-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ders and sent them to the plaintiff's principal office and place of business at Chicago, Ill., for acceptance and filling through shipment; that it received, accepted, and filled orders sent it through the mails from merchants living in Texas; that for many years it has been engaged in interstate commerce between Texas and the other states of the Union; that for the purpose of facilitating the transaction of its business, and in order that it might the more conveniently serve those with whom it transacted such commerce, it established agencies throughout the country, an agency having been established in Dallas, Tex., in 1904. It also appears that during the year 1905 the plaintiff applied for and secured from the state of Texas a permit to do business within the state for the succeeding 10 years; that during the time intervening between the year 1906 and the time of the filing of this bill it has conducted an extensive interstate and intrastate business, and has made permanent investments in the city of Dallas, Tex., in the way of a lot, building, and equipment for the more efficient and economical conduct of such business.

It is shown that plaintiff's present permit to do an intrastate business in Texas expires on the 15th day of January, 1915, and plaintiff avers that it will not apply to the Secretary of State for a renewal of this permit, nor meet the conditions in the way of the payment of fees necessary to secure such permit; that it will not, at the expiration of the present franchise tax on May 1, 1915, pay a franchise tax in compliance with the laws of the state for the fiscal year ending May 1, 1916. Plaintiff further avers that the defendants, the Attorney General and the Secretary of State, will undertake to enforce the laws of the state of Texas against it, and it will thereby be harassed, annoyed, and impeded in transacting its business in interstate commerce and the business inseparably connected therewith, and will also be ousted from doing an intrastate business in said state.

The plaintiff assails the validity of articles 3837 and 7394 of the Revised Statutes of Texas (1911), and alleges that their provisions are in violation of the rights of plaintiff guaranteed to it under the Constitution of the United States (article 1, § 8, par. 4), which, among other things, grants the Congress the power to regulate commerce among the several states, and under the first section of the fourteenth amendment to the Constitution of the United States, which guarantees plaintiff against being deprived by any state of its property without due process of law and against being deprived of the equal protection of the law. The part of article 3837 applicable to the plaintiff and here complained of is as follows:

"For each foreign corporation obtaining permit to do business in this state shall pay fees as follows: Fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof: Provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this state, shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each

additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the state of Texas. (Acts 1907, S. S. p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S. p. 267.)"

Article 7394 is as follows:

"Art. 7394. Tax to be Paid by Foreign Corporations.—Except as herein provided, each and every foreign corporation, authorized, or that may hereafter be authorized to do business in this state, shall on or before the first day of May of each year, pay in advance to the secretary of state a franchise tax for the year following, which shall be computed as follows, viz.: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars, and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. (Acts 1907, p. 503, sec. 2.)"

It is revealed that the business of plaintiff under its charter is not itself commerce. It is engaged in the manufacture and sale of certain goods and in the purchase and sale of the goods of other manufacturers. The greater part of these goods are disposed of in interstate commerce, and a small portion in intrastate commerce in Texas. A decidedly preponderating percentage of the plaintiff's property is located outside the state of Texas. The same preponderating percentage of its business is done outside the state.

[1] By the terms of the above statutes the state sought to fix upon certain classes of foreign corporations an excise tax for the privilege of exercising their franchises within the state of Texas. That a franchise tax of this character is within the power of the state to levy there can be no question. *Maine v. Grand Trunk Railway Co.*, 142 U. S. 228, 12 Sup. Ct. 121, 163, 35 L. Ed. 994.

[2] The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. *Home Insurance Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025. However, a state cannot say to a corporation: "You may do business within our borders if you permit

your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union;" but a tax levied by the state upon the right of a corporation to do business in the state (that is, a franchise tax) will not be invalidated unless its necessary effect is to burden interstate commerce. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127.

[3] Does compliance by the plaintiff with the statutes here complained of impose a burden upon interstate commerce, or violate the provisions of the first section of the fourteenth amendment to the Constitution? The necessary effect of the enforcement of the two statutes brought into question is to make plaintiff's right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the state and its interstate and foreign business grow greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the *Baltic Mining Company*, cited *supra*, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or modification of the rule announced in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 42, 30 Sup. Ct. 190, 54 L. Ed. 355, to the effect that a state may not forbid the doing of a local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the state a given per cent. of its entire capitalization, representing the value of all its business, property, and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the state is withheld if either of them is not complied with, is to make the privilege of doing a local business in Texas subject to the condition that it shall first pay to the state a given per cent. of all its capital and surplus, representing all of its property wherever situated, and all its business, intrastate and interstate.

An imposition which is based, whether in whole or in substantial part, on the value of property outside of the state, or on interstate or

foreign commerce engaged in, so that the amount of it grows in exact proportion to the growth of such property or commerce, is a burden on such property or commerce. This burden the state cannot impose, either directly or as a condition to the grant of a privilege which it may confer or withhold. The statutes in question so obviously impose such a burden that it is not permissible to regard them as privilege taxes or excises, the amount of which is determined by something not having a necessary relation to the amount or value of things which are not subjects of the state's taxing power. The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to state taxation, and being greater or less according as such property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business.

The court is therefore constrained to grant the preliminary injunction prayed for, and an order will be entered accordingly.

BLAKE et al. v FOREMAN BROS. BANKING CO. et al.

(District Court, N. D. Illinois, E. D. January 6, 1914.)

No. 13.

1. COURTS (§ 273*)—JURISDICTION OF FEDERAL COURTS—LOCAL SUITS—"PROPERTY."

Certificates of stock in corporations, properly indorsed and delivered as security to a trustee with power of sale in case of default on the trust agreement, are "property" having a situs at the place of business of the trustee, and under Judicial Code (Act March 3, 1911, c. 231) § 57, 36 Stat. 1102 (Comp. St. 1913, § 1039), a federal court in that district has jurisdiction of a suit to enforce the lien thereon, and may bring in non-resident defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 813; Dec. Dig. § 273.*]

For other definitions, see Words and Phrases, First and Second Series, Property.]

2. SALES (§ 85*)—CONTRACT—CONSTRUCTION.

A provision, in a contract for the sale of property to be paid for in installments, that the purchasers might assign or transfer the property to a corporation to be organized, which should have a capital stock of \$250,000, in which event the purchasers should be released from any further personal liability, held to contemplate a corporation having a capital stock of \$250,000 actually paid up or subscribed for by responsible parties, and not merely an authorized capital stock of such amount.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 236-238; Dec. Dig. § 85.*]

3. COURTS (§ 344*)—JURISDICTION OF FEDERAL COURT—LOCAL SUIT—SERVICE.

The provision of Judicial Code, § 57, for the service in local actions to enforce a lien of an order on the person in possession of the property, does not require service where such person is within the jurisdiction and is served with a subpoena as a defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

4. PARTIES (§ 32*)—SUIT TO ENFORCE LIEN.

Where a contract for the sale of property, deferred payments on which were secured by a deposit of collateral with a trustee, provided that the purchasers might assign or transfer the property subject to the contract, which they did, the transferee is an indispensable party to a suit to enforce the lien on the collateral.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 32.*]

In Equity. Suit by William E. Blake and Willie Mallory Chamberlain, executors of Frank W. Chamberlain, deceased, against the Foreman Bros. Banking Company and others. On motion to dismiss. Motion sustained.

William E. Blake and Willie Mallory Chamberlain, both citizens and residents of Burlington, Iowa, and executors of the last will and testament of Frank W. Chamberlain, deceased, brought this action against Foreman Bros. Banking Company, an Illinois corporation, with its principal place of business in the city of Chicago, Jacob J. Shubert, a resident and citizen of New York City, and John Cort, a resident and citizen of the state of Washington. The bill charges that Frank W. Chamberlain in his lifetime owned certain theater properties, some having a charter from Illinois and some from other states, which he sold to the defendants Shubert and Cort. The method of sale was to deposit with Foreman Bros. Banking Company, as trustee, the stock in the several theater corporations, to be held by it as security for the unpaid balance of the purchase price. The stock was duly indorsed, and ample power was conferred upon the trustee to sell in case of default.

Under the contract \$22,500 was to be and was paid by the defendants on August 1, 1910, and after that \$150,000 was to be paid in ten equal installments of \$15,000 each, payable annually, beginning August 1, 1911; the deferred payments to bear interest at the rate of 5 per cent. per annum. The interest payments for 1911 and the \$15,000 due on August 1, 1911, were paid. Nothing has been paid under the contract since that date. The contract contained the following clause: "Said first and second parties further covenant and agree that all said aforementioned properties, stocks, and leases acquired by the parties of the second part hereto under and by virtue of said contract, dated June 18, 1910, may be by the said party of the second part assigned and transferred to a corporation to be organized under the laws of the state of New York, which corporation shall have a capital stock of two hundred fifty thousand dollars (\$250,000), and immediately upon such corporation being organized, and assuming this agreement and the agreement of June 18, 1910, and executing an agreement so to do, then and in that event, by virtue of the said agreement so to be executed by such corporation, the parties of the second part hereto shall ipso facto be released from any liabilities or obligations hereunder, and said corporation shall thereupon be bound by each and every of the terms, covenants, and conditions of this agreement, and the said agreement of June 18, 1910, as though it, the said corporation, had originally been named as the party of the second part hereto, and in the said agreement of June 18, 1910, in the place and stead of the parties of the second part heretobefore mentioned."

In June, 1912, there was organized, under the laws of the state of New York, a corporation known as the "Western Theaters Limited Company," with an authorized capital stock of \$250,000, and with authority to begin business on the payment of \$1,000 of the capital stock. The bill charges that the four incorporators were the agents and attorneys of Shubert and Cort, or in some way attachés of their office. After the incorporating of the Western Theaters Limited Company, the defendants Shubert and Cort repudiated any further liability under the contract. The bill charges that the new company was incorporated by Shubert and Cort solely for the purpose of escaping liability under their contract.

The defendants Cort and Shubert have entered special appearances, and moved to dismiss for the following reasons: (1) That the court is without

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jurisdiction over the nonresident defendants, because there is no property within the Northern district of Illinois to which the complainants assert a legal or equitable lien or claim. (2) That the Western Theaters Limited Company is an indispensable party. (3) That there is no equity in the bill.

Caruthers Ewing, of Memphis, Tenn., and Howe, Fordham & Vasen, of Chicago, Ill., for plaintiffs.

Mayer, Meyer, Austrian & Platt, of Chicago, Ill., for defendants.

CARPENTER, District Judge (after stating the facts as above).

[1] Considering the pertinent questions as if all of the corporations involved were incorporated in states other than Illinois, I am of the opinion that stock certificates such as are described in the bill in this case, when properly indorsed and delivered as security to a resident trustee, with power of sale in case of default in the trust agreement, are property within the definition of section 57 of the Judicial Code, conferring jurisdiction upon this court. Such stock certificates were intended as property, endowed with all the characteristics of property, and regarded as such by the parties and by the business community. I agree fully with the reasoning of the court in *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, and *Merritt v. American Steel Barge Co.*, 79 Fed. 228, 24 C. C. A. 530. The case of *Chase v. Wetzlar*, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990, does not announce a contrary rule.

[2] The clause in the contract which permits an assignment of the contract to a New York corporation having a capital stock of \$250,000 I believe indicated an intention of the parties to allow the transfer only to a corporation which had its capital stock of \$250,000 actually paid in, or for the payment of which some responsible person was liable. Otherwise, the assignment clause in the contract would seem foolish.

[3] As to the requirement in section 57 of the Judicial Code as to service of the warning order upon the trustee: It is not necessary that such service be made, where the trustee is within the jurisdiction of the court and duly served with a subpoena to appear, as was done in this case.

[4] The Western Theaters Limited Company is not made a party to the bill. This I regard as a fatal defect. The Theaters Company is an indispensable party. It may be thoroughly responsible and interested in the execution of the contract, and may desire to make the payments and accept the benefits of it.

The motion to dismiss, therefore, must prevail, and the bill will be dismissed, with leave to the complainants, if they see fit, to amend the bill within 30 days; and it is so ordered.

THE CALCIUM.

(District Court, W. D. Washington, N. D. April 28, 1914.)

SALVAGE (§§ 7, 31*)—SERVICE ENTITLED TO COMPENSATION—RESCUE OF CREW AND TOW OF BURNING TUG.

The rescue in Puget Sound by a power schooner of the master and crew of a burning tug and of a barge in her tow, worth with cargo \$3,100, held a salvage service, and an award of \$300 made therefor; it appearing that the salving schooner incurred little or no risk, and that there was other assistance near which made certain the rescue of the men.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 13, 16, 26, 75-77; Dec. Dig. §§ 7, 31.*]

In Admiralty. Suit by F. B. Hursley, managing owner of power schooner West Coast, against the tug Calcium and barge Roche Harbor. Decree for libelants.

Moncrieffe Cameron and James B. Metcalfe, both of Seattle, Wash., for libelants.

Kerr & McCord, of Seattle, Wash., for claimants.

NETERER, District Judge. On the morning of August 7, 1913, at 6:30 o'clock, while the tug Calcium and scow Roche Harbor, No. ———, was on a voyage from Seattle to Roche Harbor, in the waters of Puget Sound, and when a short distance from shore at Camano Island, was suddenly discovered to be on fire. The tug West Coast, on a voyage from Richardson with a cargo of salmon, bound to Everett, went to her rescue; the flames being visible along the pilot house on the tug. The West Coast approached the stern of the tug Calcium on the windward side, and rescued the fireman, an engineer, and boy, Richard De Mode, who was the master's guest, and then withdrew from the burning tug a short distance and lowered a skiff, about 15 feet long and 4 feet beam, and brought the captain, the cook, and the deckhand, who had taken refuge by hanging on the anchor chain, to the West Coast. When the fire was discovered on the Calcium, the power of its engine was cut off and the tug headed for shore. The tug had stopped when the crew was taken from her. For some reason, not disclosed, the tug started to go around in a "circle about a mile long." Captain Sudlow, who had in the meantime boarded the scow, seeing the Calcium headed that way, called to Captain Hursley of the West Coast to pull the scow out of the way. Before this could be done the burning tug hit the scow at an angle and glanced off. The scow was then moved about 150 yards and anchored; the anchor being loaned for the purpose by the West Coast. The burning tug had begun its second circuit in a smaller circle, when at Captain Sudlow's request the West Coast went to within about 40 feet of her, and Captain Sudlow and his deckhand from the small boat or skiff made a line fast to the anchor chain hanging over the boat. When the West Coast started to pull, the impact drew the anchor overboard, and it went to the bottom of the sound, whereupon Captain Sudlow said: "She is anchored now, and you cannot do anything

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

more." The condition of the weather was fine. There was a light breeze from the westerly, and the tide had been at flood about 2½ hours. About halfway between Camano dock and Utsalady dock lives W. A. Knox, a fisherman, who saw the forecandle aflame and the tug turn towards the beach. He immediately jumped into his boat and went to the rescue. When he was within 300 feet, he saw the West Coast approach and did not proceed any further.

The West Coast is 65 feet long, 15 feet and 4 inches beam, and about 8 feet depth, and is run by gasoline power. The gasoline tank holds 1,200 gallons, and is located forward of amidship. There were about 900 gallons in the tank at the time. The forward part of the tank is about 18 feet back of the bow of the boat. It had on board a cargo of salmon, valued by the captain at \$2,000. The front end of the hold is 27 feet back from the stem. The Calcium was 58 feet long, 9½ feet draft, was an oil burner, and had on board master, engineer, deckhand, cook, fireman, and boy, De Mode, and about 70 barrels of oil. The bow of the West Coast, when taking a portion of the crew from the Calcium, was about 15 to 18 feet from the oil tank of the Calcium. The West Coast is owned by F. B. Hursley and E. M. Hursley, and chartered by the Everett Packing Company. On the West Coast, in addition to the crew rendering assistance, was Jack Lundey, intervening libellant in this case. It is stipulated that the value of the property salvaged is \$3,161.06. On November 22, 1913, after filing of the libel herein, there was filed in the office of the clerk of this court a "notice of tender" of \$300 "in full settlement of all claims," etc., with an acknowledgment of service by libellants' proctors November 10, 1913. No money is on deposit in the registry of the court, nor is any tender pleaded. The tender is mentioned in the argument of counsel.

A careful reading of all of the evidence in this case convinces me that the services rendered by libellants should be considered a salvage service. While the crew or property salvaged might not have been lost, but for such services, the attendant circumstances as disclosed by the evidence show that the services should be compensated in a sum exceeding the actual value of the services rendered. The service is not of as high order as counsel for libellants urge upon the court. None of the libellants left the West Coast. No risk was incurred by them with the property, nor in attempting to tow the burning tug, other than such danger as such proximity of gasoline in the tank of the tug might entail, and from the evidence no danger is made to appear. All of the lines were placed upon the scow and the burning tug by the master of the burning tug and his deckhand. The risk was taken by them in the rescue of the property after they were taken from the burning tug. There is evidence of the presence of other assistance which undoubtedly, from the testimony disclosed in the case, would have rescued the men, and this is an important element to be taken into consideration. The Boyne (D. C.) 98 Fed. 444.

After consideration of all of the circumstances as disclosed by the evidence, I think that \$300 will be a liberal allowance to the libellants. *Spreckles v. The Brussels* (D. C.) 38 Fed. 528; *The Elmbank*, 69

Fed. 104, 16 C. C. A. 164; The Florida (C. C.) 22 Fed. 617; The America (D. C.) 136 Fed. 510. This is practically 10 per cent. of the property salvaged. This is to be divided, three-fourths to the tug West Coast, and one-fourth between the master and crew and Jack Lundey, the intervening libellant; this to be divided equally between all of the parties.

A decree may be submitted.

DUPLEX METALS CO. v. STANDARD UNDERGROUND CABLE CO.

(District Court, W. D. Pennsylvania. November 23, 1914.)

No. 66.

1. COSTS (§ 154*)—DISBURSEMENTS—DEPOSITIONS—CONSULAR FEES.

Where both parties stipulated for the taking of certain testimony abroad before the United States consul, instead of a commissioner, the court, on a return of the depositions with a charge at the rates prescribed by the official tariff of American consular fees, could not disallow any part thereof as either improper or excessive.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 596-604; Dec. Dig. § 154.*]

2. COSTS (§ 178*)—DISBURSEMENTS—PHOTO-LITHOGRAPHS OF EXHIBITS.

A charge for photo-lithographs of exhibits for the records is a proper disbursement, and allowable as a cost item.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 708-711; Dec. Dig. § 178.*]

In Equity. Suit between the Duplex Metals Company and the Standard Underground Cable Company. On plaintiff's exception to the taxation of costs. Overruled.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for plaintiff.

Christy & Christy, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This matter came before the court upon exceptions on the part of the plaintiff to taxation of costs. Objection is made to the allowance of \$431.60, which appears to have been paid to Frank H. Mason, American consul general at Paris, before whom certain testimony was taken in pursuance of a stipulation entered into by the parties. The stipulation provided that the testimony of three witnesses might be taken—

"before the United States consul at Paris, or his deputy, at the consulate, or at such other place in Paris as said consul, or his deputy, may designate, or as may be determined by agreement of the counsel representing complainant and defendant in the taking of said testimony; that such testimony shall be taken in the English language, so far as possible; that the questions and answers may be propounded and given viva voce, and be recorded stenographically or by typewriter, as the said counsel shall at the time agree; and that, in case the services of an interpreter may become necessary, such person as may be agreed upon by said counsel shall act in such capacity, or, in the event of the inability to so agree, then such person as may be selected by the consul or his deputy."

[1] The parties to this suit, having agreed by their counsel as to the officer before whom the depositions should be taken, by implication

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agreed that the lawful fees of such officer should become part of the costs in the case. It is insisted now on the part of the complainant that the officer before whom the testimony was taken was acting as a commissioner, and was therefore only entitled to the fees allowed commissioners for like services. Unfortunately for the exceptant, the officer before whom the testimony was taken was acting in his official capacity as a consular representative of the United States, and as such was required to charge and receive lawful fees for the services performed by him.

By section 1750 of the Revised Statutes (Comp. St. 1913, § 3211) such consular officer was authorized to perform the services rendered in this case, and by that section protection was given to the parties against perjury by any of the witnesses, and protection was afforded by the provisions in that section for the admission in evidence of any document having the seal or signature of such consular officer. The fees established by law for consular services, and not the fees established by law for the services of an ordinary commissioner to take testimony, must control. The officer before whom the testimony was taken gave a receipt in which he states that his charges were "at the rates prescribed by the official tariff of American consular fees." In view of a certificate to that effect, this court cannot say that the fees are improper or excessive, there being no other evidence to the contrary.

Inasmuch as this court cannot control or change the official tariff of American consular fees, the first exception must be dismissed.

[2] As to the second exception, which was to an item of costs as taxed to Norris, Peters & Co., for reproduction of records, \$6.50, so far as appears, this item was for photo-lithographs of exhibits for the records. It has long been the practice of this court to allow the cost of these reproductions, which are made for the records, as being the most convenient way and the least expensive way of preparing them for the court. The second exception must be dismissed.

ARCHBALD v. UNITED STATES.

(District Court, M. D. Pennsylvania. October Term, 1914.)

No. 629.

1. JUDGES (§ 22*)—EXPENSE ALLOWANCE OF COMMERCE COURT JUDGES.

The provision of Judicial Code (Act March 3, 1911, c. 231) § 200, 36 Stat. 1146, that "each of the judges during the period of his service in the Commerce Court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as Circuit Judge an expense allowance at the rate of one thousand five hundred dollars per annum," was not repealed by the failure of Congress to make an appropriation for the payment of such allowance after August 24, 1912, and the United States is liable to a judge for the amount accrued thereunder during the time of his subsequent service as a member of the court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 75-88, 179; Dec. Dig. § 22.*]

2. COURTS (§ 302*)—JURISDICTION OF FEDERAL DISTRICT COURT—CLAIMS AGAINST UNITED STATES.

A suit by a judge to recover such allowance is not within Judicial Code (Act March 3, 1911, c. 231) § 24, par. 20, 36 Stat. 1093 (Comp. St. 1913, § 991 [20]) which excepts from suits against the United States of which the District Courts are given jurisdiction "cases brought to recover fees, salary or compensation for official services of officers of the United States," and may be maintained in a District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 843, 986; Dec. Dig. § 302.*]

At Law. Action by R. W. Archbald against the United States. Judgment for plaintiff.

See, also, 217 Fed. 165.

R. W. Archbald, Jr., of Philadelphia, Pa., for plaintiff.

Rogers L. Burnett, U. S. Atty., of Scranton, Pa.

WITMER, District Judge. This case coming on to be heard on the proofs and allegations of the parties, and the plaintiff having established his claim by proof satisfactory to the court, the following facts are found from the evidence:

Facts.

(1) The full name of the petitioner is Robert Wodrow Archbald, and he resides in the city of Scranton, county of Lackawanna, and said state of Pennsylvania.

(2) On December 12, 1910, Hon. William H. Taft, President of the United States, appointed the petitioner additional United States Circuit Judge from the Third Circuit, under and in accordance with the provisions of Act June 18, 1910, c. 309, 36 Stat. 539, commonly known as the "Commerce Court Act," and designated him to serve in the said Commerce Court for the term of four years, and on January 31, 1911, the said appointment was duly confirmed by the Senate of the United States, and the petitioner was thereupon commissioned as such Circuit Judge.

(3) On February 1, 1911, the petitioner took the required oath of office and thereupon entered upon his duties as additional United States Circuit Judge and Associate Judge of the said Commerce Court, and continued to perform the said duties until January 13, 1913; when he was impeached and removed from said office of Circuit Judge.

(4) It is provided by the first section of the said Commerce Court Act that each of the judges during the period of his services in the Commerce Court shall, on account of the regular sessions of the court being held in the city of Washington, receive, in addition to his salary as Circuit Judge, an expense allowance at the rate of \$1,500 per annum.

(5) The expense allowance of the petitioner as judge of the Commerce Court was paid up to August 24, 1912, but not after that; Congress having made no appropriation to pay such allowance to any of the judges beyond that time.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(6) The amount of the expense allowance of the plaintiff from August 24, 1912, to and including January 13, 1913, at the rate of \$1,500 per annum, is \$583.45.

The conclusions of the court upon the questions of law involved in the case are as follows:

Law.

[1] 1. The provisions of the Commerce Court Act with regard to the expense allowance of \$1,500 per annum to each of the judges was not repealed, and remained in force during the time that the petitioner was a judge of the said court.

2. The petitioner having served as a judge of the Commerce Court until he was removed from office on January 13, 1913, was entitled to be paid the said expense allowance up to that time.

3. The failure of Congress to make an appropriation to pay the expense allowance to the judges of the Commerce Court beyond August 24, 1912, did not repeal the provisions of the Commerce Court Act with regard thereto. *United States v. Langston*, 118 U. S. 389, 6 Sup. Ct. 1185, 30 L. Ed. 164; *United States v. Vulte*, 233 U. S. 509, 34 Sup. Ct. 664, 58 L. Ed. 1071.

[2] 4. This court has concurrent jurisdiction with the Court of Claims of cases of this kind by virtue of section 24, paragraph 20, of the Judicial Code, this not being a suit to recover fees, salary, or compensation for official services. *United States v. Swift*, 139 Fed. 225, 71 C. C. A. 351; *Benedict v. United States*, 176 U. S. 357, 20 Sup. Ct. 458, 44 L. Ed. 503. See, also, opinion in this case overruling demurrer to petition, 217 Fed. 165.

5. This, being the district of the petitioner's residence, is the proper district in which suit should be brought (Act March 3, 1887, c. 359, § 5, 24 Stat. 506 [Comp. St. 1913, § 1575]); this section of the Act of 1887 not having been repealed by the Judicial Code.

6. The plaintiff is entitled to judgment for \$583.45, and to recover the fees paid the clerk as costs. Act March 3, 1887, c. 359, § 15, 24 Stat. 508 (Comp. St. 1913, § 1143).

And now, to wit, December 5, 1914, the clerk is directed to enter judgment against the defendant and in favor of the plaintiff for the sum of \$583.45, with costs.

WHEELING & L. E. R. CO. et al. v. CARPENTER et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1914.)

No. 2426.

1. CARRIERS (§ 66*)—MEANS OF TRANSPORTATION—IMPLIED CONTRACTS—REORGANIZATION OF CORPORATION.

A railroad company, owning the controlling interest in a coal company, which was insolvent and in the hands of a receiver, devised and proposed and carried out a plan of reorganization, which involved (1) the acquiring of the property by a committee of bondholders through foreclosure sale, and its transfer to a new company organized by the railroad company; (2) the issuance by the new company of obligations to be paid within 10 years to take up receiver's certificates and other indebtedness prior in lien to the bonds, and also bonds to the old bondholders to the amount of 75 per cent. of their former holdings; (3) a lease of the property for 10 years providing that the lessee should mine not less than 700,000 tons of coal per year and pay a fixed royalty thereon; (4) a contract between the railroad company and the coal company, by which the former agreed to pay to the coal company a stated sum per ton on all coal shipped by the latter, to be applied to the payment of the prior lien obligations until both interest and principal should be discharged, in consideration of which it was to have all of the stock of the coal company. The mortgage securing such obligations and the bonds provided that the royalties under the lease should be applied to the payment of interest on the bonds and in creating a sinking fund for payment of the principal, any surplus to be applied to the prior lien obligations. Under such several contracts, if the minimum quantity of coal only was mined, the coal company would have sufficient income to meet all such requirements, with a small surplus. During the first two years the lessee mined more than the required minimum, but thereafter much less, because of the failure and refusal of the railroad company to furnish sufficient cars, there being no other means of shipment. The lessee was able and desired to mine the minimum or more each year, and obtained and furnished to the company additional cars, which it diverted to other uses. The coal company had no independent existence; its officers and directors being officers and employes of the railroad company, which controlled all of its actions. *Held*, that as the reorganization plan was that of the railroad company, in reliance on which the lease had been made and the bondholders had scaled their holdings, its contribution agreement, by which the prior lien obligations were to be paid, was based on a valuable consideration and valid; that as the success of the plan and the solvency of the coal company depended entirely on the production of at least the minimum quantity of coal named, as was understood by all of the parties, which again depended upon the car supply, there was an implied contract on the part of the railroad company to furnish the cars required, on which the bondholders had a right to rely, and that the railroad company was liable for all loss sustained by them by reason of its failure to do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 221; Dec. Dig. § 66.*]

2. CONTRACTS (§ 168*)—CONSTRUCTION AND OPERATION—IMPLIED CONDITIONS.

The circumstances surrounding an express contract and what is to be performed under it may raise implied incidental agreements not directly involving the subject-matter expressly agreed upon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
218 F.—18

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in equity by E. E. Carpenter, Franklin Leonard, Jr., and Joseph T. McCaddon against the Wheeling & Lake Erie Railroad Company, W. M. Duncan, its receiver, and others. Decree for complainants, and defendant Railroad Company and its receiver appeal. Modified.

The Wheeling & Lake Erie Railway Company, a corporation of Ohio, owning a large part of the stock of the Wheeling, Lake Erie & Pittsburgh Coal Company, a corporation of Ohio, controlled it as a subsidiary company, and through it had carried on the business of mining coal. Both were in the hands of the same receivers. The railway company was reorganized in 1900, under the name of the Wheeling & Lake Erie Railroad Company, a corporation of Ohio. The lands of the coal company, containing coal mines, were adjacent to the railroad, which furnished the coal's only outlet. The receivers operated the coal mines. M. A. Hanna & Co. were sales agents for the receivers, and continued as such until January, 1902. There were outstanding against the coal lands a mortgage made by the coal company securing something less than \$1,000,000 of bonds, and receivers' certificates and other debts prior to the bonds, the exact amount of which does not clearly appear.

January 25, 1897, an agreement providing for a complete plan of reorganization of the coal company was made between a committee of the bondholders, the Mercantile Trust Company and such bondholders as might deposit their bonds with the trust company for the purpose. April 11, 1900, the bondholders' committee submitted to the bondholders a plan of reorganization, and with it a circular of date April 19, 1900, prepared after consultation with representatives of bondholders and "various interests concerned." These interests were M. A. Hanna & Co., who were selling the coal mined by the receivers, and the railroad company, which controlled the mines and transported the coal.

The committee advised the bondholders of their belief that they had devised a method by which the necessary moneys could be raised and the future of the company made secure, which should be satisfactory to all the bondholders. The information in the circular to that end was:

"1. The moneys necessary to pay receivers' obligations and expenses for foreclosure and reorganization are provided for in this plan by the issue of temporary prior lien obligations, the payment of which is to be in large part made and in effect is to be guaranteed by the Wheeling & Lake Erie Railroad Company.

"2. The committee have now practical assurance that the moneys required to pay interest on the new issue of bonds, together with sinking fund, taxes, etc., can be raised by means of a lease of the mines to responsible parties, on a royalty of 6½ cents per ton on the amount of coal mined, with a guaranty of a minimum output of seven hundred thousand tons each year."

It was further said in the circular:

"In consideration of the large contribution to be made by the railroad company to the amount necessary to pay the receivers' obligations and the expenses of foreclosure and reorganization, the total of which it is estimated will be from \$175,000 to \$180,000, the capital stock of the new company, except so much of it as the committee in its discretion shall see fit to use in discharging the floating debt of the coal company, is to be turned over to the railroad company.

The expected minimum income of the new company under the proposed lease is.....		\$45,500 00
The interest on the proposed new bonds, \$634,500, at 4 per cent.....	\$25,380 00	
The amount for sinking fund.....	10,000 00	
Estimated amount for taxes, etc.....	7,000 00	42,380 00
Surplus		\$ 3,120 00

"It is expected that this surplus, together with the contributions from the railroad company, will care for the interest on the prior lien obligations, and in a few years discharge them entirely, leaving the new bonds an absolute first lien upon the property. It is also expected that the output of the mines will be considerable in excess of the minimum to be stipulated for in the lease, in which case the payment of prior lien obligations will be proportionately hastened. * * * In order to bring the interest charges of the new company within the income which is expected to be assured under this plan, it has been necessary to give to the bondholders 75 per cent. only of the face of their present holdings; but inasmuch as the new bonds will have the prospect of a regular income, as well as the advantage of a sinking fund, it is believed that the result to the bondholders will be better than that attainable by any other method which the committee can devise."

The plan, of great length and amplification of detail, was, in substance, that the foreclosure of the mortgage be brought about; the property bought in for the bondholders and paid for by the bonds pro tanto; a new corporation organized under the name of the Pittsburgh, Wheeling & Lake Erie Coal Company to take over the property; the issue of prior lien obligations at 5 per cent., maturing in 10 years, due July 1, 1911, not to exceed \$200,000, to discharge obligations prior to the bonds, and \$834,000 in mortgage bonds at 4 per cent. payable semiannually, due in 30 years from date, subject to the prior lien obligations, and \$1,250,000 in stock. The provisions for the payment of prior lien obligations were:

"1. By applying thereto the surplus earnings of the new company, after paying or setting aside the sums required for the payment of the semiannual interest upon the said mortgage bonds and for maintaining the yearly sinking fund. * * *

"2. By the contribution by the Wheeling & Lake Erie Railroad Company to the said new company towards the payment and discharge of said prior lien obligations of a sum equal to one cent upon each ton of coal produced by the mines of the new company and transported upon or over the road of said railroad company for the first year after the date of said prior lien obligations; the contribution by said railroad company for the next succeeding year, for the same purpose, of a sum equal to two cents upon each ton of coal so produced and transported; and by the contribution by said railroad company for each year thereafter, for the same purpose, of a sum equal to three cents per ton upon each ton of coal so transported, until the entire principal and interest of such prior lien obligations have been paid and discharged—it being understood that said railroad company shall not be required to make any contribution to the new company upon the coal produced by said new company and purchased from it by the railroad company for the latter's own use and consumption. * * * The contributions of said railroad company to said new company towards the payment and discharge of said prior lien obligations as aforesaid are to be provided for and made effective by such agreements with or guaranties executed by the said railroad company as the committee and their counsel shall determine."

Provision was made for securing the prior lien obligations and bonds by mortgage; the right of enforcing the security to be given to the holders of either class of obligations; the mortgage to provide also for the establishment of a sinking fund from the earnings of the new company of \$10,000 annually, which was to be used in the purchase of additional coal lands, or in the purchase and retirement of the bonds on allotment. The committee in their discretion were to use the preferred stock in settling prior claims, and any of such stock not so used and all the common stock were to be delivered to the railroad company in consideration of the contribution agreement "based upon the amount of coal produced by the new company and transported by the said railroad company upon or over its railroad."

The minutes of the reorganization committee of a meeting at New York August 16, 1901, show that all the outstanding bonds had been deposited with the committee, except 2; that the mortgage upon the property of the Wheeling, Lake Erie & Pittsburgh Coal Company had been foreclosed, and the same had been purchased on behalf of the committee for the upset price of \$350,000

and the assumption of the receivers' liabilities; that a new company had been formed in Ohio, to be called the Pittsburgh, Wheeling & Lake Erie Coal Company, and that the papers had all been prepared for the transfer of the property so purchased on behalf of the committee to the new coal company; that a mortgage by the new company to the Mercantile Trust Company, to secure the bonds and prior lien obligations, was to be made under the plan of reorganization; that a lease of the mine had been agreed upon to the Wheeling & Lake Erie Coal Mining Company, guaranteed by M. A. Hanna & Co., on a royalty of 6½ cents a ton, the lessee agreeing to pay on not less than 700,000 tons each year; that an agreement had also been entered into between the new company and the Wheeling & Lake Erie Railroad Company for a contribution to be made by the latter upon each ton of coal transported by the railroad, in accordance with the terms of the plan; that these papers had not yet been delivered, awaiting the completion of another agreement between the railroad company and the Wheeling & Lake Erie Coal Mining Company, which latter agreement was expected to be consummated the present week. (This agreement was for fuel coal.)

Thereupon it was resolved, among other things, in substance, that the chairman cause to have completed and delivered the necessary papers to carry out the transfer of the property to the Pittsburgh, Wheeling & Lake Erie Coal Company, theretofore formed, and to receive from it the prior lien obligations, bonds, and stock pursuant to the plan. And from the minutes it appears further:

"During the consideration of the foregoing resolution the following telegram was received, and ordered to be placed on file:

"Cleveland, Ohio, Aug. 15, 1901.

"A. W. Krech, Mercantile Trust Co., New York: Have just had conference, at which were present Herrick, Squires, Hanna, Blickensderfer, and myself, and we have arranged fuel matter satisfactorily. Hanna says that lease will be executed this afternoon, so the reorganization committee can go ahead.

"J. Ramsey, Jr."

Ramsey was the president of the railroad company. Krech was an officer of the Mercantile Trust Company and secretary of the committee, and an officer of the railroad company. In June the railroad company, through its agents and employes, had organized the Pittsburgh, Wheeling & Lake Erie Coal Company, with a capital stock of \$1,250,000, to take over the property of the old coal company. No money was paid in, except \$12,500—doubtless used for expenses. And the Wheeling & Lake Erie Coal Mining Company was created by M. A. Hanna & Co. to mine the coal.

At a meeting of the directors of the new coal company, who were also its incorporators and employes of the railroad company an offer was made by one of them proposing to cause to be conveyed to the new coal company the old company's property recently sold on foreclosure, and to procure acceptance by the coal mining company of a lease of the property from the new coal company for the term of 10 years from July 1, 1901, on a royalty of 6½ cents per ton mined and removed from the property, a minimum of 700,000 tons per annum to be mined. He also proposed to procure a contract for the new coal company with the railroad company whereby the railroad company would contribute toward the payment of the prior lien obligations (setting forth the manner of contribution described in the plan), for all of which he, or his nominee, was to receive all of the capital stock, \$200,000 in prior lien obligations, and mortgage bonds hereinbefore described.

The proposition provided for a mortgage from the new coal company to the Mercantile Trust Company to secure the prior lien obligations and the bonds, and the use by the coal company of the prior lien obligations and the bonds for the purpose of carrying out the reorganization, and on acceptance a deed was to be given the new coal company. The proposition was accepted, and the railroad company entered into an agreement July 1, 1901, with the coal company and the Mercantile Trust Company, as trustee (after reciting, among other things, that "said plan of reorganization was adopted and all proceedings thereunder had upon the assurance duly given by the railroad company

that it would execute and deliver an agreement to the tenor and effect hereof"), to pay to the trustee the contributions upon the amount of coal mined by Hanna & Co.'s mining company and transported by the railroad (as set forth in the plan), and that its contributions should be used by the trustee in payment of principal and interest of the prior lien obligations, and that "when the same shall have been paid and discharged in full the obligations of the railroad company to make the payment aforesaid upon each ton of coal produced and transported as aforesaid shall cease and determine." The coal company on its part agreed, until those obligations should be fully paid, to pay each year to the trustee all the surplus earnings of the coal company in accordance with article IV of the mortgage to the trustee, to which further reference will be made.

July 1, 1901, the railroad's new coal company and Hanna & Co.'s mining company entered into an agreement of lease, the terms of which were guaranteed by Hanna & Co., by which the mining company agreed to mine and remove from the coal lands at least 700,000 tons annually, and to pay for each ton so mined and removed the sum of 6½ cents as royalty to the coal company, and, if the coal were not mined, to pay royalty at the same rate, and agreed to pay all the taxes on personalty and to do many other things. The railroad company admits that it was the "real lessor" in this lease.

The mortgage securing the prior lien obligations and the bonds is of great length. It recites that its purpose is to secure the payment of the principal and interest of the prior lien obligations as a paramount lien and the principal and interest of the mortgage bonds; and for the further security for the payment of the prior lien obligations, the mortgagor agreed (article IV) to pay annually to the trustee all of its surplus earnings, and (article VI) to establish a sinking fund of \$10,000 annually to be applied to the payment of mortgage bonds on allotment as far as the money would go. And the mortgage further provided (articles VII and X) that until default be made the coal company (the mortgagor), its successors or assigns, "shall be permitted to remain in the actual possession and enjoyment of all and singular the property herein conveyed, or intended so to be, and of the revenues and income thereof, using the same, developing and operating the mines contained and to be contained within the lands and premises hereinbefore described, removing the coal therefrom, and selling and disposing thereof in the same manner as though this indenture was not made," and that in case of default the mortgagee was given the right of entry and to operate the mines and conduct the business, etc., and "also to collect and receive all the revenues, income, increase, rents, issues, and profits of the same. * * *"

One other written agreement completes the list. In the railroad's agreement to contribute, it was provided that there should be no contribution for coal used and consumed by it. Inasmuch as the railroad's coal company was a company on paper and the mines were to be operated by the mining company, an agreement was entered into between the railroad company and Hanna's mining company, by which the railroad could get coal for its own use and consumption. This was made August 15, 1901, the same day the telegram was sent by Ramsey to Krech, and in it the railroad company (after reciting that Hanna & Co. were the sales agents of the mining company and that the railroad company was interested in the property and desirous of having it worked to its capacity, and of obtaining all coal mined therefrom for transportation over its road, except so much as it desired to use for its own fuel), agreed that the mining company would, for five years, sell, and the railroad company would buy, certain coal for fuel to be delivered at the mines of the mining company, and provision was made for renewal for an additional five years, "conditioned that the Wheeling & Lake Erie Coal Mining Company, its successors and assigns, shall mine at least the minimum tonnage of 700,000 tons per year provided for in its lease from the Pittsburgh, Wheeling & Lake Erie Coal Company, and shall ship over the railroad of second party all of the coal so mined not taken under this contract by the railroad company."

The adoption of the plan was awaiting the execution of this fuel agreement and the Hanna mining company lease. Not till then was the reorganization

permitted to "go ahead." The plan proceeded. All of the stock, both preferred and common, was issued to the railroad company, and the prior lien obligations (owned by Hanna & Co. when this suit was brought) and bonds were issued. It was proved that the mining company could have produced, and Hanna & Co. could have sold, more than the minimum during the entire life of the prior lien obligations, if the railroad company had furnished the cars for transporting the coal. The railroad company, the coal company, and Worthington, receiver of both, admit in their separate answers that "the failure to mine and ship the minimum quantity of coal specified in said lease (Hanna mining company lease), and to pay the royalties thereon, was occasioned by the failure and refusal of the Wheeling & Lake Erie Railroad Company, the real lessor of said premises, to furnish sufficient facilities for handling and transporting the coal mined under said lease."

During the first two years of the working of the plan (1902 and 1903), the mining company mined more than the minimum; in 1904 much less, because of a shortage of cars, a situation which continued until the plan broke down. The success of the plan depended necessarily upon the railroad's furnishing cars to haul away the coal mined by the mining company. Its failure to provide the cars caused the failure of the plan of reorganization which it promoted for its own benefit and permitted the bondholders to participate in only upon surrendering 25 per cent. of their just debt against its coal company. Hanna & Co. repeatedly called the railroad's attention to the car shortage. They even went so far as to provide with another mining company 1,500 cars for the use of the railroad in transporting the coal. These and much of the equipment of the railroad company were diverted by it to other purposes.

In the meantime the plan of reorganization of the coal company, by which the bondholders, through the railroad's contribution agreement and Hanna's coal company's royalties, were to get their interest paid and some at least of the principal, and the holders of the prior lien obligations were to get their interest and principal within 10 years, was being starved to death. The repeated demands of Hanna & Co. for cars to be supplied the mines of their coal company meeting with no response, they from time to time withheld royalties they had agreed to pay the coal company until they owed it up to December 31, 1907, \$63,383.16, which they declined to pay. That they were injured greatly cannot be doubted. Thereupon they dealt directly with the railroad company as the only party in interest for a modification of the lease, and both parties agreed June 2, 1908 (the mining company by D. R. Hanna, its president, the members of the firm of Hanna & Co., and the coal company by B. A. Worthington, its president, who was also the vice president and general manager of the railroad company, the coal company ratifying by direction of the railroad company), that the minimum tonnage should be reduced to 550,000 tons "as conforming to the conditions of car supply and facilities offered by the Wheeling & Lake Erie Railroad Company," and that the lease should be assigned to Hanna, Ireland, and Andrews, constituting the firm of M. A. Hanna & Co., who assumed the terms and conditions thereof. The mining company and Hanna & Co. were released from liability for claims for royalty growing out of the failure to mine the minimum 700,000 tons annually up to December 31, 1907, and Hanna, Ireland, and Andrews were given permission to transfer the leases and agreement to a corporation to be organized by them or to the Wheeling & Lake Erie Coal Mining Company, but were not released from the original guarantee of their firm on the lease.

It was shown that in the negotiations leading up to the making of the original lease, the negotiations being had with officers of the railroad company, Hanna was assured that there would be transportation sufficient to move the coal contemplated by the plan, and he testified this was the condition upon which the agreement with his mining company was made. But even at the reduction to a minimum of 550,000 tons, the railroad company continued to default in furnishing cars and the inevitable arrived. The railroad company having gone into the hands of a receiver June 9, 1908 (seven days after the modification of the lease was made), by appointment of the United States District Court for the Northern District of Ohio, Eastern Division, B. A. Worthington, its receiver and vice president and general manager, and presi-

dent of the coal company, representing to the court, December 20, 1908, that the coal company was subsidiary to the railroad company and was insolvent, brought about the appointment of himself as receiver of the coal company. Prior thereto, October, 1908, he, as receiver of the railroad company, represented to the court that it was not to the interests of the railroad company to continue the contribution contract, and obtained an order to discontinue payments. This order was without notice to the Mercantile Trust Company and at the time of the modification of the lease no notice was given to the bondholders or their trustee, but the negotiations to that end were conducted entirely between Hanna & Co. and the railroad company.

Interest, payable July 1, 1908, was paid on the prior lien obligations and upon the mortgage bonds, and during July, 1909, interest accruing January 1, 1909, upon the prior lien obligations was paid under the directions of the court. Those obligations being unpaid and the coal company being in the hands of a receiver, the complainants, Carpenter, Leonard, and McCaddon, on October 5, 1909, brought this suit against the railroad company, Worthington, its receiver, the coal company, and Worthington, its receiver, the coal mining company, Mercantile Trust Company, and Hanna, Ireland, and Andrews, doing business under the name of M. A. Hanna & Co. Duncan, receiver, is the successor of Worthington, resigned. The complainants are a committee of bondholders of the coal company, who, upon the refusal of their trustee to bring the suit, institute it for themselves and others who might come in. The bill, amended and supplemental, and the answers of the defendants, are of great length. In view of what has been said heretofore, and the assignments of error, it will be sufficient to refer only to the issues presenting any real controversy.

An issue was made on complainants' contention that the order instructing the receiver to discontinue making payments under the railroad company's contribution contract should be set aside; that the contract of modification of the lease be set aside as being a fraud upon the rights of bondholders; that Hanna & Co., who had become the owners of the prior lien obligations, should be enjoined from foreclosing the mortgage upon the coal company; that Hanna & Co. should be compelled to pay the full amount of royalties, and that the railroad company should account for all moneys which it was alleged had been by it diverted from the coal company by the wrongful payment of taxes and improvements upon the leased property, which the mining company had agreed to pay; that the Mercantile Trust Company should account for moneys in its hands applicable to the payment of interest on bonds and prior lien obligations; and that an accounting should be had of the liability of the mining company for amounts of royalties due by it.

The District Judge held that the contribution contract of the railroad company was based upon sufficient consideration and obligated it to pay for and retire, before their maturity, the prior lien obligations; that the bondholders relied upon that agreement of the railroad company, and in reliance thereon received their bonds, and that the failure of the railroad to pay off and retire the prior lien obligations, and prevent the foreclosure of the mortgage by reason of their maturity, would be a fraud on the bondholders; that the contract of modification of the lease by which Hanna & Co. were excused from the payment of the royalties in default was a valid contract, and released the mining company and Hanna & Co., as guarantors of the original lease, from all liability theretofore accruing thereunder; and ordered that pending the payment of the prior lien obligations by Worthington, receiver of the railroad company, Hanna & Co., and all parties acting under them be restrained from proceeding to foreclose upon the coal company until further order, and that the claim of the bondholders for moneys alleged to have been diverted by the railroad company for the payment of taxes and improvements on the coal property be transferred to cause No. 7603, pending in the District Court. A severance having been had, the railroad company and Duncan, as its receiver, alone appeal.

The railroad company and Duncan, its receiver, assign error in the decree below in finding that the bondholders of the old coal company were induced to accept the bonds of the new coal company upon the express promise of the

railroad company contained in its contribution contract; in finding that the contribution contract was a valid and legal contract based upon sufficient consideration, and obligated the railroad company to pay off before maturity the prior lien obligations; in finding that the bondholders relied upon the railroad company's agreement to retire the prior lien obligations before maturity and in reliance thereon received their bonds; in finding that the failure of the railroad to pay the prior lien obligations and prevent the foreclosure of the mortgage because of their maturity would be a fraud on the bondholders of the coal company; in ordering that the former order directing the discontinuance of payments under the contribution contract should be set aside; in not finding that the railroad company paid under its contribution contract \$54,578.73, and its receiver had advanced \$45,519.71 as interest on the coal company's funded debt, and that the railroad company should receive credit thereon for any sums due under the contribution contract.

J. G. Fogg and R. M. Calfee, both of Cleveland, Ohio, for appellants.

D. A. Holmes, of New York City, and F. H. Ginn, of Cleveland, Ohio, for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). [1] The plan of reorganization of the coal company was in fact the plan of the railroad company. By its agents and employes it brought about the incorporation of the new coal company to take over the assets of the old coal company, which it controlled. It engineered the various steps through which the prior lien obligations were exchanged for the obligations of the old coal company prior to its bonded indebtedness, and the new bonds were issued in exchange for the old bonds at a reduction of 25 per cent. of their face value, and the stock of the new company was issued to itself. In this way, by agreement with the bondholders, becoming the owner of all of the capital stock of the new coal company, its control over that company was absolute. It brought about the Hanna mining company contract with the coal company for royalties. Its own clerks kept the books of the coal company without additional compensation. It itself made with the Hanna mining company the contract modifying the mining company lease, which it caused its coal company to thereafter ratify. The various agreements to which the new coal company was a party were its agreements—the coal company solemnly going through the forms of corporate sanction. It dominated the bondholders' committee, the secretary of which was one of its officers. It was admittedly the "real lessor" in the Hanna mining company lease. The only function left to the bondholders' committee, as such, was to issue the prior lien obligations and the new bonds to those entitled thereto. Even these, dated July 1, 1901, could not be delivered until the railroad company had brought about that lease and the contract for coal for its own consumption.

When the lease, dated July 1, 1901, was consummated, the railroad company, on the date of its actual execution, August 15, 1901, directed the bondholders' committee to "go ahead." The lease was the foundation of the plan, for the railroad company, neither by itself nor through its coal company, mined, intended to mine, or could mine any

coal. The mining company guaranteed by Hanna & Co., was to mine the coal, and the royalty paid by it was the only revenue the coal company had from which, together with the railroad company's contributions payable to the trustee of the bondholders on the coal actually transported, the prior lien obligations, within the 10 years of their life, and interest, and interest on the bonds, and taxes on the real estate for 10 years, could be paid. So the only income contemplated by the plan and available for its purposes came directly or indirectly from the coal mined by the mining company. This revenue, within the 10 years, must be \$200,000 for the prior lien obligations, \$100,000 as interest at 5 per cent., \$253,800 as interest on \$634,500 of bonds, and \$70,000 for realty taxes, estimated in the plan at \$7,000 a year—a total of \$623,800. In these figures is found the reason why the railroad company required the Hanna mining company to agree on a minimum production of 700,000 tons a year. The royalties on that minimum would amount, in 10 years, to \$455,000, and the railroad company's contributions (leaving out of consideration, for the moment, the railroad company's agreement with the mining company for coal for its own consumption, which, as it was not transported, was not subject to the agreed contribution per ton), \$189,000, a total of \$644,000, in which there is a margin of \$20,200 over the \$623,800, the bare necessities of the plan required.

It was expected by all concerned that more than the minimum would be mined, and that the royalties and contributions would not only provide for the requirements of the plan, but would produce a sum in addition sufficiently large to accelerate the time of payment of the prior lien obligations and apply also to the payment of some of the bonds on allotment. The mining company was willing to mine, and could have mined, more than the minimum the railroad company required it to agree to mine, and Hanna & Co. were willing to sell, and could have sold more than the minimum, had not the railroad company refused and failed to transport the coal. It is clear enough that, if only the minimum were mined, the railroad company could not, consistently with the requirements of the plan, purchase from the mining company more coal during the 10 years than is represented by \$20,200 at the percentage, under its contribution contract, of one cent and two cents, respectively, for the first two years, and three cents per ton for the succeeding eight years, for every ton it bought of the mining company for its own consumption reduced its contribution to the plan; the more it bought, the less its contributions would be, and vice versa. It is equally clear the mining company could not mine even the minimum, or any amount of coal, unless the railroad company furnished cars sufficient to carry it away. The success of the plan, therefore, lay wholly within the power of the railroad company. It could destroy the plan by denying to Hanna & Co. cars sufficient to haul the coal away, or by purchasing from the mining company more coal for its own consumption than the integrity of the plan permitted.

For the first two years (1902 and 1903) there were mined 95,932.95 tons in excess of the minimum, and thereafter there was a falling away each year in production from the minimum of enormous amounts of

coal—in 1904, more than 164,000 tons; in 1905, more than 306,000 tons; in 1906, nearly 252,000 tons; in 1907, more than 270,000 tons (the record not disclosing completely the deficits in each of the following years). And the evidence shows the railroad's average purchase of fuel coal for the ten years was 185,564 tons (estimating the last year on the average for the preceding nine years), representing a contribution of about \$50,000, which is nearly \$30,000 more than was consistent with the integrity of the plan. Primarily the plan failed because, and admittedly, the railroad company did not furnish the Hanna mining company cars necessary to transport the coal. The railroad company is therefore to blame for the failure of the plan and the consequent damage to the bondholders by reason of the nonpayment of the prior lien obligations and interest unpaid.

The railroad company, notwithstanding the failure of the plan because of its own wrongdoing, claims that in any event it can be required to pay only on the amount of coal actually mined and transported, as in its contribution contract it expressly agreed to pay, and that it is under no other obligation to the bondholders of its coal company. Can the railroad company, notwithstanding its culpability, escape legal liability to the bondholders?

The answer to the question depends, not only upon its express agreement to pay to the trustee of the bondholders the contribution on the amount of coal transported by it, but also on its relation to its coal company, to Hanna & Co., and their mining company, and to the plan of reorganization of the coal company, as well as upon the effect of the receipt by it under the plan of all of the stock of the coal company and the advantage accruing to it of a diminution, to the extent of 25 per cent., of the bonded debt of its old coal company. The obligations of Hanna mining company under the original agreement to pay royalties are not now involved and cannot be considered, for the reason that the bondholders have not appealed from, and in their brief acquiesce in, the judgment of the District Court in which the validity of the modification of June 2, 1908, by which Hanna & Co. and their mining company were absolved from the payment of royalties in default and the minimum was reduced to 550,000 tons a year, was established.

So far as the obligations of the railroad company rest upon express contract, they are found in its contribution agreement. This is drawn in such a way that it expressly obligates itself to pay only on "each ton of coal produced by the mines of said coal company and transported upon or over the road of said railroad company * * * until the entire principal and interest of such prior lien obligations should be paid and discharged." There is here no requirement to pay on at least 700,000 tons annually, or any specific number of tons. So far as express contract is concerned, the railroad company obligated itself to pay only on the amount Hanna & Co. mined and it transported, although the amount it transported depended solely upon itself. Nor can it be said that the circumstances raise an implied agreement for a contribution on at least 700,000 tons a year, because, the subject-matter being expressly agreed upon, no other agreement can be implied. *Hawkins v. United States*, 96 U. S. 689, 24 L. Ed. 607; *Creighton v. To-*

ledo, 18 Ohio St. 447. Nor can the railroad company be estopped from denying that it agreed to contribute on at least the minimum number of tons, because the bondholders must be held to have known, technically, at least, the extent of the railroad company's express contract liability to them, as disclosed by its agreement. If the bondholders must depend upon the express agreement alone, the elaborate plan devised by the railroad company, which seemed to promise so much to the bondholders and in reliance on which they were willing to, and did, scale their holdings against the railroad's coal property 25 per cent., and consent to the railroad company's ownership of all stock of its coal company as reorganized, was a mockery indeed.

Is it possible the bondholders have no remedy, and a court of justice is powerless to afford them relief? We think the rights of the bondholders do not altogether rest upon express contract. Granting that in the railroad company's agreement there was no limitation on the amount of coal it could take for fuel purposes, even if the amount it took was such encroachment upon the necessities of the plan as would result in reducing its contributions to a figure less than the amount the success of the plan required, and that no legal liability rested upon it to take only so much fuel coal as the integrity of the plan permitted, yet the fundamental fact underlay the plan and the various agreements that the railroad company would transport the coal.

It is obvious that the bondholders and Hanna & Co. would not have gone into the plan if they had not supposed and had not reason to suppose that the railroad company's equipment was sufficient for the purposes of the plan. Indeed, the railroad company made an express representation to Hanna & Co. of this fact. That a similar express representation was made to the bondholders or their committee does not appear, but we think an agreement with the bondholders to furnish sufficient cars to Hanna & Co. is implied from the circumstances of the case. The basis of the plan was the sufficiency of the equipment of the railroad company, a fact assumed as a matter of course—a fact which went with the plan—for without it the plan was a phantom, a framework of a plan, with form enough, but no substance. The situation is the same as if the railroad company had actually said to the bondholders that it would furnish sufficient cars to Hanna & Co. to carry the amount of coal Hanna & Co. agreed with it to mine.

It is no defense for the railroad company, against its own wrongdoing, to say that under the requirements of the Interstate Commerce Commission and the Ohio Railroad Commission and the decisions of courts it must distribute such cars as it had among all the coal operators on its line in the ratio of their relative needs; for this is not the case of an independent coal company or coal mining company operating on the line of a common carrier of freight whose supply of cars in times of shortage must be apportioned according to those requirements, for this coal company existed only on paper, and was owned and controlled by the railroad company. It made no move of its own volition, but was manipulated by the railroad company for its own purposes and in its own interests. But even if this is true, the bondholders

knew the relation of the railroad company to the coal company, and with that knowledge accepted the bonds. It, therefore, cannot be held that the prior lien obligations are the contract debt of the railroad company in the sense that it itself executed those obligations. Such a holding would necessarily involve the indebtedness of the railroad company on the bonds themselves. This the bondholders do not claim. No corporate form was used to deceive them. So far as express contract rights are concerned, the bondholders dealt with the coal company as a separate and distinct entity.

If the railroad company had permitted its coal company to manage its own affairs and deal with its creditors on terms of reorganization satisfactory to both, the relation of it to the coal company and its bondholders would be the same as to any other coal company along the line of its road, and this would probably be true even if it so happened that the railroad company owned all of the coal company's stock; but here the coal company had no vitality as a corporation. Its owner devised and brought about the plan of reorganization making a separate express agreement with the bondholders, and brought about the agreement with Hanna & Co. Both agreements were integral parts of the plan. The railroad company for its own ends thrust itself into a situation with which it had no concern, if its coal company had an existence separate from it. Its interference caused the bondholders to agree to give something to it in exchange for the benefits promised them by the plan. Its intermeddling brought it into a direct relation with the bondholders beyond and deeper than its express contract relation. That direct relation embodied the existence of a fact without which the bondholders would not have agreed to the plan, and in reliance upon which they have been subjected to loss. This fact was that the railroad company would haul away the coal mined, less what it bought for its own consumption. This fact, with the contribution agreement and the agreement to pay royalties, were the inducements to the acceptance of the plan and involved a tacit agreement by the railroad company to do the things it alone had the power to do to make the plan effective. When, therefore, the railroad company tendered the plan to the bondholders, it knew and they knew that its requirements involved an adequate supply of cars for transporting the coal. The railroad company, having brought about the Hanna mining company lease, directed the bondholders' committee to "go ahead with the reorganization." They did go ahead, and thereupon the bondholders, on their part, agreed that the railroad company should have all the stock of the coal company and the coal company should be excused from the payment of 25 per cent. of its bonded debt held by them. The bondholders complied with their agreement. The railroad company received the consideration. To now permit it to limit its liability to a contribution only on the coal actually transported by it, when the means of transportation were wholly in its own hands, would be to sanction conduct amounting to fraud on the bondholders.

We think the railroad company's liability can safely rest on an implied contract to furnish sufficient cars to transport at least the minimum. Nor is this conclusion wanting in harmony with the rule "ex-

pressum facit cessare tacitum," under which the railroad company claims that it is bound to do only that which it expressly agreed to do. That rule is not applicable here, because the express contract does not involve the same subject-matter. That was an express agreement to pay money as contributions on coal transported. This is an implied agreement to do that which, under the circumstances, the bondholders necessarily understood the railroad company would do. The bondholders are not suing for the amount the railroad company agreed to pay as contributions per ton on coal transported, but for damages for the failure of the railroad company to furnish cars to carry at least the amount of coal it required the mining company to mine. The implication arises from the nature and the circumstances of the case.

[2] That circumstances surrounding an express contract and what is to be performed under it may raise implied incidental agreements not directly involving the subject-matter expressly agreed upon is illustrated by a decision of this court in *C. & O. Ry. Co. v. McKell*, 209 Fed. 514, 522, 126 C. C. A. 336, 344. In that case there was an express contract, which in one aspect was an agreement by a railroad company to take all the coal on McKell's property, mined by him or his lessees, at a price, and to build a branch railroad on the property to reach the coal. The railroad company built the branch, but did not take all the coal contracted for. One of its defenses for its breach was that it was bound in law to impartially distribute its cars among all coal operators and had not enough to supply this particular operation. On this point Judge Denison said:

"We agree with the court below that, if this contract is to be treated as one for the purchase by the railroad company of its fuel coal, it implied the liability to furnish cars, and that the railroad's failure to provide cars to take away the fuel which it had bought and agreed to take when offered would be a breach of such contract, and that the full performance of defendant's duties as a common carrier in impartially distributing a fair supply of cars would be no answer to the breach. * * *

In *Lovering v. Coal Co.*, 54 Pa. 291, the Supreme Court of Pennsylvania held that, a coal company's railroad connecting its mines with navigation being notoriously its only means of transportation, all contracts with it for coal were made in view of that fact.

For a valuable consideration the railroad company furnished a plan to the bondholders, the success of which depended solely upon itself. It was indispensable to the working of the plan that it would furnish Hanna & Co. with sufficient cars to carry the coal. It was so understood by all interests concerned, and it was not necessary to expressly stipulate on such matters. In 2 *Parsons on Contracts* (7th Ed.) p. 646, it is said.

"The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it, because the law provided for it."

In 2 *Elliott on Contracts*, § 1360, it is said:

"The above rule, * * * that where there is an express contract the law will not imply one, is only applicable to those cases in which the ex-

press contract and that implied by law relate to the same subject-matter, and where the provisions of the express contract are intended to control and supersede those which would otherwise be raised by implication."

Judge Minshall in *Railway Co. v. Gaffney*, 65 Ohio St. 104, 114, 61 N. E. 152, 153, aptly defines the kind of implied contract dealt with here. He says:

"But contracts that are true contracts are frequently termed implied contracts, as where, from the facts and circumstances, a court or jury may fairly infer, as a matter of fact, that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts; the difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in the other case the terms are inferred as a matter of fact from the evidence offered of the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding."

By not providing sufficient cars to transport the minimum, and to that extent reducing the tonnage upon which it expressly contracted to make contributions to a figure at which the plan could not succeed, the railroad company broke its implied contract with the bondholders to transport at least the minimum, less fuel coal, and the measure of their damage is the loss to which they have been subjected by the breach. Apparently the loss, recoverable, as disclosed by the record, is the face of the prior lien obligations, less about 5 per cent., figuring royalties on the amount actually mined in 1902 and 1903, and on 700,000 tons annually for the succeeding eight years, and agreed contributions on the balance each year, after deducting the amount of fuel coal bought that year by the railroad company for its own consumption.

But it is said by the railroad company that the adjudication of the validity of the modification was, since the bondholders were parties to the case, in effect a finding that it was within the power of the railroad company and its coal company, on the one side, and Hanna & Co. and their mining company, on the other, to do away by agreement with all the obligations of the Hanna mining company and the railroad's coal company, not only as between themselves, but also between the railroad company and the bondholders. The railroad company's claim is that in that adjudication were included any and every obligation by the railroad company to the bondholders not embraced in the express agreement for contributions.

We do not think this conclusion follows, for the reason that the rights of the bondholders asserted against the railroad company in this action were not directly in issue in that controversy, since the issues involved there and decided were between the railroad company, its coal company, and the Hanna mining company, and between the Hanna mining company, and the bondholders. In that controversy no issue was raised between the railroad company and the bondholders, for, if the court below had, in making its decision on the validity of the modification of the lease intended thereby to foreclose the bondholders against the railroad company, it could not have held, as it did, the bondholders entitled to require the railroad to pay the prior lien obligations before maturity.

If we are right in holding the railroad company obligated to pay the damage caused the bondholders by its failure to furnish sufficient cars, it is immaterial that it paid to the Mercantile Trust Company contributions, amounting to \$54,578.73, or that its receiver advanced to the coal company \$45,519.71, with which to pay interest on the coal company's funded debt, the only credits which, in its assignments of error, it claims the court below erred in not allowing to it. These, or any other payments on such accounts, are immaterial, for the reason that if the cars had been furnished under the implied agreement we have found to exist, to the extent and on the basis hereinbefore stated, the coal company's receipts, in royalties and contributions, would have been sufficient to have paid interest on prior lien obligations, interest on bonds, and taxes on real estate, and to have accumulated a sum only a few thousand dollars short of the face of the prior lien obligations, as hereinbefore shown.

Since the contribution was to continue until the prior lien obligations were paid, there can be no inequity in denying the application of the usual rule authorizing a receiver to elect not to be bound by a contract thought detrimental to his trust. The court below was right in setting aside its order discontinuing those payments. The claim of the railroad company to be excused from liability in any event, because of the clause in each of the bonds, "It is agreed by the holder of this bond that no recourse shall be had for its payment to the individual liability of any incorporator, stockholder, director, or officer of the Pittsburgh, Wheeling & Lake Erie Coal Company in any manner howsoever," cannot be maintained, because that provision undoubtedly has reference to what is known as the double liability of stockholders under the Constitution and laws of Ohio in force when the bonds were issued, and for the further reason that this suit is not maintained because the railroad company was the owner of all of the stock of its coal company, but, having received by the plan all the stock of the coal company and a reduction of that company's debts, it, in consideration of these, made the express and implied agreements dealt with herein.

As the court below expressly reserved questions of priority between the holders of prior lien obligations and other creditors of the railroad company not parties to this suit, transferring such question for final determination to case No. 7603 of the District Court of the United States for the Northern District of Ohio, Eastern Division, this decision does not interfere with, or affect in any way, the order of the District Court in that behalf.

The conclusion is that the judgment of the District Court on the questions involved in this appeal must be and is modified, and the case is remanded to that court, with instructions to ascertain, by reference to a master or otherwise, the exact amount due the bondholders by the railroad company on the basis of computation herein indicated, and to enter a decree in conformity with the views expressed in this opinion. The costs in this court will be divided equally between the parties to this appeal.

CHICAGO, M. & ST. P. RY. CO. OF IDAHO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 2, 1914.)

No. 2351.

1. WOODS AND FORESTS (§ 8*)—FOREST RESERVATIONS—RAILROAD RIGHT OF WAY.

Act March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1913, § 4921 et seq.), containing a general grant of right of way for railroads over the public lands of the United States, provides in section 5 that the act shall not apply "to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale," unless provided for by treaty stipulation or act of Congress. *Held*, that such exception applies to forest reservations created under Act March 3, 1891, c. 561, § 24, 26 Stat. 1103 (Comp. St. 1913, § 5121), and subsequent acts, and that the right to build a railroad over a forest reservation can only be acquired by the approval of the surveys and plats of the right of way by the Secretary of the Interior, as authorized by Act March 3, 1899, c. 427, § 1, 30 Stat. 1233 (Comp. St. 1913, § 4945).

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

2. WOODS AND FORESTS (§ 8*)—NATIONAL FOREST RESERVATION—ORDER OF EXECUTIVE DEPARTMENT.

An order by the Commissioner of the General Land Office, temporarily withdrawing from sale public lands pending the selection of lands for a forest reservation, is the legal equivalent of one signed by the President, and is effective to prevent the subsequent acquisition of a right of way over such lands by a railroad company, under Act March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1913, § 4921 et seq.), where it is followed by a proclamation by the President creating the reservation thereon.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

3. PUBLIC LANDS (§ 92*)—RAILROAD RIGHT OF WAY—ACQUISITION OF RIGHT.

A railroad company acquires no right or title, as against the United States, to a right of way over public lands under Act March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1913, § 4921 et seq.), until it has either constructed its road or filed a profile thereof, which has been approved by the Secretary of the Interior, as provided in section 4 of the act, and neither of such acts gives the company a right as of a prior date by relation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

4. WOODS AND FORESTS (§ 8*)—FOREST RESERVATIONS—APPROVAL OF RAILROAD RIGHT OF WAY—POWER OF SECRETARY TO IMPOSE CONDITIONS.

Act March 3, 1899, c. 427, § 1, 30 Stat. 1233 (Comp. St. 1913, § 4945), which provides that in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a railroad over and across any forest reservation, "when in his judgment the public interest will not be injuriously affected thereby," confers upon the Secretary power to make his approval subject to conditions prescribed by him to provide against threatened injury to the public interests, and to afford relief and reimbursement for such injuries as may actually be sustained; and in view of the power expressly conferred on him by Act June 4, 1897, c. 2, § 1 (4), 30 Stat. 35 (Comp. St. 1913, § 5126), to make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon, the Secretary may make general rules and regulations, to which all railroad companies which are permitted to construct their roads over such a reservation must agree to conform, as a condition to the granting of such right.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. SPECIFIC PERFORMANCE (§ 49*)—CONTRACTS ENFORCEABLE—AGREEMENT TO EXECUTE STIPULATION AND BOND.

Defendant railroad company, by its general counsel, entered into an agreement with an officer of the government forest service, reciting that it desired immediate permission to begin construction of its road over a national forest reservation, and agreeing that it would execute a stipulation to be prescribed by the government, "to be as nearly as practicable" like one previously executed by it relating to another forest reservation. The survey and plat of its right of way had not been approved by the Secretary of the Interior; but it was permitted to proceed and constructed its road through the reservation, after which it refused to enter into any stipulation. *Held*, that the agreement was based on a valuable consideration, and was binding on defendant, and that the United States could maintain a suit for its specific enforcement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.*]

6. SPECIFIC PERFORMANCE (§ 32*)—CONTRACTS ENFORCEABLE—WANT OF MUTUALITY.

Want of mutuality cannot be predicated of an agreement wholly executed by the party seeking specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.*]

7. EQUITY (§ 39*)—JURISDICTION—RETENTION OF JURISDICTION TO GRANT COMPLETE RELIEF.

In a suit by the United States for the specific enforcement of an agreement by a railroad company to execute a stipulation and bond to protect the public interests from loss or injury by reason of the construction and maintenance of its road over a national forest reservation, a court of equity has incidental jurisdiction to award damages for injuries previously caused by defendant to timber in the reservation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

Appeal from the District Court of the United States for the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by the United States against the Chicago, Milwaukee & St. Paul Railway Company of Idaho. Decree for the United States, and defendant appeals. Affirmed.

For opinion below, see 207 Fed. 164.

On March 21, 1905, the Commissioner of the General Land Office made and published an order temporarily withdrawing from sale, pending a decision of the President as to the advisability of creating a national forest reserve, a large body of vacant, unappropriated public lands situate in the state of Idaho, and on November 6, 1906, the President, by proclamation, set apart as a public reservation, with the exception of some minor tracts, the lands thus temporarily withdrawn, to be known as the "Cœur d'Alene Forest Reserve."

On October 23, 1906, the defendant filed in the United States land office at Cœur d'Alene, Idaho, its profile, survey, and plat of a proposed right of way for a railroad through the reserve, traversing certain subdivisions particularly specified. On March 20, 1907, the defendant filed in the local land office an amended map and profile, changing the proposed route of its right of way, and the previous map was returned from the General Land Office without approval by the Secretary of the Interior. On May 10, 1907, the defendant filed in the local land office another amended map and plat of its proposed right of way through the reserve, differing from the last, and, in accordance with the practice, the first amended plat was also returned without approval.

On the same day the defendant, desiring immediate permission to begin

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construction of its railroad, acting through its general counsel, George R. Peck, entered into the following agreement in writing with the acting forester of the Forest Service:

"Whereas, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the company's railroad in the Cœur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulations and conditions to be prescribed by the forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana.

"Dated May 10, 1907.

[Signed] Geo. R. Peck."

This agreement was indorsed:

"Approved and advance permission given to construct, subject to ratification hereof by the company.

"Dated May 10, 1907.

James B. Adams, Acting Forester."

In pursuance of such agreement, defendant was permitted to and did at once enter upon the construction of its railway over and across the lands of the Cœur d'Alene Forest Reservation, and so continued until the road was completed; but in the meanwhile, on December 3, 1907, defendant informed the forester that it ought not to be required to file any stipulation whatever.

After entering into the agreement, the Secretary of Agriculture drafted a stipulation, and requested defendant to enter into and execute it, and on August 14, 1908, the Secretary of the Interior demanded of the defendant that it comply with the requirements of the Secretary of Agriculture as a condition precedent to the approval of defendant's map of May 10, 1907. The defendant refusing to comply with such condition, the map was, on October 29, 1908, rejected, and taken from the files of the Department of the Interior, and returned to defendant without approval by the Secretary.

The United States, for its bill of complaint, sets up these facts, and further shows, in effect, that on February 11, 1904, the Secretary of the Interior publicly promulgated certain regulations and conditions designed for the protection of the public interest respecting forest reservations, setting out such as are thought to have relation to the present controversy; that the stipulation prepared by the Secretary of Agriculture was as nearly as practicable like the stipulation referred to in the Peck agreement; that the defendant has, without regard to the terms and conditions of the stipulation agreed to be entered into, and wholly in disregard of the rules and regulations prescribed and required by the Secretary of Agriculture and the Secretary of the Interior for the protection of forest reserves, cut large quantities of timber upon the reserve, and has destroyed and is destroying and causing to be destroyed large quantities of young timber, has thrown and deposited great quantities of rock, earth, gravel, and debris in the St. Joseph river, thereby obstructing its navigation and rendering it unfit for use in driving logs, and has set and caused to be set fires along the right of way, which have escaped from control and destroyed other timber on the reserve, all to the great damage of plaintiff; that the defendant has been repeatedly warned against its acts of trespass and waste committed contrary to the terms of the proposed stipulation and the rules and regulations of the Department, but has wholly disregarded said warnings, and openly threatens and intends to continue such disregard of the requirements of the proper authorities of the government.

The bill prays that defendant be required to enter into the proposed stipulation, to cease obstructing St. Joseph river and trespassing upon the reserve, and to discontinue constructing or operating its railroad within said reserve until it shall have executed and filed with the Secretary of the Interior the required stipulation and complied with the rules and regulations pertaining to forest reserves, for damages for cutting timber, etc., and for further relief.

Exceptions to the bill and a demurrer were interposed and denied. The answer controverts the legal effect of the temporary withdrawal order of the Secretary of the Interior of March 21, 1905, as it pertains to the matters in suit, also the authority of that officer to promulgate the rules and regulations prescribed by the order of February 11, 1904, and avers that on February 17,

1906, the Secretary of the Interior accepted for filing and duly filed due proofs of the defendant company's organization, made in pursuance of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," but did not accept the map of location of its proposed railroad, being the same as filed in the local land office, as alleged in the bill of complaint. The answer also controverts the alleged purpose and effect of the Peck agreement, or that defendant in pursuance of said agreement entered into possession of the right of way for advance construction of its railroad through the reserve, but admits that defendant through its general counsel informed the forester that it ought not to be required to file any stipulation in the premises.

Further answering, the defendant avers that long prior to the proclamation of November 6, 1906, it had, by virtue of the provisions of the act of March 3, 1875, and compliance therewith, acquired and become vested with all the rights, privileges, and authorities conferred and to be conferred by said act, and thereby was entitled to take for its railroad a right of way and to construct its road thereon, and to take from the public lands material, earth, stone, and timber necessary for construction purposes, without payment to the government, all without regard to any rights claimed to have been conferred by the agreement of March 10, 1907; that such agreement was wholly without consideration, and, further, that the Peck agreement was entered into under a mistake of fact on the part of both the United States and the defendant as to the rights the defendant had acquired for construction of its railroad across the reserve under the act of March 3, 1875, prior to the proclamation of the President setting aside such reserve. But, without this, it is further averred that the defendant has the right to the benefits of the act of March 3, 1875, without payment of compensation of any kind to the United States, and that for the foregoing reasons the defendant has refused to ratify or confirm the Peck agreement of May 10, 1907.

The answer further calls in question the reasonableness of the terms and conditions of the stipulation prepared by the Secretary of Agriculture, and known as "Exhibit G," as to whether it is as nearly as practicable in conformity to the conditions of the stipulation entered into with respect to the Helena Forest Reserve, and controverts the authority of the Secretary of the Interior to prescribe such or any conditions or impose the same upon the defendant. It admits the cutting of timber, but denies liability, and denies obstruction of the St. Joseph river, and all liability for destruction of timber by fire. Lastly, it is averred that defendant constructed its road over the reserve with full knowledge on the part of the United States that defendant had not ratified the Peck agreement, and that it had so and continuously refused to ratify the same, and that by reason thereof the plaintiff is estopped now to insist that defendant execute the stipulation referred to in such agreement.

After a hearing upon the evidence, the court pronounced in favor of the plaintiff, and the defendant appeals.

F. M. Dudley, of Seattle, Wash., H. H. Field, of Chicago, Ill., and Geo. W. Korte, of Seattle, Wash., for appellant.

J. L. McClear, U. S. Atty., of Cœur d'Alene, Idaho, J. R. Smead, Asst. U. S. Atty., of Boise, Idaho, D. F. McGowan, Asst. Sol., Department of Agriculture, of Missoula, Mont., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above).
 [1] The primary contention hinges largely upon the purposes and intentment of the act of March 3, 1875 (18 Stat. 482), and later acts respecting forest reserves. By the first section of the act of 1875 a right of way through the public lands of the United States is granted

to any railroad company, organized under the laws of any state, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the center line of said railroad; also the right to take from the public lands adjacent to the line of road material, earth, stone, and timber necessary for the construction of the road; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each 10 miles of road. Section 4 provides:

"That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

And section 5:

"That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed."

Under an act entitled "An act to repeal timber culture laws, and for other purposes," adopted March 3, 1891, the President of the United States was authorized to set apart and reserve, from time to time, in any state or territory having public land bearing forests, any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; the same to be by public proclamation declaring the establishment of such reservations and the limits thereof. 26 Stat. 1103. By a clause contained in an act making appropriations for sundry civil expenses of the government for the year 1897, adopted June 4, 1897, the Secretary of the Interior is authorized to make provision for protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside, or which might thereafter be set aside under the act of March 3, 1891, and to make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. By the same act the Secretary of the Interior is authorized and empowered, under such rules and regulations as he may prescribe, to sell and dispose of the dead timber and matured and large growth trees found upon such reservation (30 Stat. 35); and the President is authorized to modify executive orders establishing forest reserves, and to vacate the same altogether (30 Stat. 36).

By another act making appropriations to provide for deficiencies, adopted March 3, 1899, this clause was inserted, namely:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby." 30 Stat. 1233.

For some time prior to the adoption of the act of March 3, 1875, it had been the policy of the general government to grant by special acts rights of way for railroads over the public lands, and these carried their own terms and conditions. No doubt believing the purpose could as well be subserved by a general act, Congress adopted the act of 1875.

Much discussion is indulged in respecting the meaning and legislative significance of the words "public lands," as contained in section 1 of the act; but we are not impressed that it is necessary to enter at all upon that inquiry, as we believe that section 5 affords a sufficiently clear interpretation of the statute for the purposes of this case. That section makes the act inapplicable to any lands within the limits of any military, park, or Indian reservation, or other lands specifically reserved from sale. It is the cardinal policy and purpose of Congress and the general government that the lands comprised within forest reservations shall be specially reserved from sale and disposal to settlers and other persons, except as more recently expressly provided by law, while such reservations remain unrevoked by direction or order of the President. As said in *Shannon v. United States*, 160 Fed. 870, 873, 88 C. C. A. 52, 55:

"The creation of such a reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use."

Nor does it seem to us that the rule *ejusdem generis* helps the respondent, for national forest reserves are set apart for a definite, permanent, and public use, the same as are military, park, and Indian reservations, only that the use is different. So is the use of a military reserve different from that of a park reserve or an Indian reservation, and an Indian reservation from that of a park, but all are created and set apart for special governmental use. And a forest reserve, under the conservation policy of the government, is just as essential and vital to the effectuation of the government's purposes in that direction as a military reserve, a park, or an Indian reservation for the purposes of the government to the ends for which they are respectively established.

"Congress establishes a forest reserve for what it decides to be national and public purposes." *Light v. United States*, 220 U. S. 523, 537, 31 Sup. Ct. 485, 488 (55 L. Ed. 570).

Congress by later enactments has so interpreted the act. This is evidenced by an act of July 8, 1898, c. 645 (30 Stat. 729, c. 645), and another of January 10, 1899 (30 Stat. 783, c. 44). The first of these acts grants a right of way to the Cripple Creek Short Line Railway Company through the Pikes Peak Timber Land Reserve, "subject to the rules and restrictions and carrying all the rights and privileges" of the act of March 3, 1875, but providing "that no timber shall be cut by said railroad company for any purpose outside of the rights

of way," thus impliedly recognizing that the act of March 3, 1875, was without application to a forest reserve. Otherwise it would seem that Congress would not have specially made applicable the rules and restrictions of said act, and declared that all the rights and privileges thereof should be read into the act then adopted. Again, the provision touching the cutting of timber outside of the right of way was a restriction upon the act of 1875.

The second act (January 10, 1899), grants the right of way to the Saginaw Southern Railroad Company through the San Francisco Mountains Forest Reserve, a reserve set apart and established by President McKinley, "said right of way being granted subject to the rules and restrictions and carrying all the rights and privileges" of the act of 1875. It must have been the view of Congress that without these enabling acts a railroad company had no right, under the act of 1875, to cross forest reserves; otherwise there was no need of their enactment.

For other acts of like nature, see Act May 28, 1896, c. 258; 29 Stat. 190, Act June 6, 1896, c. 336, 29 Stat. 253, Act May 18, 1898, c. 343, 30 Stat. 418, and Act Feb. 28, 1899, c. 223, 30 Stat. 910.

So also, is the act of March 3, 1899, in full recognition of the same thought. In form provided by existing law, the Secretary of the Interior is authorized to approve surveys and plats of rights of way for railroads across any forest reservation, thus delegating the power that Congress formerly exercised in that respect to the Secretary of the Interior. Judicial interpretation, so far as authorities have been cited, is the same way. *United States v. Bailey* (C. C.) 178 Fed. 302.

[2] We may next inquire whether the defendant company acquired a right of way under the act of 1875 prior to or pending the setting aside and establishment of the Cœur d'Alene Forest Reserve. To recall the pertinent facts: The Commissioner of the General Land Office temporarily withdrew from sale and disposal the lands comprised in the reserve March 21, 1905. On February 17, 1906, due proofs of the company's organization, under the laws of the state of Idaho, were by the Secretary of the Interior accepted and filed in his department. On October 23, 1906, the defendant filed in the local land office its profile, survey, and plat of its proposed right of way through the reserve. An amended map was filed March 20, 1907, and a second amended map May 10, 1907. The first two of these plats were returned from the General Land Office when the amendments were presented for approval, and the last was finally taken from the files, also without approval, by the Secretary of the Interior. Previous, however, to the filing of either of the amended maps, namely, on November 6, 1906, the President by his proclamation finally established the reserve. Thus it will be seen that initiatory steps had been taken to create the Cœur d'Alene reservation before the defendant was even organized, and long before it attempted to file any map or profile of the location of its right of way across the reserve, and the company twice amended its map of survey and final location after the President had issued his proclamation finally establishing the reserve, changing its route in material particulars each time.

The Secretary of the Interior has long exercised the authority of withdrawing specific lands from settlement and sale. Especially has this been so with respect to withdrawals to satisfy the requirements of land grants for railway and other purposes. These withdrawals operate effectively to prevent the inception of any right under the preemption and homestead laws. *Hamblin v. Western Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, 37 L. Ed. 267, and cases cited. But a withdrawal by the head of a department is tantamount to a withdrawal by the President. The executive acts through the heads of departments, and their acts in many of the larger affairs of state are his acts.

In an early case in the Supreme Court (*Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264), it appears that the Secretary of War requested the Commissioner of the General Land Office to direct a reservation of lands to be made, and one was accordingly made, for military purposes, and the act of the Secretary of War in this respect was held to be the act of the President. In another case (*Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915), where the Commissioner of the General Land Office directed the registers and receivers of the local land offices to withhold from sale all odd-numbered sections within a described area, the Supreme Court, speaking through Chief Justice Waite, applies this reasoning:

"If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox v. Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect."

The reasoning is apt as it respects the case at bar. The Commissioner of the General Land Office by order withdrew the lands comprised within the reserve from sale and disposal, and although it was pending an investigation as to what lands should be finally included within a reserve, it was in effect the act of the President and tantamount to an executive order for that purpose, so that thenceforth the land was especially reserved from sale. This in itself would seem sufficient to preclude the defendant from the acquirement of a right of way over the reserve under the act of 1875.

[3] But it has been further established, and by recent cases, that the grant to railroad companies under the act of 1875 may take effect in two ways: First, upon a construction of the road; and, second, upon the approval of the Secretary of the Interior after the definite location and filing of a profile of the road in the local land office. *Jamestown & Northern Railroad Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Doughty*, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474. It was held in the latter case that a valid homestead entry, made after final survey, but before either the construction of the road or the approval by the Secretary of the Interior of the profile, is superior to the rights of the company in acquiring the right of way.

Neither of the conditions ascertained by these cases was complied with by defendant prior to the temporary withdrawal; nor were they wholly complied with prior to the proclamation of the President finally setting aside and establishing the reserve. True, the railroad company had organized, and had filed with the Secretary of the Interior due proofs of such organization, and had also filed in the local land office a survey and plat of its proposed right of way through the reserve prior to the President's proclamation; but that map and plat lacked the approval of the Secretary of the Interior, so that when the reserve was established the company had not acquired its right of way under the provisions of the act of 1875.

It is urged that the cases last cited pertained to the correlative rights of the parties as between the railroad company and the settler, and that the doctrine announced ought not to apply as between the railroad company and the government. And in this relation it is further urged that when the right of way was finally located the company took title thereto by relation back to the time of making due proofs of organization and filing such proofs with the Secretary of the Interior. This under the doctrine as promulgated touching grants of lands to railway companies, that when the location of a road is finally established the grant takes effect by relation back to the date of the grant, and by a fiction of law the grant is called one in *præsenti*. As said in *Railway Co. v. Alling*, 99 U. S. 463, 475 (25 L. Ed. 438):

"When such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant."

See, also, *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201.

The grant was termed a float in the meanwhile; but the title passed to no specific land, because it lacked identification. But the analogy to the present case is not apparent. Here counsel would treat the right of way as a float when the right of way is dependent absolutely upon its own definite location. It is not a grant of lands dependent upon a location of the road, but a right of way dependent upon its own location. No preliminary or other location is indicated by the proofs of organization. Article 8 of the articles of incorporation indicates that the company intends to construct a road from some point to be located on the east boundary line of the state of Idaho, between the forty-sixth and fifty-seventh degrees of north latitude, thence extending in a general westerly direction to some convenient point to be located on the west boundary line of the state. To call the right of way dependent upon such a designation of the probable termini and route of the road a float would manifestly be a palpable misnomer. It could not by any stretch of the imagination be so termed. As was said in *Jamestown & Northern Railroad Co. v. Jones*, *supra*:

"Different considerations apply to the grant of lands than to the grant of the right of way."

While the filing of proofs of organization authorizes the railroad company to locate its right of way over public lands, it acquires no

particular route or right of way until it has either actually constructed its road or complied with section 4 in locating, filing, and having approved the profile of its right of way; and this applies as between the railroad company and the government. Indeed, in a later case, *Stalker v. Oregon Short Line*, 225 U. S. 142, 151, 32 Sup. Ct. 636, 639 (56 L. Ed. 1027), the Supreme Court interprets what was said in the opinion of the court in *Railway Co. v. Doughty* about the grant of the right of way being dependent upon three things, naming them, as referring—

“to the nonvesting of any right as against the United States, and not as denying the priority of right in the acquisition of the premises as between parties growing out of priority of application.”

We see no escape from the conclusion that the government's establishment of the reserve is paramount, that the lands comprised thereby were especially reserved from sale, and that the defendant railway company failed in the acquirement of a right of way for its railroad across the reserve in pursuance of the act of 1875.

[4] It being ascertained that a forest reserve is excepted from the operation of the act of March 3, 1875, and that the defendant railroad company did not, by what it did, acquire a right of way over the Cœur d'Alene Reserve prior to its establishment through withdrawal of the lands comprised therein from sale by the Commissioner of the General Land Office and by the proclamation of the President, it remains to be seen by what authority, right, or method a railroad company may acquire such right of way.

The government's position is that the act of March 3, 1899, not only affords the means by which such a right of way may be acquired, but that it is potent to authorize the Secretary of the Interior to prescribe rules and regulations to be observed and the conditions, within reasonable bounds, upon which a railroad company may obtain the privilege contemplated.

The act provides that in form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a railroad over and across any forest reservation, when in his judgment the public interests will not be injuriously affected thereby. It is somewhat obscure, and just what Congress intended to accomplish by its adoption is not readily apparent; but one thing seems to be of clear intentment, and that is that the Secretary of the Interior shall only file and approve surveys and plats of rights of way when in his judgment the public interests will not be injuriously affected. In other words, the Secretary of the Interior is made the arbiter as to when such surveys and plats shall be approved, and without such approval it is plain that a railroad company cannot acquire a right of way across a forest reserve. If in his judgment the public interests would be injuriously affected, it would seem he could prevent, by refusal to approve the surveys and plats, any occupation of the reservations for right of way purposes. Having the power to prevent, it would seem to follow that he also has the power to approve surveys on conditions that would provide against threatened in-

jury to the public interests, and also afford relief and reimbursement against such as might actually be sustained.

Acting upon this principle, the Secretary of the Interior has, for the exercise of his judgment in the premises, heretofore adopted and promulgated certain rules and regulations and prescribed certain conditions calculated to safeguard the public interests in that regard. These require of the applicant for a right of way a stipulation that the right of way shall not be so located as to interfere with the proper occupation of the reservation by the government; that the applicant will cut no timber outside of the right of way; that he will remove no timber within the right of way, except as rendered necessary by the proper use and enjoyment of the privilege; that he will remove from the reservation, or destroy under proper safeguards, all standing, fallen, or dead timber, etc., for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire, and will also furnish men and materials for fighting fire, if it can be done without serious injury to applicant's business. Such rules and regulations also require the applicant to execute a bond to the government, conditioned that the makers thereof will pay—

“for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur.”

No construction can be allowed until an application for the right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered and permission specifically given. The regulations have since been changed, so that the applicant must enter into stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves.

Now, referring to the authority expressly conferred upon the Secretary of the Interior by the act of June 4, 1897, to make rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction, thus delegating to such department a broad scope of regulation touching forest reservations, it would indicate that when the act of 1899 was adopted, Congress assumed that the Secretary already had ample power and authority to regulate by rule and the imposition of proper conditions the occupation generally of forest reserves, and the especial purpose of that act was to render the power specific as respects occupation for right of way for railroad purposes; hence the peculiar wording of the act.

The authority accorded the Secretary of the Interior to exercise his judgment for the conservation of the public interests respecting forest reserves carries with it, by strong implication, the authority to make rules and regulations for the better and more efficacious exercise of his judgment. The act of adopting such rules and regulations is not legislative, but merely administrative for enforcing the

law, specially given into his charge to provide ways and means for its due execution and enforcement. In general, the power to make rules and regulations must be granted expressly or by necessary implication; otherwise, it cannot be lawfully exercised. *Van Lear v. Eisele* (C. C.) 126 Fed. 823, 827.

But we think in the present case the power exercised by the Secretary of the Interior in making the rules and regulations in question, and to prescribe the conditions imposed, is clearly implied by the terms of the statute in view of the previous legislation pertaining to the conservation of forest reserves. The conclusion thus deduced touching the power and authority of the Secretary of the Interior respecting the forest reserves, and the approval of surveys and plats of rights of way across such reserves, affords ample consideration for upholding the Peck agreement, for the agreement was entered into upon the condition that the defendant company should have immediate permission from the Forest Service to begin construction of its railroad through the reserve.

[5] This brings us to the contention of appellant that the respondent is not entitled to equitable relief. The purpose of the bill of complaint is to require specific performance of the Peck agreement, in that the defendant company shall execute and abide by stipulations and conditions to be prescribed by the forester in respect of defendant's railroad, such stipulations and conditions to be as nearly as practicable like those executed by the defendant company on January 18, 1907, with relation to its railroad within the Helena National Forest, Montana, and, further, that the defendant company shall respond in such damages as the plaintiff has sustained in the meantime by reason of the defendant's construction of its railroad across the reserve and occupation of the right of way therefor. Specific performance is a well-established head of equitable jurisprudence, and it is wholly unnecessary to cite authority to that purpose. The several objections assigned as to why the bill is without equity may be disposed of seriatim.

It is first urged that there was no authority vested in the Executive Department to consent to a railway company which was not a qualified beneficiary under the act of 1875 entering upon the public lands for the purpose of constructing a railroad thereon. This objection is disposed of by what has been previously determined as to the power and authority of the Secretary of the Interior to approve surveys and plats of rights of way over the forest reservations. So, also, has the objection been disposed of that there was no consideration for the promise embodied in the agreement.

The third objection is that the undertaking is an agreement to make an agreement, and that specific performance of such an engagement will not be decreed. This is the general rule, no doubt. But contracts of insurance and indemnity and agreements for the execution of formal contracts of security constitute well-settled exceptions to the general rule. 36 Cyc. 567. The stipulation agreed to be executed is in the nature of a contract to indemnify and save harmless the United States, and as further security against any damage that might result

from the construction of defendant's railroad and the occupancy of the right of way across the reserve for railroad purposes.

The fourth objection is that the stipulation demanded in the bill is not essentially the same as the one agreed to be executed under the Peck agreement. Some reference to the pleadings and the facts is necessary to an understanding of the situation. Prior to the institution of the suit the Secretary of Agriculture prescribed a form of stipulation, a copy being attached to the bill of complaint and marked "Exhibit G." A copy also of the stipulation entered into relative to the Helena Forest Reserve is found in the evidence. A comparison of these two documents indicates a material difference between them, and, while the court is not disposed to require an execution of Exhibit G, we think complainant is entitled to an execution on the part of the railroad company of a stipulation "as nearly as practicable like" the one executed January 18, 1907, respecting the Helena Forest Reserve. The scope of the relief prayed is broad enough to require an execution of the stipulation, if the plaintiff is otherwise entitled to equitable relief.

It is further urged in this relation that the plaintiff made no tender of any stipulation, approximating as nearly as practicable the Helena stipulation, for defendant's execution. This was unnecessary under the facts developed, as in the end the defendant declined to sign any stipulation as required by the Peck agreement.

The next objection is that the Peck agreement is too uncertain for specific performance. That is certain which is capable of being rendered certain. The Helena contract was touching the approval of a survey and plat of a right of way across a reserve under conditions similar to those obtaining in respect to the Cœur d'Alene reserve, and it was manifestly not a difficult task to suit the stipulation to the slight difference in conditions that really existed. The controlling features were practically the same in each case. We therefore deem the Peck contract susceptible of specific performance. *Hebert v. Mutual Life Ins. Co.* (C. C.) 12 Fed. 807.

The next objection is that the Peck agreement is lacking in mutuality. Peck was the general counsel of the defendant railroad company, and unquestionably authorized, in furtherance of its purpose in acquiring a right of way across the Cœur d'Alene Reserve, to enter into just such an agreement as he did. In implicit reliance upon said agreement, and in full pursuance of its intendment, the plaintiff, acting through its duly authorized officer, granted immediate permission to enter upon the construction of its railroad across the reserve, and this prior to any approval of the surveys and plat of the company's right of way. Having entered upon the construction of its railroad, the defendant so continued without interference on the part of the government until the latter part of November, 1907, when the stipulation Exhibit G was presented for execution. Execution was declined pending certain negotiations in Washington, D. C., and in the meanwhile the defendant was allowed to continue in its construction without compliance with the requirements of the Forest Service, and it so continued to proceed with the work until it had fully

completed its construction work for the full distance across the reserve, and is now in the operation of its railroad.

[6] The outcome of the controversy is this suit, called a friendly suit to determine the correlative rights of the parties litigant. The agreement was wholly executed on the part of the government the moment it granted permission to the defendant to enter upon construction. If not then, it has since been so amply executed that there can no longer be any question about it. Want of mutuality cannot be predicated of an agreement wholly executed by the party seeking specific performance. *Mississippi Glass Co. v. Franzen*, 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707. In this case is found a quotation from *Grove v. Hodges*, 55 Pa. 504, 516, which states the doctrine explicitly as follows:

"Want of mutuality is no defense to either party, except in cases of executory contracts. It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one, the obligation was fulfilled; the contract was executed when it was made. As to the other party, it remained executory. A consideration may be either something done, or something to be done, or a promise itself. When it is something already done, it is idle to talk of want of mutuality. That is to be considered only when the obligations of both parties are future."

But counsel insist that advance permission was given subject to ratification by the company, and that the company has never ratified the Peck agreement. It has, however, availed itself to the fullest extent of the very advantages which it sought to acquire, and did acquire, by virtue of the agreement. While delaying express ratification, it continued in the exercise and enjoyment of the right and privileges extended in pursuance of the agreement until it got absolutely everything it wanted, and now seeks, through the instrumentality of a friendly suit, to have the agreement declared nonenforceable because not ratified by it. It is too late, after enjoying the full benefits extended under the agreement, to insist now that defendant should not be required to perform because it has not expressly ratified such agreement.

It is further suggested that the defendant company had no knowledge of the agreement until Exhibit G was presented for execution. But this knowledge is imputed from the fact that the agreement was executed by the general counsel of the company, and, having been done in the line of his authority and in pursuance of an explicit duty enjoined, the company is bound to know what he did in that relation.

Another objection is that the agreement was signed under a mistake of fact on the part of Mr. Peck. But this cannot go to the sufficiency of the bill, as it is set up as a defense, and is to be determined upon the evidence adduced. The trial court has found against the defendant on the issue, and we approve the findings in that respect. We think it clear that the bill states facts pertinent and sufficient to entitle the plaintiff to specific performance of the Peck agreement.

[7] Again, it is insisted that the bill is multifarious, and that a court of equity is without jurisdiction to award money damages. Several items of damages are claimed, such as for obstructing St. Joseph river with débris, for timber destroyed by fire, caused by the escape

thereof through want of proper precautions, and for timber cut in clearing the right of way. But it is urged that these items are each and all subjects for actions at law, and, having been combined in a demand for relief in one bill, render the bill multifarious. A court of equity, having acquired jurisdiction for one purpose, may generally award incidental relief, although such relief may be legal rather than equitable. All these demands for damages are merely incidental to the main suit for specific performance of the Peck agreement, and equitable jurisdiction is clear to afford entire relief in one suit.

The idea of the bill is to require due execution of the stipulation and bond, as contemplated by the Peck agreement, and to recover what damages the government has suffered in the meantime, in pursuance of the stipulation and bond, had they been given as agreed. Whatever damages might arise in the future would be provided against by the stipulation and bond executed under the decree of the court. In this view of the case, the damages prayed are but incidental to the main suit, and the bill is therefore not multifarious.

The trial court directed a form of stipulation to be entered into, one which the parties themselves had agreed to after the main decision was rendered, with an additional provision that it should be effective as of date May 10, 1907, and awarded damages in the aggregate of \$68,489.

Being of the opinion that no error was committed, the decree of the District Court is affirmed; and it is so ordered.

GREAT NORTHERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1914.)

No. 4115.

1. MASTER AND SERVANT (§ 17*)—HOURS OF SERVICE—ACTIONS FOR PENALTIES—BURDEN OF PROOF.

Where, in an action against a railway company for penalties, the government showed that firemen were required to remain on duty more than 16 consecutive hours without being relieved from such duty, this cast upon the company the burden of proving by the greater weight of the testimony facts bringing the case within the proviso of Hours of Service Act March 4, 1907, c. 2939, § 3, 34 Stat. 1416 (Comp. St. 1913, § 8679), that such act shall not apply in any case of casualty, unavoidable accident, or act of God, nor where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of the employé, when the employé left a terminal, and which could not have been foreseen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

2. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE—STATUTORY PROVISIONS—"EMPLOYÉ."

Where, though a train was tied up, its running temporarily suspended, and the rest of the train crew relieved from duty, within 16 hours from the time they went on duty, the fireman was required to watch and care for the engine, keep up steam, and the proper amount of water in the boiler, and otherwise care for it, thus remaining on duty for more than

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

16 hours, there was a violation of Hours of Service Act, § 2, making it unlawful for any common carrier to permit any employé subject to that act to be on duty for more than 16 consecutive hours, and section 1, providing that "employés" therein shall mean persons actually engaged in or connected with the movement of any train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, First and Second Series, Employé.]

3. MASTER AND SERVANT (§ 17*)—HOURS OF SERVICE—ACTIONS FOR PENALTIES—EVIDENCE ADMISSIBLE UNDER PLEADING.

In an action for penalties under the Hours of Service Act, a defendant, relying upon a defense under the proviso of section 3, must allege the facts constituting such defense; and hence, where the only defense alleged was that the employés named in the complaint were not kept on duty for more than 16 hours, evidence of facts claimed to constitute a defense under the proviso was not admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

4. STIPULATIONS (§ 18*)—AMENDMENT OF PLEADING.

Where evidence was inadmissible under the original answer, but the court at the trial gave leave to defendant to file an amended answer, which was not then filed, and no leave was granted to file it later, the parties could not bind the court by a provision, in a stipulation subsequently made, that a supplemental answer materially changing the issues might be filed, and considered as filed prior to the trial, and thereby require the appellate court to determine questions never determined by the trial court.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

5. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE—STATUTORY PROVISIONS.

Within the proviso of Hours of Service Act, § 3, a hot box, an unusually heavy movement of grain, or an extraordinary head wind or storm, delaying trains to some extent in making their ordinary running time, but not causing obstructions to or breaks in the tracks or roadbed, is not a casualty, unavoidable accident, or act of God; and a delay thereby caused, requiring the train employes to work more than 16 hours consecutively, does not result from a cause not known to the carrier, or its officer or agent in charge of the trainmen, at the time they left the terminal, which could not have been anticipated and foreseen, as, in the exercise of reasonable diligence, such matters could be anticipated and guarded against, or the trainmen could be relieved, if necessary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

Hours of service of employes, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action for penalties by the United States against the Great Northern Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

The United States sued the defendant railway company, a common carrier by railroad of property in interstate commerce, to recover penalties for three separate alleged violations of the act of Congress approved March 4, 1907 (34 Stat. 1415, c. 2939 [Comp. St. 1913, §§ 8677-8680]) commonly called the "Hours of Service Act." The trial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

resulted in a directed verdict and judgment for the plaintiff on each count, and the defendant brings error.

John F. Finerty, Jr., of St. Paul, Minn. (E. C. Lindley, of St. Paul, Minn., on the brief), for plaintiff in error.

Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C. (Charles C. Houpt, U. S. Atty., of St. Paul, Minn., and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge (after stating the facts as above). The petition or complaint is in three counts, was filed February 28, 1913, and each count alleges that on certain dates named in October, 1912, the defendant required and permitted a person named therein, employed by it as fireman on one of its engines moving interstate traffic on the lines of its road, to be and remain on duty as such fireman longer than 16 consecutive hours, in violation of said act of Congress.

The original answer of the defendant was filed March 18, 1913, and admitted that defendant was engaged as a common carrier by railroad of interstate traffic at the times alleged in the petition, and for answer to count 1 thereof alleged: That its fireman named in said count (Joseph Boese) went on duty at 4 o'clock p. m., October 10, 1912, at Devils Lake, N. D., upon engine No. 1168, and upon arrival at Redland, Minn., a division terminal, said engine was "tied up" at 7:30 a. m., October 11th, and that the total number of hours of continuous service rendered by said fireman was less than 16. The answer to count 2 alleged that the fireman named in said count (S. Keeling) went on duty at 10:15 a. m., October 13, 1912, at Redland, Minn., as fireman on engine No. 1179, ran to Larimore, N. D., and return, arriving at Redland at 1:45 a. m. the next day, October 14th, and that said fireman was on duty less than 16 consecutive hours. The answer to count 3 alleged that its fireman (William Kohn) went on duty at 2 o'clock a. m., October 29, 1912, on engine No. 604 extra, at Garretson, S. D., for a run to Willmar, Minn.; that said engine was "tied up" at 5:15 p. m. of that day; and that said fireman was on duty as such for 15 hours and 15 minutes, and no more. The answer denies the other allegations of each count of the petition.

The jury was impaneled and the cause tried on June 4, 1913, resulting in a directed verdict and judgment for the plaintiff on that day upon each count of the petition.

The government's evidence on count 1 shows without dispute that engine No. 1168 on which Boese was fireman, left Devils Lake, N. D., at 4 o'clock p. m., October 10th, and arrived at Redland, a division terminal, the next morning at 7:30 a. m., when the engine was "tied up" and the crew, except Fireman Boese, relieved of duty; that he was required to remain as watcher of the engine until 11 o'clock a. m. of that day (October 11th), when he was relieved from duty after some 19 consecutive hours of service on and about the engine. The train dispatcher testified that the distance between Devils Lake and

Redland was 168 miles; that the ordinary running time between those stations was 12 to 13 hours; that he always figured whether a train would get into its terminal within the 16-hour period; that until this train got to Fisher, 12 miles from Redland, he had anticipated that it would get to Redland in sufficient time to allow the crew to be relieved within the 16 hours; that he held a passenger train at some point to enable the train to reach Redland within the 16-hour limit, and after the train left Fisher he sent a wire to Redland advising that the train was on short time. The defendant then offered to prove by its dispatcher that there was an unanticipated delay by reason of a hot box; also that there was at this time an unusually heavy grain movement on this division of the road, and even under these circumstances the dispatcher expected the train to reach the terminal in time to be relieved within the 16-hour limit. This offered testimony upon objection was ruled out as being immaterial under the issues, and the ruling is assigned as error.

Upon the second count the government's proof shows without dispute that the fireman (Keeling) went on duty at 10:15 a. m., October 13th, at Redland, the starting point of the train for a run to Larimore, N. D., and return, and returned to Redland at 1:45 a. m. the next day; that the others of the crew were then relieved within the 16-hour period, and Fireman Keeling required to remain about 1 hour and 20 minutes longer as watchman of the engine before he was relieved—making a total of some 17 hours of consecutive service by him. The defendant offered to show by its train dispatcher that the time consumed at Larimore before starting on the return trip was only sufficient to make up the train to be brought back, and that he expected that the train would get to Redland upon its return trip within the 16-hour period (as it in fact did); also that the train sheet showed no unusual delay in the way of hot boxes; that delays on account of hot boxes could not be anticipated or taken into account by the train dispatcher; and that there was no way of telling when they would occur. This offered testimony was rejected, upon motion of the government, as immaterial under the issues, and this ruling is assigned as error.

Upon the third count the government's proof shows without dispute that the engine crew of No. 604 extra was called to report for duty at 2 o'clock a. m., October 29, 1912, at Garretson, S. D., to take a train to Willmar, Minn., a division terminal; that the train left Garretson at 4:50 a. m. and arrived at Clara City at 4:55 p. m., within the 16-hour limit, when it was "tied up" and the crew other than the fireman relieved at 5:15 p. m.; that he (Kohn) was required to remain in charge of the engine as watchman, and did so remain at Clara City, until at least 8 o'clock p. m. of that day; when the engine with him in charge was, after 8 o'clock p. m., towed in from Clara City to Willmar by another train and crew, and arrived at Willmar some time later that evening. The defendant offered to show that the train did not make its usual time by reason of unavoidable delays; that the engine was on its second trip after having been overhauled generally, and because of that condition, and an extraordinary head wind, did

not make the time expected of her; in fact, that when it made the trip the day before it made it without difficulty, and that was its initial trip after the overhauling. The offered testimony was upon objection rejected as being immaterial under the issues, and because the train had reached Clara City within the 16-hour period, and in time to relieve the other members of the crew. Counsel for defendant then stated:

"That it had two defenses to this cause of action: First, that the reason of the delay in this case was because of a condition not known at the time the train left the terminal, and was one which the officials in charge had no reason to foresee; that it was proper under the statute to have run the entire trip into the terminal at Willmar, because of the proviso which says that the statute shall not apply in cases where the delay is caused by something not known at the time the train left the terminal, and which could not have been foreseen by the officials. Second, that Kohn was not on duty, within the meaning of the statute, after he was relieved as fireman at Clara City."

The defendant also offered to prove that this is the only instance in which this train was required to "tie up" by reason of not being able to make the run within 16 hours; that the trainmaster first learned that the train would be unable to make its terminal at Willmar within 16 hours was when it arrived at a station called Maynard, some 25 miles from Willmar, when he received a message from the conductor in charge thereof that he would be unable to reach Wilmar within 16 hours. This offered testimony was rejected upon objection as being immaterial under the issues.

The applicable provisions of the Hours of Service Act are:

Section 1: "That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad" in interstate commerce; "and the term 'employes' * * * shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 2: "That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe * * * shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty. * * *"

Section 3: "* * * Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen. * * *"

[1] The testimony on behalf of the government shows without dispute that the fireman named in each count was required to remain on duty on and about his respective engine more than 16 consecutive hours without being relieved from such duty. This cast upon the defendant the burden of alleging and proving, by the greater weight of the testimony, facts which bring it within the proviso in section 3 of the act. *United States v. Kansas City Southern Ry. Co.*, 202 Fed. 828, 121 C. C. A. 136.

[2] It was the contention of the defendant upon the trial in the District Court, and is its contention here, that when the engine upon

which each of the firemen was employed was "tied up" (that is, its run temporarily suspended) within the 16-hour period and the rest of the crew relieved from duty within such time, and the fireman required to watch and care for the engine, keep up its steam, the proper amount of water in the boiler, and otherwise care for the same thereafter, that while so engaged he was not employed "as fireman," and was not then within the provisions of this act. This court in *San Pedro. L. A. & S. L. R. Co. v. United States*, 213 Fed. 328, 130 C. C. A. 28, and the Court of Appeals in the Ninth Circuit in *Great Northern Ry. Co. v. United States*, 211 Fed. 309, 127 C. C. A. 595, and in *Northern Pacific Ry. Co. v. United States*, 213 Fed. 577, 130 C. C. A. 157, have held against this contention. A certiorari was denied by the Supreme Court in *Great Northern Ry. Co. v. United States*, above, May 1st of this year (234 U. S. 760, 34 Sup. Ct. 776, 58 L. Ed. 1580). The defendant's contention in this respect needs, therefore, no further consideration, and must be and is overruled.

The defendant offered to prove, upon the trial of count 1, that upon the run from Devils Lake to Redland, which are division terminals, that there was an unanticipated delay of the train because of a hot box; also that there was then an unusually heavy grain movement, and that even under these circumstances, the dispatcher expected that when the train reached Fisher, 12 miles from Redland, it would be able to reach Redland within the 16-hour period (as it in fact did). The court rejected this offered testimony as immaterial under the issues. A similar offer was made by the defendant upon the trial of count 2, which was rejected by the court for the same reason. Upon the trial of count 3 the defendant offered to prove by its trainmaster that the train did not make its usual time for reasons not known to defendant or its agents when the train left Garretson, one of which was that the engine was not working well, because it had recently been overhauled and it did not make the time expected of it.

It was upon the trial of this count that the defendant first suggested a defense under the proviso in section 3 of the act. It is proper, however, to say that the evidence upon count 3 was offered before the evidence upon counts 1 and 2 was offered. It is quite doubtful if this defense is properly before us for consideration. At the close of the evidence upon all the counts the defendant moved for a directed verdict in its favor, which motion was denied, and defendant excepted. The government then moved for a directed verdict in its favor upon each count of the petition. Upon intimation of the court that it would have to be sustained, counsel for defendant said:

"I understand that the government is willing that the record shall show that we made no defense under the answer, and that we may make up a special plea in defense required under the proviso."

The court said:

"I will allow you to file an amended answer. It may be that you can settle upon the amendment."

No amendment was then filed, nor was leave granted to file it later. The motion of the government for a directed verdict in its favor was

then sustained, and judgment rendered for the plaintiff upon each count of the petition on June 4th as before stated. A stay of proceedings was then ordered until August 31, 1913, which was later extended to and including October 31, 1913, when the bill of exceptions was signed. On October 28th there was filed with the clerk, without further leave of court, a stipulation as follows:

"It is hereby stipulated between the parties to the above-entitled cause by their respective attorneys that the supplemental answer of the defendant, attached hereto and made part of this stipulation, may be filed in said cause, and may be considered as filed on or before the date on which said cause was called for trial, to wit, June 4, 1913; and it may be further considered that the trial of said cause was had as if said supplemental answer had theretofore been filed therein, and issue joined thereon, and evidence presented thereunder. [Signed by the attorneys of the respective parties.]"

The supplemental answer, so called, attached to the above stipulation, is as follows:

"Comes now the above-named defendant, and by leave of court first had and obtained makes further answer to the plaintiff's complaint herein, to wit: "(1) States, as to plaintiff's first cause of action, that if Joseph Boese, as alleged therein, was required and permitted to be and remain on duty as fireman and employé for a longer period than 16 consecutive hours, that said Boese was so required and permitted to remain on duty because of delay which was the result of a cause or causes not known to the defendant, or its officer, or agent, in charge of said Boese at the time said Boese left the terminal known as Devils Lake, N. D., for the terminal known as Redland, Minn., and such delay could not have been foreseen, and said Boese was not required or permitted again to go on duty until he had had at least 10 consecutive hours off duty."

This answer to the second and third counts of the petition is identical with that to the first count above, except the name of the fireman and the terminals of the train upon which he was employed.

[3-5] The court was undoubtedly right in excluding the evidence offered by the defendant in support of any supposed defense it might have under the proviso in section 3 of the Hours of Service Act, as the only defense pleaded when this offer was made was that neither of the firemen was employed more than 16 consecutive hours upon his engine. If the defendant relied upon any defense under the proviso, it was its duty to allege the facts constituting such defense before the trial began, so that the government might know what it would be required to meet. The so-called supplemental answer is but an amendment to the original answer; but it was not filed until more than 4½ months after the trial and judgment. It does not appear from the record that the attention of the trial court was ever called to this stipulation, or to this supplemental answer. It may be that the statement of the court that it "would permit an amendment to the answer," and the stipulation of the government's counsel that it may be filed so long after the trial and without objection thereto, is sufficient to authorize its retention in the record as an amendment to the answer. But counsel should not be permitted to bind the court by stipulation that a pleading filed 4½ months after the trial is completed and judgment entered, which materially changes the issue, shall be considered as having been filed before the trial began, for this would permit them to require the appellate court to determine ques-

tions never determined by the trial court. But, putting aside this question, we are of opinion that the proffered testimony offered by the defendant does not show any casualty or unavoidable accident or an act of God, nor a delay which was the result of a cause not known to the carrier or its officer or agent in charge of the trainmen at the time they left a terminal, which could not have been anticipated and foreseen in the exercise of proper vigilance and care upon their part.

It is a matter of common knowledge among railroad officials and trainmen, as indicated by the defendant's testimony, that hot boxes are liable to occur at any time in the operation of railroad trains; and officials in charge of the running of such trains should be held to anticipate their occurrence and to exercise reasonable diligence to guard against delays because of them. If a hot box occurs in the running of a train that is liable to prevent it from reaching the end of its run within the 16-hour period, reasonable diligence would require that the car upon which it occurs should be set out at the first opportunity, and trainmen not continued on duty overtime because thereof to their detriment, and the danger to persons and property because of their lack of required rest.

That there was a heavy grain movement upon defendant's road at the time in question is surely not an unavoidable casualty, nor is it a cause that cannot be known or foreseen in the exercise of proper diligence upon the part of the officials in charge of the running of trains before they are sent out. Neither is an "extraordinary head wind" or a storm, that does not cause obstructions to or breaks in the track or roadbed that may delay trains to some extent in making their ordinary running time, a cause not to be anticipated or foreseen by train officials; and violations of the law in working the trainmen overtime can easily be avoided by relieving them, if necessary. In other words, the proviso in section 3 of the act does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them overtime; and proper diligence requires train officials to know whether or not engines and cars are in proper condition for use when starting them upon a run.

The defendant made no offer to show the length of time either of the trains in question was delayed because of the alleged unknown causes, except that there was an offer to prove that the engine mentioned in count 2 of the petition was delayed 35 minutes at some station on the line because of a hot box. But notwithstanding this the train arrived at Redland, its terminal, within the 16-hour period, and the crew, except the fireman, relieved within that period. See *Northern Pacific Ry. Co. v. United States*, 213 Fed. 577, 580, 581, 130 C. A. 157 (9th C. C. A.).

The judgment must be and is affirmed.

LADD & TILTON BANK v. LEWIS A. HICKS CO.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1914.)

No. 2324.

1. COURTS (§ 356*)—FEDERAL COURTS—ACTIONS TRIED TO COURT—WAIVER OF JURY.

Rev. St. § 649 (U. S. Comp. St. 1913, § 1587), provides that issues of fact in civil actions may be tried by the court with the written consent of the parties to waive a jury, and that the court's finding on the facts, which may be general or special, shall have the effect of a verdict. Section 700 (section 1668) declares that, when an issue of fact in a civil case is tried by the court without a jury, the court's rulings in the progress of the trial, if excepted to and presented by bill of exceptions, may be reviewed, and, when the finding is special, the rule may extend to the determination of the sufficiency of the facts found to support the judgment. *Held*, that such provisions, so far as the right to review is concerned, are jurisdictional, and that where a case has been tried to the court without a written stipulation waiving a jury, and the facts are not admitted in a case stated, no question is open to review on a writ of error, except such as arise on the process, pleadings, or judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

2. JUDGMENT (§ 18*)—PLEADINGS—GENERAL DENIAL.

Where, in addition to a special defense pleaded, the answer contained denials of material facts requisite to plaintiff's recovery, the general issue so pleaded was sufficient to sustain a judgment for defendant, regardless of whether the special matter pleaded constituted a good defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37; Dec. Dig. § 18.*]

3. COURTS (§ 356*)—FEDERAL COURTS—REVIEW—DISPOSITION OF CAUSE.

Where, on a trial in a federal court, the jury was orally waived without a stipulation in writing required by Rev. St. § 649 (U. S. Comp. St. 1913, § 1587), and for this reason only questions arising on the process, pleadings, or judgment could be reviewed on a writ of error, as provided by section 700 (section 1668), a judgment based on a general finding, having been rendered for defendant, could not be reversed and the cause remanded for a new trial because the admitted waiver of a jury was apparently in good faith; there being no special circumstances involved to justify such disposition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Action by the Ladd & Tilton Bank against the Lewis A. Hicks Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wood, Montague & Hunt, of Portland, Or., for plaintiff in error. Chamberlain, Thomas & Kraemer and Lester W. Humphreys, all of Portland, Or., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge. The writ of error in this case brings up for review a judgment in an action at law tried to the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

without a jury; the judgment being based upon a general finding upon the evidence in favor of the defendant in the court below, the defendant in error here. A jury was dispensed with by consent of the parties expressed orally in open court, but no stipulation in writing evidencing the waiver was had or filed; and the assignments of error are all based upon rulings had at the trial.

[1] In this state of the record the defendant in error makes the point that the errors assigned may not competently be inquired into by this court; and we are of opinion that this objection must prevail, at least as to all but a single assignment to be noticed later. The objection is based upon the limitations which circumscribe these courts in trials of issues of fact in actions at law; the statute requiring that they be tried by a jury (section 648, R. S. [U. S. Comp. St. 1913, § 1584]), unless the jury be waived by a stipulation in writing (section 649 [section 1587]), when the facts may be tried by the court and its rulings reviewed as provided in section 700 (section 1668). These provisions have been construed, so far as the right to review is concerned, as jurisdictional; and in the absence of a compliance therewith, except the facts be admitted by the parties in a case stated, no question is open for review on error other than "those arising upon the process, pleadings, or judgment." *Erkel v. United States*, 169 Fed. 623, 624, 95 C. C. A. 151, 152. In that case the rule and its reason are thus stated by Judge Gilbert:

"It is well settled that no question of law can be reviewed on error, except those arising upon the process, pleadings, or judgment, 'unless the facts are found by a jury by a general or special verdict, or are admitted by the parties upon a case stated.' *Campbell v. Boyreau*, 21 How. 223, 16 L. Ed. 96. In that case it was held that the finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. The court said: 'And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties.'"

As all the leading cases in support of these principles are there cited, further consideration of the question is unnecessary, since it is in no respect left in doubt.

While those sections of the statute applied originally only to trials in the late Circuit Courts, they were, on the abolishment of those courts, given application to the present District Courts. Judicial Code, § 291 (Act March 3, 1911, c. 231, 36 Stat. 1167 [U. S. Comp. St. 1913, § 1268]). Nor is the objection, as urged, in any proper sense, technical, or one which the defendant in error is estopped, by its consent in the court below, from raising. It is one which goes to the question of the court's power in the premises, and which it would be bound to regard independently of objection by a party. *Bond v. Dustin*, 112 U. S. 604, 605, 5 Sup. Ct. 296, 28 L. Ed. 835.

It is urged that, if compliance with these provisions is to be regarded as jurisdictional for the purposes of review, they are equally so as to the power of the trial court to competently render a valid judgment, and that as a result there has not been a trial of the action such as contemplated by law, and no judgment which can bind any

one, and that the cause should therefore be remanded for disposition in accordance with the forms of law. But this contention is quite at variance with the settled law on the subject. The omission to legally waive a jury does not deprive the trial court; it having jurisdiction of the action and the parties, of power to render a valid judgment. It affects only the extent to which such judgment may be reviewed. The judgment is valid unless set aside, and may be reviewed in certain respects, but the rulings as to the facts underlying it cannot be inquired into. This distinction is expressly recognized in *Campbell v. Boyreau*, 21 How. 223, 16 L. Ed. 96, where it is said that:

"As the Circuit Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

And again in *Bond v. Dustin*, *supra*, the court say, in considering these sections:

"Before the passage of this statute, it had been settled by repeated decisions that in any action at law in which the parties waived a trial by jury and submitted the facts to the determination of the Circuit Court upon the evidence, its judgment was valid; but that this court had no authority to revise its opinion upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, and therefore, when no other error appeared on the record, must affirm the judgment."

And it was held that the same rule as to the validity of the judgment obtains under the statute; the judgment being affirmed.

[2] We are thus left at liberty to consider only questions as to the sufficiency of the pleadings to sustain the judgment. In this view there is one ruling which we are called upon to notice. At the close of the evidence, plaintiff (plaintiff in error here) moved the court "for a judgment on the pleadings and for a verdict and judgment upon the pleadings and testimony," on certain grounds stated. This motion was denied, an exception taken, and the ruling assigned as error. The contention is made for the first time in the reply brief, filed since the argument, that this ruling involves the sufficiency of the pleadings to sustain the judgment, and as such is open to our review. In the first place, not only the form of the motion but the reasons upon which it was based indicate that it was more in the nature of a motion for judgment for want of sufficient evidence to sustain a special defense set up in the answer than one challenging the sufficiency of the pleading; and it is largely so treated in the opening brief of plaintiff in error, the sufficiency of the evidence being fully discussed. But in the next place, assuming that the assignment is such as to raise a question of the sufficiency of the special defense to sustain the judgment, it is without material effect. The record discloses that, in addition to the special defense pleaded, the answer contained denials of material facts requisite to the plaintiff's recovery, and as the judgment was based on a general finding for the defendant, which involved the sufficiency of the proof on plaintiff's part to entitle it to recover, it is not material to inquire whether the special matter pleaded in the answer constituted a good defense or not, since, in view of the general

defense, it cannot be said that the pleadings are insufficient to sustain the judgment. *Bond v. Dustin*, supra.

[3] We are not unmindful of the ethical force in the urgent contention of the plaintiff in error that the cause should be remanded for a new trial rather than the judgment be affirmed and his right to review thus defeated, notwithstanding that the attempted waiver of the jury was apparently in good faith on both sides; but we are unable to reach the conclusion that such course would be sanctioned by law. The uniform rule in such cases is that the judgment must be affirmed, "unless under very special circumstances." *Bond v. Dustin*, supra; *Flanders v. Tweed*, 76 U. S. (9 Wall.) 425, 19 L. Ed. 678. There is nothing presented by the present record to bring the case within the ruling in any of the cases relied on where the judgment was reversed on account of "special circumstances." What the character of such circumstances must be to warrant the court in departing from the usual rule of affirmation may be gathered by a glance at the cases in which that course has been pursued. In *Flanders v. Tweed*, supra, the parties were at liberty, according to the practice in Louisiana, to submit the case for trial upon an agreed case to be certified by the judge for purposes of review; and it was said:

"In the present case it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record; and under the circumstances, the case being an important one, and intended to be carried up here for re-examination, we shall reverse the judgment for a mistrial, and remand it to the court below for a new trial."

In *Graham v. Bayne*, 59 U. S. (18 How.) 60, 15 L. Ed. 265, an action of ejectment, the parties stipulated (whether orally or in writing is not stated) that the cause might be tried by the Circuit Court without a jury, and that "if it should be necessary to a hearing of this cause in the Supreme Court, to treat the evidence in this cause in the nature of a special verdict." The court said:

"Counsel may agree, as in this case, to submit both fact and law to the decision of the court. * * * If the parties agree to submit the trial both of fact and law to the judge, they constitute him an arbitrator, or referee, whose award must be final and conclusive between them; but no consent can constitute this court appellate arbitrators. * * * The record exhibits the testimony and evidence laid before the judge. It is evidence of facts, but not the facts themselves as agreed or found."

And it was held that the form in which the evidence was submitted was too ambiguous and imperfect to be considered a special verdict, and that, since an ambiguous and imperfect special verdict constitutes a mistrial, the judgment of the court should be reversed.

In *Burr v. Des Moines Co.*, 68 U. S. (1 Wall.) 99, 17 L. Ed. 561, the cause was tried by the court upon an agreed statement of facts, which "was not signed by counsel, nor entered on the record of the court, nor made a part of the record of the case by bill of exceptions, or in any other manner." The court held that the statement of facts should have been entered on the record, but that, even if it were part of the record,

the statement was "evidence of facts, and not the facts themselves as agreed or found," and would require the court to weigh conflicting testimony, and said:

"The legal presumption is in favor of the correctness of that judgment, but as the parties here have all considered the case as turning on the evidence which we have refused to consider, and have so argued it, and as it was no doubt prepared with a view to obtaining the opinion of this court on the case there stated, we have determined to dismiss the writ of error, thus leaving the parties at liberty, if they can do so by a proper agreement in the court below, to remove the difficulties which now prevent this court from reviewing the case."

In *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1 (C. C. A. 6th Circuit), a criminal action for unlawfully carrying on the business of a rectifier without having paid the special tax required by law, the parties had agreed to submit the cause to the court without a jury. The court said:

"The defendants and the government waived a jury, and the case was heard upon the evidence by the court, and a general judgment rendered of guilty upon certain counts and not guilty upon others. Aside from the fact that this was a criminal and not a civil case, there is no statute which provides for a trial by the court without a jury, except in cases of equity or maritime jurisdiction, or when so provided by the bankrupt law. * * * Section 649 of the Revised Statutes, * * * which provides for the waiving of a jury, applies only to the Circuit Court."

And the judgment was set aside and the cause remanded, with directions to award a new trial.

The other cases cited are even less pertinent to the facts of the present record than those just considered, and it is apparent that none of them would warrant us in reversing the judgment in the present case. Were we to do so, our judgment would be erroneous. *Campbell v. United States*, 224 U. S. 99, 32 Sup. Ct. 398, 56 L. Ed. 684.

The judgment is affirmed.

ROSS, Circuit Judge (concurring). Prior to the act of Congress of March 3, 1865, now embodied in the sections of the Revised Statutes cited in the opinion of the court, the submission of issues of fact, in an action at law, to the court instead of to a jury for trial precluded a review by writ of error of alleged errors occurring in the course of such trial. The reasons therefor were clearly stated by Mr. Justice Miller in the case of *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395. To provide for such a review, the act of March 3, 1865, authorized the parties to make in writing, and file with the clerk of the court, a stipulation waiving a jury, compliance with which prescribed steps, the Supreme Court held in the case cited, enables the defeated party to have errors alleged to have been committed on such a trial reviewed by writ of error; but, in the absence of those steps, it was there distinctly adjudged that no such review can be had, and that in such cases the judgment must be affirmed; the court having jurisdiction of the parties and the subject-matter.

I also concur in the holding that the pleadings in the present case are not insufficient to support the judgment.

TURK et al. v. ILLINOIS CENT. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1914.)

No. 2493.

1. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—DETERMINATION OF JURISDICTIONAL QUESTIONS.

Where, in proceedings in error to review a judgment of a District Court, the assignments of error cover not only the question of the jurisdiction of the District Court, but also questions on the merits, thus giving the Circuit Court of Appeals jurisdiction, such jurisdiction is not lost by the failure of plaintiff in error to argue the questions on the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101 1103; Dec. Dig. § 405.*]

2. COURTS (§ 272*)—JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—DISTRICT OF SUIT.

To authorize the bringing of a suit in a federal court on the ground of diverse citizenship, all of the plaintiffs or all of the defendants must be residents of the district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

3. REMOVAL OF CAUSES (§ 11*)—RIGHT OF REMOVAL—RESTRICTION AS TO DISTRICT IN WHICH SUIT MIGHT HAVE BEEN BROUGHT.

A cause is not removable unless it could have been originally brought in the federal court into which it is sought to be removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

4. REMOVAL OF CAUSES (§ 29*)—DIVERSITY OF CITIZENSHIP—STATUS OF PARTIES.

The question of a plaintiff's rightful status as a party in an action at law for the purpose of determining the right of removal is to be determined by the law of the state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.*]

5. REMOVAL OF CAUSES (§ 31*)—DIVERSITY OF CITIZENSHIP—JOINDER OF PLAINTIFFS.

Under Civ. Code Prac. §§ 18, 24, which provide that every action must be prosecuted in the name of the real party in interest and that parties who are united in interest must be joined as plaintiffs or defendants, in an action to recover for damage to property by fire alleged to have been caused by the negligence of defendant, where a part of the loss was covered by insurance, which has been paid, the owner and insurer may join as plaintiffs, and in such case for the purposes of federal jurisdiction the insurer is not merely a formal or nominal, but a real and substantial, party, and must be treated as such in determining the right to remove the cause into a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71; Dec. Dig. § 31.*]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action at law by J. W. Turk individually, the Insurance Company of North America, and J. W. Turk, for the use of the Insurance Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany, against the Illinois Central Railroad Company and the Chicago, St. Louis & New Orleans Railroad Company. Judgment for defendants, and plaintiffs bring error. Reversed.

J. S. Laurent, of Louisville, Ky., for plaintiffs in error.

E. F. Trabue, of Louisville, Ky., for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. [1] The only question argued is whether the court below acquired jurisdiction through removal proceedings from the state court, and a record which presents only that question must be reviewed by the Supreme Court; but the assignments of error also involve the ultimate merits, so giving this court jurisdiction over both questions (*Phillips Co. v. Railway*, 195 Fed. 12, 15, 115 C. C. A. 94); and we think the jurisdiction so acquired is not lost by a failure to argue the merits, nor by the fact that we do not find the nonjurisdictional assignments to be vital.

The claim is that property belonging to Turk was damaged in the amount of about \$6,700 by fire due to the negligence of the railroads. To the extent of about \$4,200, his loss was covered by a policy in the Insurance Company, and it had paid that amount to him. This action was brought in a state court of Kentucky to recover from the railroads the full amount of the fire loss, and the declaration named as plaintiffs the Insurance Company, Turk in his own right and Turk, individually and as trustee for the Insurance Company. The Insurance Company was a citizen of New York; Turk was a citizen of Kentucky; the defendant the Illinois Central Company was a citizen of Illinois; and the defendant the Chicago, St. Louis & New Orleans Company was a citizen of Kentucky. The latter company was made defendant because it was the lessor owning the railroad, through the negligent operation of which by the Illinois Central Company, as lessee, the loss was charged to have occurred. The Illinois Central removed the case to the court below, alleging that the lessor railroad had been joined as a defendant only with the fraudulent purpose of defeating the right of removal, and alleging that the Insurance Company was not a necessary or proper plaintiff. In the court below, the plaintiffs moved to remand for the reasons: First, that the Insurance Company was properly joined as plaintiff, and therefore the western district of Kentucky was not the district in which the plaintiffs resided; and, second, that the joinder of the Kentucky corporation as defendant was rightful. The court below overruled the motion to remand, and, upon the eventual trial on the merits, instructed a verdict for defendants. Both the overruling of the motion and the directing of the verdict are assigned as error.

[2-4] It must be taken as decided that, if the Insurance Company is to be treated as a party plaintiff, the case could not have been brought in the court below, because that was not the district of residence of all the defendants or of all the plaintiffs (*Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635); that the case, over the seasonable objection of plaintiffs, could not be removed to the court below, if it

could not have been brought there (*Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164); and that when removed from a state court, in a case at law, the question of the plaintiff's rightful status is to be determined by the law of the state (*Thompson v. Railroad*, 73 U. S. [6 Wall.] 134, 138, 18 L. Ed. 765).

[5] The Kentucky Code provides (section 18) that "every action must be prosecuted in the name of the real party in interest," and (section 24) that "parties who are united in interest must be joined as plaintiffs or defendants." The Code also abolishes the distinction between actions at law and in equity.

We will get a clearer approach by first considering whether, when the insurer has paid the entire loss and so has been subrogated to the whole of the insured's cause of action for negligence, it can itself bring an action. We find no Kentucky decision covering this question. The same situation was before us in a case from Ohio, in *Travelers' Co. v. Great Lakes Co.*, 184 Fed. 432, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60. The controlling provisions of the Ohio Code were, apparently, the same as those of Kentucky, and we reached the conclusion, after a review of the authorities, that the insurer can maintain such an action in his own name. We see no reason why the same rule should not prevail in Kentucky, and, accordingly, we must assume that if the Insurance Company, plaintiff here, had been liable for and had paid the whole loss, it could have maintained this suit in its own name and without joining Turk as a party.

It is equally clear that the Insurance Company could not have brought a separate action to recover its separate portion of the entire loss. This results from that rule of necessity which forbids the splitting of a cause of action (see cases cited in *Travelers' Co. v. Great Lakes Co.*, supra).

The present case is not within either of these principles. The Insurance Company is not seeking to do the thing which would be clearly right nor the thing which is clearly forbidden. It propounds only its right to demand that it may be a joint party plaintiff. It seems entirely reasonable that it should have that right. It is unquestionably the beneficial owner of a part of the cause of action; it is, in a very fair sense, pro tanto, the "real party in interest;" and, certainly in equity, and therefore in the action which was brought in the Kentucky court and in which distinctions between law and equity were unknown, the defendants could exonerate themselves by discharge from the Insurance Company, as far as its interest went. If, before the fire, the Insurance Company had been the owner of a \$4,200 interest in the property destroyed, a corresponding fraction of the cause of action against the railroads would have accrued to it, and it unquestionably could have joined with Turk as plaintiff. It is difficult to see why, under the rule of the Kentucky Code, it should not have the same right when the same fractional cause of action accrues to it in another way. So, also, it is hard to believe that an insurer, who beneficially owns nine-tenths of the cause of action, must stand helplessly by, and see its rights sacrificed by mismanagement of the suit or by imprudent com-

proraise on the part of the insured; in a court of equity—and in an action under the Code—such an insurer would seem to have at least as much right to be upon the record and to control the action as has the insured with a comparatively nominal beneficial interest. For these reasons, we must think, unless the weight of authority is to the contrary, that the Insurance Company was a real, substantial, and rightful party.

In spite of this conclusion, it must be conceded that the insurer is not, in such case, an indispensable party, as the Kentucky Code is interpreted by the Court of Appeals of that state. In *Railroad v. Hicklin*, 131 Ky. 624, 115 S. W. 752, 23 L. R. A. (N. S.) 870, it appeared that the entire loss for which plaintiff sued had been covered by insurance which had been paid to the plaintiff, and the defendant pleaded that the right of action was thereby gone from plaintiff and vested in the insurer, so that the plaintiff could not maintain the action. The court overruled this plea, holding that, as between the owner of the property and the defendant, the wrongdoer, the plaintiff was the real party in interest, and that it was no concern of the defendant what the equities were between the plaintiff and the insurer. In its opinion, the court undoubtedly used language broad enough to indicate that the insurer had no right of action and could have maintained no suit in its own name; but that point was not before the court, and we cannot assume that it was intended to be decided. In that case, the insurance company was apparently acquiescing in the suit which the plaintiff brought, and was content that plaintiff should act as trustee for it. There is no inconsistency in holding that a right of action may be prosecuted in the name of the sole legal owner, even though some one else owns the entire beneficial interest, if the beneficial owner consents or acquiesces, and that, in such case, the defendant cannot be heard to complain, and at the same time holding that the beneficial owner may, if he chooses, sue in his own name. Reading the whole opinion and with due regard to the authorities upon which it seems to depend, we think it is not to be taken as deciding more than that, in such a case, and, a fortiori, in the present case, the insurer is not an indispensable party.¹

On the other hand, it seems clear enough that the insurance company, in case of partial insurance, is not that merely formal or nominal party whose presence on the record, while quite proper, has been held immaterial on the question of federal jurisdiction—like a mere stakeholder, an agent whose principal is also a party, etc. *Wood v. Davis*, 18 How. 467, 15 L. Ed. 460; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; *Construction Co. v. Simon* (C. C. Ohio) 53 Fed 1. If this action is successful, the insurance company will get \$4,200. If the

¹ The collection and discussion of decisions from the Code states, found in 30 Cyc. and referred to in the *Hicklin* Case by the Kentucky court, make it clear that there is practical unanimity in holding at least that the insurer may join with the insured as plaintiffs, and make it unlikely that the court intended to deny that right. This idea is confirmed by the tacit approval of actions so brought in *Greenwich Co. v. Railroad*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; *Railroad v. Home Ins. Co.*, 146 Ky. 281, 142 S. W. 398; and *Railroad v. Hamburg Ins. Co.*, 152 Ky. 510, 153 S. W. 745.

action fails, it will get nothing from anybody. It is not permissible to call such an interest "merely nominal."

We have, then, a party which has a real and substantial interest in its own right and which at its own demand has rightfully become a party to the record, and yet whose interest is such that, unless it moves affirmatively, the entire controversy could be finally decided in its absence. Is such a party one whose residence will determine the federal jurisdiction?

We find no ruling in point, in the Supreme Court nor in this court. *New Orleans v. Gaines*, Adm'r, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102, has only an indirect bearing. It is to the effect that, where a party acquires rights by subrogation, it is his own citizenship, and not the citizenship of the party through whom the rights come, that is important. This court said in *Pittsburgh Ry. v. Baltimore Ry.*, 61 Fed. 705, 712, 10 C. C. A. 20, that the citizenship of one who was a proper, even though not a necessary, party, would control the jurisdiction; but it is quite clear that the word "necessary" was there used in the sense of "indispensable," and that "proper" was used as meaning more than "permissible." The party of whom the court was speaking had such an interest in one branch of the controversy that its rights therein could not have been finally determined without its presence on the record. In that sense, the party was "necessary"; and so the case is clearly distinguishable from the present one. In *Ireton v. Railroad*, 185 Fed. 84, 86, 107 C. C. A. 304, this court found it unnecessary to consider the present question.

The immateriality of the citizenship of such a party as the Insurance Company is has been affirmed by the District Courts of Indiana (*Over v. Lake Erie Co.* [C. C.] 63 Fed. 34) and of the Western district of Kentucky (*Turk v. Ill. Cent. Co.* [D. C.] 193 Fed. 252). Both of these opinions stand upon argument necessarily leading to the conclusion that the insurer who had paid the entire loss could not sue in its own name, and would not have even an equitable right of action against the wrongdoer, and for the reasons stated in the *Great Lakes Case*, we think that is not the law under the Kentucky Code. On the other hand, the contrary result has been reached by the District Courts in Montana (*Gaugler v. Railroad*, 197 Fed. 79) and the Western district of Washington (*Palmer v. Railroad*, 208 Fed. 666) upon reasoning which we feel bound to approve.² The apprehension that the rightful jurisdiction of the federal courts may be defeated by assignments of a trifling interest in the cause of action is sufficiently met by what is said in *New Orleans v. Gaines*, supra, 138 U. S. at page 606, 11 Sup. Ct. 428, 34 L. Ed. 1102.

Upon the whole, we conclude that, under a Code like that of Kentucky, and where the beneficial owners of fractions of the right of action, accrued to them by subrogation, in good faith present themselves

² The holding of the Fourth Circuit Court of Appeals, in *Southern Bell Co. v. Watts*, 66 Fed. 460, 464, 13 C. C. A. 579, seems to be based upon the common-law rule, and is to the effect that the defendant cannot insist that the insurance company should join.

in the state court as joint plaintiffs, they must be treated as parties, in determining the right to remove the case to the federal court.

It follows that the court below was without jurisdiction. The judgment will be reversed, with instructions to remand the record to the state court. The plaintiff in error will recover the costs of this court.

COBB v. SERTIC.

(Circuit Court of Appeals, Sixth Circuit. November 17, 1914.)

No. 2506.

1. COURTS (§ 405*)—JURISDICTION OF CIRCUIT COURT OF APPEALS—CASES INVOLVING JURISDICTION OF LOWER COURT.

The Circuit Court of Appeals has jurisdiction of proceedings in error where the assignment of errors embraces questions involving the merits, although the question of the jurisdiction of the District Court is also involved, and may determine such question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegoa*, 32 C. C. A. 475.]

2. COURTS (§ 295*)—JURISDICTION OF FEDERAL COURTS—ACTION AGAINST RECEIVER.

An action may be maintained in a federal court against a receiver appointed by that court, based upon his alleged negligent performance of his duties as such receiver, regardless of the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 837; Dec. Dig. § 295.*]

3. COURTS (§ 299*)—JURISDICTION OF FEDERAL COURT—CONSTRUCTION OF PLEADINGS.

Plaintiff, in an action in a federal court to recover for personal injuries, alleged that defendant was a receiver appointed by such court for the property of a corporation and was engaged in operating a manufacturing plant in which plaintiff, an employé, was injured through defendant's negligence. The answer admitted that defendant was receiver for the corporation alleged, which was engaged in operating a plant of the kind and at the place alleged and that plaintiff was injured therein. It then set up matters of defense and denied generally each and every allegation of the petition "not herein specifically admitted to be true." In the trial court no evidence was offered and no question was raised as to the court by which defendant was appointed receiver. *Held* that, in view of such fact and of the requirement of the Ohio Code (Page & A. Gen. Code, § 11,345) that pleadings "shall be liberally construed with a view to substantial justice between the parties," it was fairly deducible from the pleadings that defendant was appointed receiver by the trial court as alleged, and that therefore it had jurisdiction of the action without regard to the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.*]

In Error to the District Court of the United States for the Northern District of Ohio, Eastern Division; William L. Day, Judge.

At Law. Action by Ivan Sertic against L. A. Cobb, receiver of the

Columbian Hardware Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Roberts, of Cleveland, Ohio, for plaintiff in error.

G. H. Eichelberger, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] The only question argued in this case either orally or in the briefs is one of jurisdiction of the court below; but the proceeding in this court is prosecuted upon assignments of error which embrace a number of questions concerning the merits of the cause. It follows that the case is rightly here and that this court may pass upon the question argued. *Olds v. Herman H. Hettler Lumber Co.*, 195 Fed. 9, 11, 115 C. C. A. 91 (C. C. A. 6th Cir.); *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 195 Fed. 12, 15, 115 C. C. A. 94 (C. C. A. 6th Cir.); *Smith v. Farbenfabriken of Elberfeld Co.*, 203 Fed. 476, 478, 121 C. C. A. 598 (C. C. A. 6th Cir.); *Turk v. Illinois Central R. R.* (C. C. A. 6th Cir.) 218 Fed. 315, 134 C. C. A. 111, filed November 9, 1914.

The sole basis of the question so argued is that the jurisdiction of the court depended upon diversity of citizenship; but this is a mistake. True, it is alleged in the petition that plaintiff is "an alien and a subject of Austro-Hungary," though the proof offered to support the allegation is meager and unsatisfactory. However, the petition further alleges that the defendant Cobb "is and at the times herein-after complained of was the receiver of the Columbian Hardware Company, a corporation, organized and existing under and by virtue of the laws of the state of Ohio; that he was appointed such receiver" by the court below on a date named, and at the times complained of "was engaged in operating a factory for the manufacture of various products of iron" in Cleveland, Ohio; and that on a specified date plaintiff was seriously injured while in the employ and through the negligence of defendant. The answer admits that the defendant, Cobb, is the receiver of this corporation, that the corporation "was engaged in operating a factory for the manufacture of various products of iron in the city of Cleveland," and that on the date stated in the petition plaintiff "met with an accident which caused him some injury; but the defendant, not being fully advised as to the nature and extent of the same, denies the allegations of the petition pertaining thereto." And defendant "denies each and every allegation therein contained not herein specifically admitted to be true." Defendant further answered, alleging:

"That such injuries as the plaintiff received were either directly caused or contributed to by the negligence or carelessness of the plaintiff himself."

[2] It was rightly conceded in the argument of the receiver's counsel that the plaintiff could sue the receiver without previously obtaining leave of the court appointing him (Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 [Comp. St. 1913, § 1047]); and, further, that if Cobb had in truth been appointed by the court below and was acting as

receiver of the corporation and its property, the suit could be maintained regardless of the citizenship of the parties. *Rouse v. Letcher*, 156 U. S. 47, 49, 50, 15 Sup. Ct. 266, 39 L. Ed. 341; *Stewart v. Dunham*, 115 U. S. 61, 64, 5 Sup. Ct. 1163, 29 L. Ed. 329; *White v. Ewing*, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 40 L. Ed. 67; *Compton v. Jesup*, 68 Fed. 263, 278 to 282, 15 C. C. A. 397 (C. C. A. 6th Cir.); *Trust Co. of America v. Chicago, P. & St. L. Ry. Co.* (D. C.) 199 Fed. 593, 603. Plaintiff did not offer proof of the receiver's appointment, and the receiver himself made no question in that respect, at the trial; it would therefore seem that the parties did not then regard the matter of the receivership as open to controversy; and no question in this behalf appears to have been made at any stage of the trial. True, one of the grounds stated in support of the motion for a new trial was that the court erred in refusing to direct a verdict, "because there was no evidence showing the jurisdiction of this court in this case"; and in the third assignment of error this ground is repeated; but it appears from the argument that the evidence so alluded to related only to the question of diversity of citizenship.

[3] Can it then be fairly and reasonably deduced from the pleadings that the appointment of defendant as receiver of the Columbian Hardware Company was made by, and that the property of the company was in possession of, the court below? We are constrained to believe that this is the natural interpretation of the pertinent language of the petition and answer; and that it is in accord with the practical construction which the parties themselves in effect placed upon those instruments at the trial. The petition alleges, not merely that defendant was the receiver of the Columbian Hardware Company, but also that he was appointed as such receiver by the court below; and, since no other source of appointment is suggested in either the answer or the evidence, the rational inference to be drawn from the admission that defendant is the receiver of the company is that the admission embraces the appointment as it is alleged in the petition; and it scarcely need be added that, if this inference is justifiable, the court's possession of the company's property may be regarded as a necessary result of the appointment. This interpretation derives support from the further admission that the company of which defendant is receiver was engaged in operating a factory identical in its location and manufactured products with the one described in the petition; and also from the admission that plaintiff met with an injury on the very date of the injury sustained by him as alleged in the petition. The denial made in immediate connection with these admissions is distinctly limited to the nature and extent of this injury; and while the more general denial is addressed to each and every allegation not "specifically admitted," it cannot reasonably be said that the admissions before pointed out are not specific within the meaning of, and so excepted by, this denial. In saying this, we are mindful of the fact that under the Ohio Code the common-law rule requiring pleadings to be construed most strongly against the pleader, is abrogated. *Crooks v. Finney*, 39 Ohio St. 57, 58. Yet it is equally true that "pleadings, under the present system, must be fairly and reasonably,

not strictly, construed." *McCurdy v. Baughman*, 43 Ohio St. 78, syl. 1, 1 N. E. 93; *Travelers' Ins. Co. v. Great Lakes Engineering W. Co.*, 184 Fed. 426, 429, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60 (C. C. A. 6th Cir.); *Bryson v. Gallo*, 180 Fed. 70, 74, 103 C. C. A. 424 (C. C. A. 6th Cir.). Indeed, the very language of the Ohio Code is that:

"The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties." Section 11345, 5 Page & Adams Ohio Gen. Code, p. 833.

We also recognize the rule that it is the duty of the federal courts to decline to take cognizance of a cause that does not fall reasonably within their jurisdiction; but in a case like this we are disposed to approve of the course taken in *William H. Perry Co. v. Klosters Aktie Bolag*, 152 Fed. 967, 969, 82 C. C. A. 321 (C. C. A. 1st Cir.), where it was said:

"Still, while the parties cannot confer jurisdiction by consent, where the jurisdictional facts are properly alleged, and thus properly appear upon the record, and the parties upon pleadings which go to the merits, proceed to trial, and particularly where the jurisdictional facts are not subsequently put in issue by the defendant or seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, and this is especially so where the proofs do not create a legal certainty that the controversy involved is not within the jurisdiction."

The judgment below is affirmed, with costs.

FREEDOM CASKET CO. v. McMANUS.

(Circuit Court of Appeals, Third Circuit. November 12, 1914.)

No. 1868.

1. MASTER AND SERVANT (§ 153*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DUTY TO WARN AND INSTRUCT.

When a servant is taken by the master from his ordinary employment, and put at work that he never before has done, there rests upon the master the duty of instructing the servant with respect to the methods and the dangers of the new kind of work, and such duty is an absolute one, for the performance of which the master is personally responsible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Plaintiff, who was employed as an unskilled workman in defendant's works, was set to operate a circular saw fixed in a table for sawing boards. He had never done such work, and at the very beginning his hand was caught by the saw and injured. There was a guard fixed above the saw for the protection of the operator, but plaintiff was not instructed as to its purpose or mode of adjustment. While the foreman showed him how the saw was operated and gave him certain instructions, there was a conflict of testimony as to their nature and extent, and as to whether

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the guard was properly placed. *Held*, that the case was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 121*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—"PROPER GUARD."

Under Factory Act Pa. May 2, 1905 (P. L. 352), requiring the use of safety appliances on dangerous machines, the avowed purpose of which is "to provide for the safety of all employes in industrial establishments," a "proper guard" on a dangerous machine means, not merely the presence of a proper guard on a machine, but that it shall be so used and adjusted as to be effective, and the failure of the master to comply with both of such requirements constitutes actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, Second Series, Proper Guard.]

In Error to the District Court of the United States for the Western District of Pennsylvania; William H. Hunt, Judge.

Action at law by Thomas McManus against the Freedom Casket Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William S. Dalzell, of Pittsburgh, Pa., for plaintiff in error.

Meredith R. Marshall, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiff below, hereinafter called the plaintiff, received injuries while operating a circular saw in the works of the defendant below, hereinafter called the defendant, to recover damages for which this action was brought. The testimony tends to show that the plaintiff was a man of about 23 years of age and was employed as an unskilled workman about the plant of the defendant. He knew from observation something about locomotive machinery, but knew nothing about saws. After being employed by the defendant for a period of 10 days and being theretofore engaged only in work of a general character, the foreman set the plaintiff to work cutting boards with a circular saw. The saw operated through a slot in a table, extending or protruding above the upper surface of the table about 1¼ inches. The table was so constructed that its elevation could be adjusted to increase or decrease the exposure of the saw above its surface. Above the table and overhanging the saw was an iron guard, in length equal to the upper arc of the saw and about two inches in width, and situate about 2½ inches above the top of the saw, or from 3 to 3½ inches above the top of the table. The presence and purpose of this guard was to protect the operator from injury, in conformity with the requirements of the Pennsylvania act of 1905 (P. L. 355), known as the "Factory Act."

Before entering upon the work, the foreman gave the plaintiff certain instructions respecting the manner of cutting boards and operat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the saw, which instructions consisted chiefly in cutting three boards and showing the plaintiff the position in which to stand and the manner of holding the boards and of driving them into the saw. After putting a board through the saw, a strip cut from the board would remain upon the table close to the saw, which the foreman removed by displacing it with his fingers and casting it aside. The foreman did not instruct the plaintiff relative to the purpose of the guard, nor to the necessity of adjusting it with relation to the thickness of the board being cut, nor to the manner of adjusting it by the use of the thumb screws by which its position could be controlled. In fact, no reference was made by the foreman in his instructions to the plaintiff respecting the guard, or its use, purpose or adjustment.

The injury to the plaintiff occurred in his attempt to remove from the side of the saw the waste strip which had been cut upon the first piece of work that he had attempted after receiving the instructions of the foreman.

The acts of negligence charged to the defendant among others, were:

First, the master's failure to give its servant proper instructions in operating a machine with which he was unfamiliar and to warn him of its dangers; and

Second, its failure to provide a proper guard, as required by the act of assembly, known as the "Factory Act," and its failure to instruct him how to use and adjust the same.

The defendant contended that it furnished the plaintiff a sufficient guard in conformity with the statute, and through the foreman gave him sufficient and proper instructions how to operate the machine with safety, the dangers of the same being apparent alike to the plaintiff and the defendant, and that the injuries to the plaintiff were caused by his own negligence.

The jury rendered a verdict for the plaintiff, and the error assigned is the refusal of the trial court to instruct the jury to render a verdict for the defendant.

[1] First. There was a conflict of testimony respecting the nature and extent of the instructions given. For the plaintiff it was testified that the foreman gave him no warning of the dangers of the machine, and that when the injury occurred he was removing the waste strip from the side of the saw in the way in which he had been shown. For the defendant it was testified that, to have received his injury, the plaintiff must have deliberately put his hand under the guard and against the saw, and by his own negligence, therefore, contributed to or caused his own injury.

It is a recognized principle of law that, when a servant is taken by his master from his ordinary employment and put at work that he never before had done, there rests upon the master the duty of instructing the servant with respect to the methods and the dangers of the new kind of work. In *Peters v. George*, 154 Fed. 634, 639, 83 C. C. A. 408, 413, Judge Gray, speaking for this court, said:

"The master does not insure the safety of the servant, but he does undertake that the place in which he works, and the appliances with which he works, and the conditions under which he works, shall be reasonably safeguarded. * * * It has never been doubted that a master's duty to an ig-

norant or inexperienced workman, indeed to any workman about to undertake more than ordinarily dangerous work, is to explain its dangerous character and give adequate caution as to its prosecution. This duty is of the absolute personal character above referred to, and is not discharged by merely intrusting its performance to a properly selected subordinate. Nothing short of actual notice of the danger to the workman who is to encounter it, with such cautionary explanation as may enable him to avoid it, will satisfy the requirement of the law, and the default of the intermediary, whether he be the highest officer in control, or merely a fellow workman of the one exposed to the danger, is the default of the master."

[2] Applying this principle of law to a situation which may reasonably be inferred from the controverted state of the testimony respecting the absence of warning and the extent of the instructions given by the master to the plaintiff as its unskilled employé, we are of the opinion that the court below committed no error in submitting this issue to the jury.

[3] Second. There is no conflict of testimony in this case respecting the purpose of the guard placed above the saw, but there is a radical conflict of testimony as to what is a proper adjustment of the guard with relation to the saw in order to secure the safety intended by its presence. The board which the plaintiff was sawing was seven-eighths of an inch thick. There was testimony that, in order for the guard to give the protection intended, the guard should be adjusted one-eighth to one-quarter of an inch above the board, just so the board could pass freely beneath it; and, if this be true, a proper adjustment of the guard in this instance, and under certain of the testimony, would have been from 1 inch to $1\frac{1}{8}$ inches above the surface of the table. It was admitted by the defendant that the guard was from 3 to $3\frac{1}{2}$ inches above the table, and there was testimony that it was from $3\frac{1}{2}$ to 4 inches above the table, and that it was not adjusted by the foreman, nor did the foreman instruct the plaintiff how to adjust it, for the work that he was set to do. There was further testimony that a proper adjustment of about an inch above the table might and probably would have prevented the plaintiff's injury, while the adjustment of from 3 to 4 inches above the table was no protection at all. Opposed to this there was testimony that, at the elevation at which it was adjusted, the guard was a complete protection against the dangers of the machine to an operator who was not himself negligent.

The avowed purpose of the statute requiring the use of safety appliances upon dangerous machines is "to provide for the safety of all employés in industrial establishments," and the requirement that these machines be properly guarded means "effectively guarded in the light of the dangers to be anticipated," and the failure of the master to comply with this act constitutes actionable negligence. *American Ice Co. v. Porreca*, 213 Fed. 185, 129 C. C. A. 529.

It has been the policy of this court to construe this statute broadly, in accord with its purpose to prevent avoidable harm. A proper guard upon a dangerous machine means not merely the presence of a proper guard upon the machine, but of a guard properly used and adjusted; and instructions which the law requires a master to give an employé unfamiliar with the dangers of a machine upon which he is put to work, when such a machine is required by the Factory Act to be properly

guarded, contemplate instructions with respect to the purpose, use, and adjustment of the guard for the safety of the operator quite as well as instructions in the manner of operating the machine itself.

In the conflict of testimony respecting the elevation of the guard over a dangerous part of the machine and its effectiveness as a protection against the dangers of the machine, as well as from the undisputed testimony concerning the conduct of the plaintiff in exposing his hand to injury by placing it under the guard and near the saw, we are of opinion that fair-minded men might reasonably draw different conclusions concerning negligence of the defendant and contributory negligence of the plaintiff, and when such differing conclusions can reasonably be drawn from evidence that is either in conflict or undisputed, questions of negligence remain questions of fact and should not be withdrawn from the jury. *Texas & Pacific Ry. Co. v. Harvey*, 228 U. S. 319, 324, 33 Sup. Ct. 518, 57 L. Ed. 852. The court below committed no error in submitting these issues to the jury and in refusing to bind the jury to render a verdict for the defendant.

The judgment below is affirmed.

STEWART MINING CO. v. BOURNE et ux.

SAME v. SIERRA NEVADA MINING CO.

(Circuit Court of Appeals, Ninth Circuit. November 2, 1914.)

Nos. 2390, 2391.

1. MINES AND MINERALS (§ 47*)—MINING CLAIMS—EXTENT—PRESUMPTION.

An ore body found beneath the surface of a mining claim presumptively belongs to the owner of that claim.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 133; Dec. Dig. § 47.*]

2. MINES AND MINERALS (§ 44*)—MINING CLAIMS—PRESUMPTION FROM ISSUANCE OF PATENT.

Where a patent has been issued for a mining claim, there is a conclusive presumption that there is a discovery vein therein, that the claim was properly located thereon, and that all precedent acts necessary to authorize the issuance of the patent had been performed.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 130; Dec. Dig. § 44.*]

3. MINES AND MINERALS (§ 38*)—LODE MINING CLAIM—EXTRALATERAL RIGHTS.

Evidence as to location of the apex of an ore vein on the surface of a lode mining claim held not to sustain the claim of the owner to extralateral rights.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

Appeals from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Separate suits in equity by the Stewart Mining Company against Jonathan Bourne, Jr., and Lillian E. Bourne, his wife, and against the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Sierra Nevada Mining Company. Decrees for defendants, and complainant appeals. Affirmed.

C. S. Thomas, of Denver, Colo., Cullen, Lee & Matthews, of Spokane, Wash., and Gunn, Rasch & Hall, of Helena, Mont., for appellant.

Myron A. Folsom, of Spokane, Wash., and Curtis H. Lindley, of San Francisco, Cal., for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. These cases were by the stipulation of the respective parties consolidated "for the purpose of trial, appeal, and other proceedings" therein—the complaint in each of the actions, in so far as the complainant's alleged title is concerned, being, according to the stipulation, identical, and the defenses set up in the answers very similar.

[1] The question involved is the ownership of certain ore bodies found beneath the surface of the patented mining claim Ontario, situated in Shoshone county, Idaho, owned by the appellee Jonathan Bourne, Jr. Presumptively, therefore, they belong to the owner of that claim. *Lawson v. United States Mining Co.*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65. Their ownership, however, is asserted by the complainant in the cases, the appellant here, and owner of an adjacent mining claim called Senator Stewart Fraction, by virtue of the provisions of section 2322 of the Revised Statutes (Comp. St. 1913, § 4618), conferring upon the owners of mining claims extralateral rights under certain prescribed conditions.

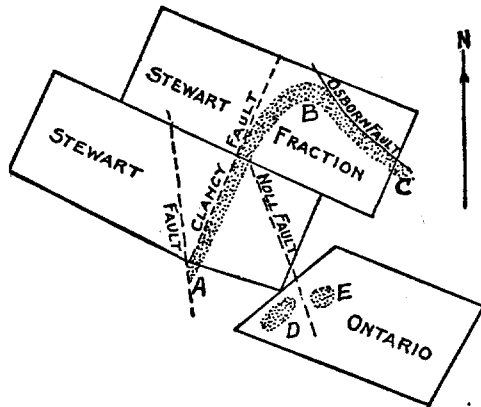
It appears from the stipulation of the parties that a similar action was previously brought by the Stewart Mining Company against certain lessees of the defendants Bourne, in the district court of the First judicial district of the state of Idaho for Shoshone county, resulting in a judgment for the defendants, from which judgment an appeal was taken to the Supreme Court of Idaho, where the judgment was affirmed—the opinion of that court being reported in 23 Idaho, 724, 132 Pac. 787. The present cases were, pursuant to the stipulation of the parties, heard and decided by the court below on the evidence given in that case, which is embodied in the record here, supplemented by an agreement as to certain other facts.

[2] It appears that the Senator Stewart Fraction is also a patented claim, and although no reference is made either in the pleadings or in the evidence to the discovery vein of that claim, the conclusive presumption is that there was a discovery vein therein, that the land was properly located, and that all preliminary and precedent acts necessary to authorize and justify the issuance of the patent had been performed as the law required. Authorities to that effect are so numerous as to render their citation unnecessary. Among those prerequisites is the requirement that the boundaries of the claim be so marked on the ground as to embrace not exceeding 300 feet on each side of the middle of the vein, and not exceeding 1,500 feet in length along the vein. In *Lindley on Mines* (3d Ed.) p. 725, it is said:

"The 'course of the vein' appearing on the surface is plainly the course of its apex, which is generally inclined and undulating, and departs more or less materially from the 'strike.' The miner is required to locate his claim 'along the vein,' which plainly means along the outcrop or course of the apex. It would be impracticable for him to locate it along the strike, as it usually takes years of underground work to determine the strike through the length of his claim. It is often difficult even to locate properly along the apex, especially where the walls are obscured by surface disintegration or are covered with a capping or large accumulation of detritus."

Nothing to the contrary appearing, the conclusive presumption is that the Senator Stewart Fraction claim was located not exceeding 1,500 feet along the course or strike of the discovery vein, and not exceeding 600 feet in width. But the evidence clearly shows, and it is indeed conceded by the respective counsel, that beneath the surface of the latter claim there is a secondary vein, which enters its southerly side line near the center thereof, from which point it extends on a practical level to within about 100 feet of its northerly side line (underlying for that distance a fault designated in the record "Clancy fault"), where it is found in contact with a fault of very large dimensions called "Osborne fault."

[3] A map introduced in evidence on the part of the plaintiff in the case—plaintiff in error here—a modified copy of which is found in the opinion of the court below appearing in the record and is here inserted for illustration, shows, as will be seen, that at the point of contact of the vein in question with the Osborne fault the vein was thereby turned in a northeasterly direction, and thence extended about 700 feet along that fault to and out of the easterly end line of the Stewart Fraction claim. But the large model introduced in evidence by the defendants on the trial, the correctness of which was not only not questioned at the argument by counsel on either side, but is practically conceded, and which model shows the situation



of the vein by actual development, thereby amounting to a demonstration, makes plain, we think, that this vein was not turned or bent in its course or strike at the point of its contact with the Osborne fault, and did not and does not extend from that point along that fault, but, on the contrary, came to an abrupt end there. True, further to the northeasterly and at a much greater depth the ore is shown by the model to have extended to the Osborne fault, and from that point to have followed the fault northeasterly to and out of the easterly end line of the claim. But we think it manifest that such portion of the ore body cannot in any proper sense be regarded as any part of the apex of the vein. In its course upward from the bowels of the earth the

ore evidently made its way through the openings to that part of the Osborne fault last referred to, and on upward through the comparatively narrow space forming the only connection with that portion of the vein within the boundaries of the Senator Stewart Fraction claim that extends from the point of its entry therein at the southerly boundary of the claim to its contact with the Osborne fault, near the northerly side line of the claim. That portion of the vein, as has been said, underlies the Clancy fault. It is shown to be practically level, and is clearly shown by the evidence, and is practically conceded by counsel on both sides, to be a part of the apex of the vein in question. We think it is very clearly shown by the model referred to to be its only apex within the boundaries of the Senator Stewart Fraction claim. It, however, afforded the plaintiff in the case no basis for the assertion of any extralateral right, for the obvious reason that it entered the claim through one of its side lines, and in its course or strike did not pass out of the claim at all. Consequently, the plaintiff based its complaint solely upon an alleged apex thus described therein:

"That within said Senator Stewart Fraction quartz lode mining claim is a certain vein or lode bearing silver, lead, and other valuable minerals, the top or apex of which vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners Nos. 1 and 2, and extends within the boundaries of said claim in a westerly direction, following the general course of said claim, for a distance of seven hundred five (705) feet, more or less."

The foregoing description, as will be readily seen from the diagram above inserted, covers an alleged apex extending from the letter C to B. The evidence showing, as has been above pointed out, that there is no such apex, the suit of the plaintiff must necessarily fail.

Accordingly in each case the judgment appealed from is affirmed.

STEWART MINING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. November 2, 1914.)

No. 2389.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by the Stewart Mining Company against the Bunker Hill & Sullivan Mining & Concentrating Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, *Stewart Mining Co. v. Bourne*, 218 Fed. 327.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

PER CURIAM. Upon the authority of *Stewart Mining Co. v. Jonathan Bourne, Jr., et al.* (No. 2390) and *Stewart Mining Co. v. Sierra Nevada Mining Co.* (No. 2391) 218 Fed. 327, 134 C. C. A. 123, just decided, the judgment herein is affirmed.

LINTON v. OMAHA WHOLESALE PRODUCE MARKET HOUSE CO.†

(Circuit Court of Appeals, Eighth Circuit. October 26, 1914.)

No. 4031.

1. JUDGMENT (§ 585*)—RES JUDICATA.

Where a second action is on the same claim or demand as the first, and is between the same parties or their privies, the judgment in the first, if rendered on the merits, constitutes an absolute bar to the prosecution of the second.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132; Dec. Dig. § 585.*]

2. JUDGMENT (§ 670*)—PRIOR SUIT—CAPACITY OF PARTIES.

Where, in a prior suit to quiet title to real property, L. was joined as a defendant, and, though his capacity as trustee was not disclosed in the title, such was the interest attributed to him in the body of the bill, the judgment in favor of the complainant in that suit was a bar to a subsequent suit by complainant as trustee for the same beneficiaries.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185; Dec. Dig. § 670.*]

3. JUDGMENT (§ 585*)—CONCLUSIVENESS—RES JUDICATA.

Where, in a prior suit to quiet title, complainant was joined as a defendant, and sued as trustee for certain infant children, it was his duty to set up whatever claims of title he had; and his failure in that suit to rely on a certain deed did not entitle him, after an adverse decree, to maintain another suit to establish the trust, based on such deed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132; Dec. Dig. § 585.*]

Appeal from the District Court of the United States for the District of Nebraska; William H. Munger, Judge.

Suit by Adolphus F. Linton, trustee, etc., against the Omaha Wholesale Produce Market House Company. From a decree dismissing the bill, complainant appeals. Affirmed.

Charles Haffke, of Omaha, Neb. (Halleck F. Rose, John F. Stout, and Arthur R. Wells, all of Omaha, Neb., on the brief), for appellant.

F. H. Gaines, of Omaha, Neb. (E. G. McGilton and Sidney W. Smith, both Omaha, Neb., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. This was a suit in equity, brought by Adolphus F. Linton, the appellant, against the Omaha Wholesale Produce Market House Company, to charge lots 5 and 6 of block 164 in the city of Omaha, the legal title to which stood in the name of the defendant, with a trust in favor of complainant as trustee for his children, for an accounting of rents, income, and profits, and for other relief. The answer put in issue the allegations of the bill, and pleaded in bar a former judgment alleged to have been rendered in an action between the same parties, or their privies, involving the same issues as are here involved. Although evidence was taken on the merits, the cause by stipulation of parties was submitted to the court for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 11, 1915.

final decision on the plea in bar. The court below sustained this plea and entered a decree dismissing the bill. From that decree the complainant appeals.

Did the court err in sustaining that plea? In answering this question the following pertinent facts are involved:

A common source of title is found in Phoebe Linton, wife of the complainant, who, it is claimed, entered into an antenuptial contract with the complainant, prior to their marriage in 1878, by the provisions of which a certain trust was created in favor of children which might be born of the marriage. This contract was not at the time recorded in the office of the register of deeds of Douglas county, Neb., but subsequently, for the purpose of affecting the public with knowledge of its contents, certain deeds were executed. Among them was one executed by Mrs. Linton (Mr. Linton joining), conveying the premises to Kate Remnant, and another one, simultaneously executed by Kate Remnant, conveying the premises to Mr. Linton. These deeds were dated March 31, 1897, and recorded June 2, 1902. On May 1, 1897, Mrs. Linton executed another deed conveying the premises to complainant. In this deed is found the following recital:

"Whereas, an antenuptial agreement and settlement was entered into between the said Phoebe R. E. Linton and the said Adolphus F. Linton on the 10th day of December, 1878: Now, in consideration of the agreement and settlement, witnesseth that the said party of the first part (Phoebe R. E. Linton), for and in consideration of the sum of \$50,000 agreed to be paid and the sum of \$1,000 * * * unto her well and truly paid by the party of the second part (Adolphus F. Linton) at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted," etc.

After the acknowledgment of this last-mentioned deed appears a written statement as follows:

"I declare this deed has only just been found, after being lost for several years. This property was deeded to me to hold in trust for Charles S. Linton and Fryda A. B. Linton, my children. I declare I hold the legal title in trust for my children according to the terms of the marriage agreement made before marriage to my wife, P. R. E. Linton.

"[Signed] Adolphus F. Linton."

The deed dated May 1, 1897, with the declaration of trust written upon it, as just recited, was recorded in the office of the register of deeds of Douglas county, Neb., on August 6, 1906. By virtue of the foregoing conveyances Mr. Linton claims to own the lots in question as trustee for his children.

Defendant's title is deraigned from Mrs. Linton in this way: In 1892 she executed a mortgage conveying certain other real estate to the National Life Insurance Company of Vermont to secure the payment of a note for \$25,000. In 1896 suit was instituted to foreclose this mortgage. Anticipating that the proceeds of sale of the mortgaged premises would not be sufficient to pay the amount due on the note, complainant in that suit specifically prayed for a deficiency judgment against Mrs. Linton. A decree of foreclosure followed in due time, and the proceeds of sale of the mortgaged property being insufficient to pay the mortgage debt, on March 15, 1901, a deficiency judgment was rendered against Mrs. Linton in the sum of \$1,982.50.

Execution was duly issued on this judgment and in 1905 it was levied upon the lots in question in this case, as the property of the judgment debtor. They were subsequently sold under execution and purchased by one Anson E. Becker, to whom on August 28, 1905, they were conveyed by appropriate official deed.

By reason of a claim then made that Becker's title emanating from Mrs. Linton was not good, he, on September 19, 1905, instituted a suit in the district court of Douglas county, Neb., against Mr. Linton, Mrs. Linton, and their two children, Charles S. Linton and Fryda S. Blessing, née Linton, alleging in his bill that the defendants claimed some right, title, or interest in the lots so purchased by him, by virtue of the two Remnant deeds. It was alleged in the bill that since those deeds were executed Mr. Linton had filed some declaration of trust whereby he claimed to hold the premises in suit for his children by virtue of some antenuptial settlement between himself and his wife, when in truth and in fact the children had no right or interest in or to the premises, but that they were the sole and absolute property of Mrs. Linton, from whom he (Becker) deraigned his title; that the purpose and intent of the Remnant deeds was to defeat the collection of the judgment of the National Life Insurance Company, to defraud that company and other creditors of Mrs. Linton, and that the declaration of trust afterwards made by Mr. Linton in favor of his children conferred no right upon them as against the complainant who had the legal title. The complainant, Becker, then prayed that the deeds from Mrs. Linton to Kate Remnant and Kate Remnant to Mr. Linton be declared void and of no effect, and that Becker's title to the lots in question be quieted as against the claims of each and all of the defendants in that suit, and that he might have such other and further relief as might appear equitable and just.

The defendants in that suit joined issue on the substantial averments of the bill and pleaded affirmatively that the Remnant deeds were made for the purpose of executing the provisions of the antenuptial agreement and that Mr. Linton held title to the lots in question as trustee for his children.

On the issues so made the cause came on for a hearing on the merits and resulted on July 13, 1906, in a decree in favor of the complainant, Becker, adjudging the Remnant deeds null and void, canceling the same, and decreeing that Becker's title be quieted and confirmed in him as against the defendants and all persons claiming by, through, or under them. This judgment was affirmed by the Supreme Court of the state of Nebraska. See *Becker v. Linton*, 80 Neb. 655, 114 N. W. 928, 127 Am. St. Rep. 795.

Thereafter, on August 13, 1906, Becker conveyed the lots so acquired by him, being the lots now in controversy, to the defendant the Omaha Wholesale Produce Market Company. It is now claimed by this defendant, appellee herein, that the judgment in the case of *Becker v. Linton* constitutes a prior adjudication of the controversy disclosed by the pleadings and proof in this case, and that complainant is stopped by that judgment from prosecuting this case. Is this correct?

[1] The governing rule which we must apply in answering this question is this: If the second action is upon the same claim or demand as was the first, and is between the same parties or their privies, the judgment in the first action, if rendered on the merits, constitutes an absolute bar to the prosecution of the second action. It is a finality as to the claim or demand involved in the first action, concluding parties and those in privity with them, not only as to any matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Wiggins Ferry Co. v. O. & M. Railway Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Gordon v. Ware National Bank*, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; *Stewart v. Board of Trustees*, 84 C. C. A. 451, 156 Fed. 773.

In the Becker suit it appears that Anson E. Becker, in whom was vested the legal title of record to the lots now in controversy, was the complainant; that Adolphus F. Linton, the complainant in the present action, his wife, Phoebe Linton, through whom Becker acquired title, and Linton's two children, Charles Linton and Fryda Linton, were the defendants. The purpose of that suit was to set aside the two Remnant deeds, whereby title to the lots was conveyed to Mr. Linton, to quiet title thereto in Becker, and for general relief. In the bill in that case it was averred that those deeds were executed for the alleged purpose of vesting title to the lots in question in Mr. Linton as trustee for his children, pursuant to the requirements of an antenuptial contract; whereas, in truth and in fact the deeds were resorted to as a device to hinder, delay, and defraud the creditors of Mrs. Linton. On these allegations issue was joined by all the defendants in that case, but in their answer they affirmatively invoked the obligation arising out of the antenuptial contract as a good consideration for the Remnant deeds, and alleged that Mr. Linton, by means of those deeds, acquired and held title to the lots in question as trustee for his children pursuant to the requirements of that contract.

It thus appears that the parties to this suit were the same as those in the Becker suit, excepting that the defendant in this case is the grantee of the complainant in that, and complainant Adolphus F. Linton, in this suit, was one of the defendants in that suit, joined with the beneficiaries, for whom he claimed to be acting in that suit as well as in this suit. In other words, the parties to the present action, although differently arrayed, are the same as those in the Becker suit, or in privity with them. The substantial issue in both cases is whether Mr. Linton, by virtue of the antenuptial contract and subsequent deeds, so acquired title to the lots as trustee for his children as to defeat the assertion of a claim thereto by creditors of Mrs. Linton, the former owner. In the first-mentioned suit Becker asserted absolute ownership in them as against a claim of defendants that Mr. Linton owned them as trustee for his children. In this suit Mr. Linton claims that he, as trustee for his children, is the owner as against the Market House Company, which claims to be the owner as grantee of Becker, claimant in the first suit. It is difficult to conceive of causes

which present a more perfect identity of parties or privies and of causes of action.

A lengthy argument is made in the brief of appellant's counsel to the effect that as Becker, prior to the commencement of his suit, had parted with his interest in the premises in question to the Market House Company, the defendant in this case, and as the latter company was not made a party to the Becker suit, it is not bound by the decree rendered in that suit, and consequently complainant is not estopped by it. This argument is constructed upon the assumption that Becker had disposed of the property before he commenced his suit. There is some vague and indefinite testimony, altogether oral and of a hearsay character, to the effect that Becker had commenced negotiation for the sale of the premises before he brought his suit, but that on account of claims made by complainant and those associated with him he was required to clear his title before a sale could be consummated. After a careful reading of all the record contains on this subject, we are unable to find in it anything but incomplete negotiation, and surely nothing of the certainty and dignity of a binding contract of sale of real estate. We accordingly refrain from further consideration of the interesting argument made on the erroneous assumption.

[2] It is contended by appellant's counsel that, as Adolphus F. Linton was not impleaded in the Becker suit as trustee, but as an individual, in his own right, he cannot be estopped from prosecuting this suit, in which he appears in his capacity as trustee for his children, by the judgment rendered against him in that suit. Here, too, we think the assumption is unfounded. It is true he was not designated in the caption of the Becker suit as *a trustee*, but averments are found throughout the bill in that suit which most clearly disclose that he was there charged with making a claim to the lots in question solely as trustee for his children. It is quite common and altogether proper to describe the capacity of a named defendant or his relationship to other parties in the body of the bill, without disclosing them in the style of the action at all. Not only so, but the defendants in the Becker case pleaded affirmatively that Mr. Linton held title to the lots in question for his children, and the case was tried on that issue. That issue was, therefore, not only made, but fully tried, in the Becker suit. *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212; *City of Denver v. Mercantile Trust Co.*, 120 C. C. A. 100, 201 Fed. 790.

[3] Contention is made that the deed of Mrs. Linton to Mr. Linton, dated May 1, 1897, conferred upon him some right in addition to or different from the right acquired by him by means of the Remnant deeds, and that the present action, in so far as Mr. Linton grounds his right upon the deed of May 1, 1897, presents a different claim or demand from that involved in the Becker suit, and that as a result, the judgment in that case is not *res adjudicata* of his present claim. We fail to see any merit in this contention. Whether Mr. Linton acquired legal title to the premises by one deed or another is not material. The real question is whether he had so acquired title and de-

clared a valid trust in favor of his children as to extinguish the right of Mrs. Linton to the property and thus destroy Becker's title derived through her. The mere legal title, without the creation of a trust in favor of his children, to serve the purpose of a consideration for the deeds to him, would have constituted a voluntary conveyance only by Mrs. Linton, which would not have screened her property from the demands of her creditors. The existence of the trust was therefore the all-important issue in both cases. But let it be conceded that Mr. Linton did acquire some additional support to his pretensions by the deed of 1897; inasmuch as that was available to him in the Becker suit as a defense to the contention of Becker, the judgment rendered in that suit is just as conclusive against the prosecution by Mr. Linton of a second action based on that deed as it would have been had that deed been actually pleaded or proved as a part of his case in the Becker suit. The judgment in that case was a finality, not only as to what was offered and received to sustain or defeat the claim or demand therein involved, but as to any other admissible matter which might have been offered for that purpose. See cases *supra*.

We have carefully considered the arguments of counsel that the Becker judgment was obtained by fraud, as the result of a conspiracy between Becker and the defendant in this case; but for reasons unnecessary to be specified it is not convincing. The District Court in our opinion was clearly right in sustaining the plea in bar; accordingly it becomes unnecessary to consider some other questions relating to the merits of the case which were argued by counsel.

The decree of the District Court is affirmed.

**CENTRAL TRUST CO. OF NEW YORK v. CHICAGO, R. I. & P. R.
CO. et al. (two cases).**

(Circuit Court of Appeals, Second Circuit. November 19, 1914.)

Nos. 156, 157.

**1. APPEAL AND ERROR (§ 87*)—ORDERS APPEALABLE—MATTERS OF DISCRETION
—APPLICATION TO INTERVENE—DENIAL.**

The rule that the denial of a petition to intervene is discretionary, and not appealable, is subject to the qualification that the discretion must be exercised in accordance with recognized judicial standards.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-569, 577-596; Dec. Dig. § 87.*]

2. PARTIES (§ 41*)—INTERVENTION—RIGHT TO INTERVENE.

Where claimant's rights are finally disposed of, and intervention is necessary for their protection, the right to intervene is absolute.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 68; Dec. Dig. § 41.*]

3. RAILROADS (§ 186*)—STOCK—MORTGAGES—FORECLOSURE—SALE—INTERVENTION.

Where the only asset of a railroad company was a proportionate amount of the capital stock of a railway company of the same name, the railroad company having mortgaged the stock to secure its bonds, and in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceedings to foreclose the mortgage the value of the stock depended largely on the purchaser's getting control of the railway company, and the interest of a protective committee, with which it was alleged the trustee was acting, was adverse to that of nondepositing bondholders, it was error to deny the petition of one representing substantial rights of nondepositing holders to intervene, to contest the mode and terms of the sale.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. § 186.*]

4. APPEAL AND ERROR (§ 87*)—ORDERS APPEALABLE—FINAL ORDER—DETERMINATION OF RIGHTS—PETITION OF INTERVENTION—LEAVE TO INTERVENE—DENIAL.

Where orders denying the petition of one representing nondepositing bondholders to intervene in proceedings to foreclose a mortgage on certain railway stock completely disposed of petitioner's claims and left nothing to be done as to them in the litigation, the orders were final and appealable, under Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133 (Comp. St. 1913, § 1120), though the sale, to which objections were made, was subject to confirmation after it had been held.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-569, 577-596; Dec. Dig. § 87.*]

Finality of judgments and decrees for purposes of review, see notes to *Brush Electric Co. v. Electric Imp. Co. of San Jose*, 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.]

Lacombe, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

Suits by the Central Trust Company of New York against the Chicago, Rock Island & Pacific Railroad Company, in which Nathan L. Amster applied to intervene. From orders denying such application, intervener appeals. Reversed.

Louis Marshall, of New York City, for appellant.

A. H. Van Brunt and H. B. Stimson, both of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. These are appeals from two orders of the District Court denying the petition of one Nathan L. Amster for leave to intervene in a foreclosure suit brought by the Central Trust Company as trustee against the Chicago, Rock Island & Pacific Railroad Company, and also motions by the trustee to dismiss the said appeals.

The Chicago, Rock Island & Pacific Railroad Company is the owner of \$71,353,500, par value, of the capital stock of the Chicago, Rock Island & Pacific Railway Company outstanding to the amount of \$75,000,000, which is substantially the only property it has. August 1, 1902, the Railroad Company mortgaged this stock to secure the payment of its 4 per cent. collateral bonds due November 1, 2002, aggregating \$71,353,000—that is, one bond of \$1,000 for every 10 shares of stock—and appointed the Central Trust Company of New York trustee under the mortgage.

February 26, 1914, it being quite apparent that the Railway Company could declare no dividend on its stock, and therefore that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—22

Railroad Company, which had no other source of income, would default on the interest of its bonds due May 1st, a protective committee of bondholders was formed. The president of the trustee became chairman of this committee, its counsel became the counsel of the committee, and the trustee the depository for the committee. May 1st the Railroad Company defaulted in the payment of its interest. September 2d the Trust Company, the 90-day period having expired, provided in the mortgage, declared the principal of the bonds due and began a suit to foreclose the mortgage. September 16th the Railroad Company filed an answer admitting the allegations of the bill. Thereafter the Trust Company submitted the decree of sale to the court.

September 28th Amster, as owner of bonds to the amount of \$350,000 and as representing the owners of bonds to upwards of \$700,000, applied to the District Court for leave to intervene in the foreclosure suit and be made a party defendant. At this time there were deposited with the protective committee bonds to the amount of \$18,000,000. The petition set up no defense to the foreclosure suit, but only objected to the mode of sale. It alleged as grounds of intervention that the trustee was not fairly representing the petitioner and the bondholders represented by him, but was acting in harmony with financial interests controlling the committee, which were irreconcilable with the interests of himself and the bondholders he represented. In respect to the proposed decree he objected that an immediate sale of the mortgaged stock at a time of such financial stringency would make it impossible for any third party to bid successfully against the committee, especially upon notice giving little time for the scattered bondholders to be heard from; that the sale of the bonds in one block would be destructive of the rights of the nondepositing bondholders; and that an upset price should be fixed.

October 10th the District Judge signed the proposed decree and denied the petition, on the ground that the trustee had done nothing justifying intervention. The sale has been fixed for November 28th. October 13th he allowed the petitioner's appeal.

October 17th the petitioner filed a second petition for leave to intervene, alleging that he represented \$3,000,000 of bonds in addition to his own, and that since the order denying his first petition the protective committee had published a plan prepared by counsel who were also counsel for the trustee which he criticized as unfair to the nondepositing bondholders. At this time there were deposited with the committee not over 40 per cent. of the bonds. October 23d the District Judge denied this petition, saying:

"It is, of course, impossible to predict the result at the foreclosure sale; but, as heretofore pointed out, any bondholder will have the fullest opportunity to be heard upon any application to confirm the sale, and notice of such application is by the terms of the decree to be widely published. It must be assumed that the sale—whether the purchase be made by the committee or by others—will be confirmed only if it appears that it is for the benefit of the bondholders so to do."

October 26th he allowed the petitioner's appeal. Both appeals were argued together.

[1, 2] The general rule is that the denial of a petition to intervene is discretionary and therefore not appealable. The discretion, however, must be exercised in accordance with recognized judicial standards. There is a class of cases where the claimant's rights are finally disposed of and intervention is necessary for their protection, in which the right to intervene is absolute. Cases recognizing the existence of these two classes are *Credits Commutation Co. v. United States*, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; *Farmers' Loan & Trust Co. v. Northern Pacific Railway Co.* (C. C.) 66 Fed. 169; *Farmers' Loan & Trust Co. v. Cape Fear & Yadkin Valley Railway Co.* (C. C.) 71 Fed. 38; *Minot v. Mastin*, 95 Fed. 734, 37 C. C. A. 234; *United States v. Philips*, 107 Fed. 824, 46 C. C. A. 660.

[3] It is not always easy to draw the line. The circumstances of this case are such as to cause us to think that the intervention should have been allowed. Very substantial rights are involved and serious objections made. The attitude of the trustee is ambiguous. The property is railroad stock. The value of it depends largely upon the purchaser's getting control of the Railway Company. The interest of the protective committee is to buy the stock as cheaply as possible, while it is the interest of the nondepositing bondholders that it be sold at as high a price as possible. If the sale be confirmed the mortgaged stock may be dissipated.

[4] Objection is made by the trustee that, the sale being subject to confirmation by the court, the orders are not appealable as final decisions within section 128 of the Judicial Code. The orders certainly did completely dispose of the petitioner's claims and left nothing further to be done as to them in the litigation. The fact that the sale is subject to confirmation confers no rights upon him. A resale would be ordered only if the price bid were so inadequate as to shock the conscience of the court, or if fraud were developed in connection with it. If the sale were confirmed, the petitioner, not being a party, could not appeal from the decree and could not again ask the court to pass upon claims as to the mode of sale theretofore disposed of. See *Standley v. Roberts*, 59 Fed. 836, 8 C. C. A. 305, and the authorities discussed by Judge Sanborn. The case of *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559, on which counsel for the trustee place great reliance, is different. There the dispute was as to the amount of compensation awarded to the trustee which was to be paid by the bondholders. Obviously the trustee could not represent them in this controversy, and the bondholders were there allowed to appeal from the order of confirmation.

It must be understood that we express no opinion whatever as to the merits of the petitioner's claims, but simply find that they are of such a character as to entitle him to intervene.

The motions to dismiss the appeals are denied, and the orders reversed.

LACOMBE, Circuit Judge (dissenting). I dissent from the decision of the majority of the court because I do not think the orders denying leave to intervene are final orders. The sale effects nothing until it is

confirmed. As I understand *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559, this petitioner could be heard on appeal from the decree of confirmation which would certainly be final. If this be not so, it would seem that, should the District Court refuse to hear any person interested on motion to confirm the sale, or to put him in a position where he could secure a review of such determination (as to the sale), such order would be final.

Dissenting on this ground, I do not find it necessary to express an opinion on any question which has been argued here.

BREAKWATER CO. v. DONOVAN.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1914.)

No. 2495.

1. CORPORATIONS (§ 518*)—ACTIONS—DEFENSES—ULTRA VIRES—PLEADING.

In an action against a corporation for breach of an employment contract, a defense of ultra vires, not pleaded, was unavailable.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2028, 2086, 2087; Dec. Dig. § 518.*]

2. PLEADING (§ 236*)—ANSWER—AMENDMENT—DEFENSES—DISCRETION.

Where an employé, having recovered judgment against defendant corporation for installments due under his contract, assigned his further rights thereunder to plaintiff, who brought a subsequent suit for breach of the contract, it was a proper exercise of the court's discretion for it to refuse an application by defendant, made at the conclusion of all of the testimony, for leave to amend its answer, to present the defense of ultra vires.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

3. JUDGMENT (§ 603*)—RECOVERY IN FORMER ACTION—CONCLUSIVENESS.

Where plaintiff's assignor brought a former action on a compromise settlement and employment contract specially limited to a recovery of the settlement installments and salary then due, a judgment in his favor was no bar to a subsequent suit by his assignee to recover further installments when matured.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1118; Dec. Dig. § 603.*]

4. TRIAL (§ 177*)—VERDICT—MOTION TO DIRECT—RIGHT TO SUBMIT ISSUES TO JURY.

Where, after defendant's motion for a directed verdict was denied, plaintiff moved for a directed verdict, whereupon defendant insisted on the submission of issues of fact to the jury, there was no consent thereby to a submission of all the issues to the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 400; Dec. Dig. § 177.*]

5. APPEAL AND ERROR (§ 1061*)—REVIEW—PREJUDICE.

Error in treating motions by both parties to direct a verdict as a submission of issues of both law and fact to the court, and the direction of a verdict for plaintiff, was not prejudicial to defendant, where its only meritorious defense was not proved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.*]

6. MASTER AND SERVANT (§ 43*)—CONTRACT OF EMPLOYMENT—BREACH—OUTSIDE EMPLOYMENT—QUESTION FOR JURY.

Where, after breach of a contract of employment, the employé during the term earned \$800 in other employment, but claimed that his contract did not contemplate giving his full time to defendant, whether the nature of his outside work was such as to be inconsistent with his obligation to defendant under the contract, if it had continued, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

7. APPEAL AND ERROR (§ 1140*)—CURING ERRORS—REMITTITUR.

Where, in an action for breach of an employment contract, it appeared that the employé earned \$800 from other employment within the term, and the court erred in not submitting the question whether the services rendered were not inconsistent with his obligation under the contract to the jury, such error could be cured by a remission of that sum from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by Leona T. Donovan against the Breakwater Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

J. H. Price, of Cleveland, Ohio, and Province Pogue, of Cincinnati, Ohio, for plaintiff in error.

J. E. Morley, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This was an action at law, in which, in the court below, Mrs. Donovan, as assignee of her husband, John F. Donovan, was plaintiff, and the Breakwater Company was defendant. The suit was based upon a written contract made October 3, 1908, by which the company agreed to pay Donovan, in installments, about \$5,900 in compromise settlement of all existing controversies, and also agreed to employ him at a monthly salary until December 31, 1910. In December, 1909, Donovan commenced suit and later recovered judgment in Pennsylvania against the company for the unpaid installments of the compromise settlement and of salary that were then due. In March, 1910, he was discharged from further employment, and the company, claiming sufficient justification, repudiated the contract. He waited until its term expired, brought this suit for the remaining installments of salary, and by direction of the court below recovered judgment. The company's assignments of error cover several distinct causes for reversal. So far as thought meriting discussion, these claims are: (1) The contract was ultra vires the corporation. (2) The former recovery in Pennsylvania exhausted the right of action. (3) Issues of fact should have been left to the jury. (4) Defendant was entitled to a credit of \$800 earned by plaintiff in other employment.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1, 2] 1. *Ultra Vires*. The corporation was formed simultaneously with the making of this contract, and Donovan had no existing claim against it; but it seems not to be questioned that he was making claims against older corporations, all the assets of which were being taken over by this company in a reorganization, and that the prosecution of his claims would at least have embarrassed and complicated defendant's affairs. In that view, it would be clear that the transaction was not merely the assuming of a debt which the defendant did not owe, but it was a settlement and adjustment which defendant had power to make.

Another reason for claiming a lack of power is that the contract provided for Donovan's election as second vice president of the company, and for his holding that position during the term of the contract. Thereupon it is said that the public policy of Ohio, the state where the corporation was organized, would not permit the term of an officer to be fixed for more than one year. Whatever force this contention might have regarding an officer whose powers of management were fixed by statute, it can hardly apply in this instance, where the "office" was created only by a resolution passed by the stockholders, and where its powers and duties were only such as might be, from time to time, prescribed by the board of directors. Indeed, this honorary title given to Donovan seems to be only a convenient name by which his employment was to be called; but, whatever ultimate view might be taken of this particular stated supporting ground for the defense of *ultra vires*, it, as well as the one just previously stated, are completely met by the fact that the answer presented no such defense, but relied upon the effect of the Pennsylvania judgment as a sufficient bar. This judgment necessarily implied the validity of the contract; and accordingly, when at the conclusion of all the testimony the defendant first asked leave to amend its answer by presenting these defenses of *ultra vires*, it was at least well within the discretion of the court to do as it did, and to refuse to permit the amendment.

[3] 2. *The Former Recovery*. It is not to be doubted that, if a contract provides for the doing of a unitary thing upon each side, there can be only one action for its breach, nor that, even in case of continuing or recurrent mutual obligations, like a contract for employment with monthly salary payments, if either party repudiates the contract, the other party may bring suit at once and may—and, in some jurisdictions, must—in an anticipatory way claim and recover the entire damages resulting from nonperformance during the remainder of the term. In such case, also, one recovery would be a bar to a future action. This is the principle upon which defendant relies; but it is quite inapplicable to this contract and to these circumstances. It is not important whether the agreement be considered, as plaintiff claims, to be two separate contracts, one for compromise of an old dispute and one for future employment and compensation, or, as defendant claims, to be one contract in which part of the single agreed payment was to be spread over future dates under color of a theoretical employment. In either view, the payments were to be in stipulated installments. Of these, when the Pennsylvania suit was commenced, part were due and part were not due, and the claim in that suit

was carefully confined to those agreed payments which were past due. No allegation or suggestion was there made that defendant had repudiated the contract; but it was apparently treated as still continuing in force, and plaintiff offered to continue to perform. Under the pleadings, nothing could have been awarded for anticipatory damages. Even if the effect of that record might be varied by showing that the defendant in fact, before that suit, repudiated the contract and was no longer recognizing it as a continuing obligation, no such showing is here made. The Pennsylvania action must be treated as one merely for the recovery of those installments which had become due on a continuing contract; and as such it clearly was no bar to the bringing of the suits for further installments when matured. *Carter-Crume v. Peurrung* (C. C. A. 6) 99 Fed. 888, 890, 40 C. C. A. 150.

[4] 3. The Instructed Verdict. The seemingly incomplete and perhaps confused stenographer's record makes it appear that at the close of the trial defendant moved for an instructed verdict, which motion was denied. Thereupon plaintiff moved for a directed verdict. Defendant then insisted that there were issues of fact, and asked that they be submitted; but the court, upon the ground that both parties had requested the court to direct a verdict and had thereby made submission to the jury uncalled for, proceeded to direct a verdict for plaintiff. This action was not within the authority of *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, and *Love v. Scatcherd* (C. C. A. 6) 146 Fed. 1, 6, 77 C. C. A. 1; but was rather governed by the rule of *Empire Co. v. Atchison Co.*, 210 U. S. 1, 8, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70, and of our own decisions in *Minahan v. Grand Trunk Co.*, 138 Fed. 37, 42, 70 C. C. A. 463, *Bank v. Maines*, 183 Fed. 37, 41, 105 C. C. A. 329, and *Chesapeake Co. v. McKell*, 209 Fed. 514, 516, 126 C. C. A. 336. It was, accordingly, erroneous to treat the matter as if both parties were agreeing that there was no issue of fact for the jury.

[5] However, this would not be prejudicial error, if the instruction was right upon other grounds. The only meritorious defense pleaded was that Donovan had not ceased the harassing prosecution of his old claims and that he had not been loyal to the company's interests. We have examined the entire record, including depositions excluded by the trial judge, and we find nothing tending to support this defense, or which would justify a jury in finding a breach of his contract by Donovan. Such testimony as is urged to that end is either obviously incompetent, or relates to a period before the making of the contract, or is too vague and shadowy to be considered substantial evidence. Under familiar principles, the judgment cannot be reversed merely because the court proceeded upon an erroneous theory to reach a right result.

[6] 4. The \$800 Credit. After defendant had repudiated the contract, but within its term, Donovan accepted other employment and earned \$800. He claims, and the court below ruled, that he need not give credit for this, because the contract in suit only called for such services as might be required, not contemplating his full time, so that he would have been at liberty to take this outside employment, even while the contract was in force. We think it was a question of fact for

the jury whether the nature of this outside work was such as to be inconsistent with his obligation under the contract, if it had continued; and so it was erroneous wholly to disregard this claim of credit in directing a verdict for the full amount of the unpaid salary.

[7] Upon the argument, counsel for Donovan offered to abate \$800 of the judgment, if the court thought there had been error in this respect. We approve the curing of error in such manner, whenever it can be definitely known how much of the verdict is affected thereby (*R. R. v. Niebel* [C. C. A. 6] 214 Fed. 952, 131 C. C. A. 248, and cases cited on page 957); and this is an appropriate case for such abatement.

If the plaintiff, within 30 days from the filing of this opinion, files in the court below its written election to reduce the judgment by the sum of \$800, with the properly attendant interest, and files in this court a certified copy of such remittitur, the judgment, as so modified, will be affirmed; otherwise, it will be reversed, and the case remanded for a new trial. In either case, the plaintiff in error, the company, will recover the costs of this court.

ORLEANS-KENNER ELECTRIC RY. CO. v. DUNBAR.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1914. Rehearing Denied January 11, 1915.)

No. 2664.

1. APPEAL AND ERROR (§ 323*)—NECESSARY PARTIES APPELLANT—PARTIES HAVING SEPARATE INTERESTS.

Where the respective interests of several defendants, which are affected by a judgment or decree against all of them, are separate and different, one may appeal without joining the others.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. § 323.*]

2. COURTS (§ 329*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

A federal court is without jurisdiction of a suit brought by a property owner, in behalf of himself and all other property owners who might join, to enjoin an electric railroad company from exercising the privilege of crossing certain streets and highways, granted by the municipal authorities, where no others joined as complainants, and it is not alleged or shown that the injury to complainant's property rights from the exercise of the privilege granted would exceed \$3,000.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 897; Dec. Dig. § 329.*]

Jurisdiction of federal courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennet-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by Charles T. Dunbar against the Orleans-Kenner Electric Railway Company and the Police Jury of the Parish of Jef-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fereson, La. Decree for complainant, and defendant Railway Company appeals. Reversed.

Peter Stiff, T. M. Miller, and J. D. Miller, all of New Orleans, La., for appellant.

Frank William Hart and H. Generes Dufour, both of New Orleans, La. (Gustaf R. Westfeldt, Jr., of New Orleans, La., on the brief), for appellee.

Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. The parties named as defendants to the bill in this case were the Orleans-Kenner Electric Railway Company, a private corporation, and the police jury of the parish of Jefferson, state of Louisiana, a municipal corporation, and the purpose of the bill was to enjoin the exercise of the privilege or right which a resolution adopted by the last-named defendant undertook to confer upon the first-named defendant. On its face, the resolution in question purported to do no more than grant to the railway company permission to cross several enumerated public streets and highways in said parish in the construction of an electric road which the railway company proposed to build over its own private right of way. From a decree granting the relief prayed for the railway company appealed.

[1] A motion has been made to dismiss the appeal because of the failure of the other defendant to join in it and the absence of any summons or notice to it of the taking of the appeal. We are not of opinion that the motion is well taken. The interest of the railway company which was affected by the decree rendered was so separate and distinct from that of the other defendant that the former is entitled to maintain an appeal in which the latter does not join. Obviously, the pecuniary or proprietary interest acquired or claimed by the grantee of such a privilege is very different from that of the public governmental body which undertook to confer the privilege. Whatever concern or interest that body may be regarded as having in the maintenance of the power or jurisdiction which it has undertaken to exercise by the action complained of by the bill, that interest is not one which it has jointly or in common with the party in whose behalf the claimed power or jurisdiction was exercised. The beneficial proprietary interest which the latter has in the privilege which it claims to have acquired entitles it to maintain an appeal from a judgment or decree adversely affecting its interest, though the official body which undertook to confer the privilege, and which also was a party defendant to the cause, does not join in the appeal. Where the respective interests of several defendants which are affected by a judgment or decree against all of them are separate and different, one of them may appeal without joining the others. *Winters v. United States*, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340; 2 Cyc. 758.

[2] The jurisdiction of the court to entertain the bill was dependent upon a diversity of citizenship between the plaintiff and the defend-

ants, and upon the matter in controversy exceeding, exclusive of interest and costs, the sum or value of \$3,000. U. S. Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991). The bill alleges diversity of citizenship. Its only allegations as to the interest of the plaintiff which was sought to be protected, or as to the value of anything which was made the subject of controversy in the suit, were the following:

"Your orator is the owner of certain real estate situated in the parish of Jefferson in the state of Louisiana of a value in excess of twenty thousand dollars (\$20,000), and is a property taxpayer in said parish of Jefferson, and the right to the use and enjoyment of his said property under the Constitution and laws of the United States and the Constitution and laws of the state of Louisiana largely exceeds the sum of three thousand dollars (\$3,000). * * * Your orator further avers that the rights, privileges, and franchises which the police jury of the parish of Jefferson have sought to confer upon Orleans-Kenner Electric Railway Company, as aforesaid, largely exceed in value the sum of three thousand dollars (\$3,000), exclusive of interest and costs, and that by reason of the pretended grant aforesaid, the parish of Jefferson, its citizens and taxpayers, will be deprived of a sum largely in excess of three thousand dollars (\$3,000), exclusive of interest and costs, as a result of said grants and rights being conferred without consideration, instead of same being offered for sale at public auction as required by law."

The plaintiff sued in behalf of himself and of all other persons or corporations in interest who might join in the suit. No one else joined him in the suit. The result was that the original plaintiff was the only party before the court to be benefited by the decree which was rendered. *Bruce v. Manchester & Keene Railroad*, 117 U. S. 514, 6 Sup. Ct. 849, 29 L. Ed. 990. The suit remained one the sole purpose of which was to protect the original plaintiff's individual interests, and to prevent damage to him as a result of the granting of the privilege complained of. In such case the suit cannot be maintained, unless it is made to appear that the exercise of the privilege claimed to have been wrongfully conferred, and which is sought to be enjoined, would result in damages to the plaintiff to an amount in excess of \$3,000. The matter involved was the injury to the plaintiff's property interest. *El Paso Water Company v. El Paso*, 152 U. S. 157, 14 Sup. Ct. 494, 38 L. Ed. 396; *Colvin v. Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053; *Bitterman v. Louisville & Nashville R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Louisville & Nashville R. Co. v. Smith*, 128 Fed. 1, 63 C. C. A. 1.

The averments above quoted by no means show or indicate that the exercise of the privilege complained of would or could have involved injury to the plaintiff to the extent of the jurisdictional amount. No facts are averred which would furnish support for a conclusion as to what, if any, impairment of the value of the plaintiff's property, or of his beneficial enjoyment of it, would result from the track of the railway company crossing the streets and highways mentioned in the resolution complained of, or from the construction of the proposed line by the railway company. Indeed, it cannot be said that it has been made to appear how the plaintiff's right to use and enjoy his property would be prejudicially affected at all by the acts sought

to be enjoined. And certainly the averment to the effect that the parish of Jefferson, its citizens and taxpayers, will be deprived of a sum largely in excess of \$3,000, exclusive of interest and costs, as a result of the action of the parish authorities which is complained of, falls far short of showing that the plaintiff individually will thereby be subjected to injury in any such amount.

The defendant railway company, in its motion to dismiss the bill, suggested its failure to show that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of \$3,000. The existence of such value is not disclosed in the bill or elsewhere in the record. In no way is it made to appear that the happening of the things sought to be enjoined would involve prejudice to the plaintiff's interests to the extent required to entitle him to maintain the suit in the court in which it was brought. Such being the situation, that court was without jurisdiction to entertain the bill. It follows that the decree rendered must be reversed.

The cause is remanded, with directions to dismiss the bill.

ROBINSON et al. v. POSTAL LIFE INS. CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 58.

INSURANCE (§ 678*)—NEW INSURANCE—OFFER—CONSTRUCTION.

An insurance company having passed into the hands of receivers, they secured an offer from defendant to issue new policies to such holders of insurance in the insolvent company on a specified date as might accept the terms of the proposal, which contained an article providing that the receivers did not affect the rights or interests of any policy holder in the old company, or assignee thereof, or beneficiary named therein; the word "policy holder" being used to mean the person whose life is insured under any policy, and being subject in ease of impairment of health to a new examination and an impairment lien. *Held*, that such clause should be construed to mean that nothing in the agreement between the receivers and defendant should affect the rights of any one under the insolvent company's policies, be he the insured, his assignee, or beneficiary, and as the right to new insurance arose, not out of the policies in the insolvent company, but out of the agreement between defendant and the receivers, it was limited to the policy holder himself, and hence could not be accepted for an insane policy holder by his guardian, under the order of the court having jurisdiction of the guardianship.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1810; Dec. Dig. § 678.*]

Appeal from the District Court of the United States for the Southern District of New York.

William S. Maddox, of New York City, for appellant.

J. T. McGovern, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The complainants, citizens of the state of Missouri, are executors of Edward I. Robinson, deceased, who took

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

out on February 1, 1902, a policy of insurance on his life known as a "legal reserve" policy of the Mutual Reserve Life Insurance Company, a corporation of the state of New York, for \$10,000, payable to his executors or administrators. February 15, 1908, the company went into the hands of receivers appointed by the Circuit Court for the Southern District of New York. After that event individuals insured in the company could not, on account of their greater age, get new insurance, except at higher rates of premium. Therefore, to protect their interests, the receivers sought to find a company which would be willing, in consideration of getting a large body of policy holders, together with the books and good will of the Mutual Reserve Company, to give them its policies in the New York standard form of the same date, amount, and rate of premium as their own. Subsequently they did make such a contract with the Postal Life Insurance Company. It recites:

"This agreement, entered into this first day of June, 1908, in the city of New York, between the Postal Life Insurance Company, a corporation organized and operating under the laws of the state of New York and with its home office at Nos. 525-527 Fifth avenue, New York City, borough of Manhattan, and William Hepburn Russell and Charles E. Rushmore, as receivers, appointed by the Circuit Court of the United States for the Southern District of the state of New York, of the funds, property, and assets of the Mutual Reserve Life Insurance Company, witnesseth:

"The Postal Life Insurance Company hereby proposes to insure such of the policy holders of the Mutual Reserve Life Insurance Company who were residents in the United States of America at the time such policies were issued and whose policies were issued after the seventeenth day of April, 1902, upon what is known as the 'legal reserve' plan, and were in force on the fifteenth day of February, 1908, when said receivers were appointed, as may accept the terms and this proposal in accordance with the conditions thereof, which are as follows:

"First. This agreement constitutes on the part of the Postal Life Insurance Company an offer to each such policyholder to insure him on the terms herein set forth."

The sixteenth article was as follows:

"Sixteenth. It is understood that the receivers do not by implication or otherwise affect the rights or interests of any holder of any policy issued by the Mutual Reserve Life Insurance Company, or assignee thereof, or beneficiary named therein. The words 'policy holder,' wherever used in this agreement, mean the person whose life is insured under any policy."

In pursuance of this agreement the Postal Company sent out notices with appropriate forms of application to all persons insured under legal reserve policies of the Mutual Reserve Company, explaining that upon application, accompanied by the surrender of their policies and assignment of their interest in the assets of the Mutual Reserve Company to be applied on the reserve of their policies, and in case of impairment of health with consent to a new examination and an impairment lien, its policies would be issued to them of the same date, amount, and rate of premium. When these papers were received by Edward I. Robinson, he was in a sanitarium, and was subsequently, July 17, 1908, declared to be of unsound mind by a competent court of the state of Missouri, which appointed his son, William B. Robinson, to be guardian of his person and estate. Upon the same day the court

authorized the guardian to accept the offer of the Postal Company on behalf of his ward and to that end to execute all necessary papers on his behalf. Thereupon the guardian, in his own name as guardian of Edward I. Robinson, did make and execute the application for a policy in the Postal Company on the life of his ward, subject to an impairment lien on account of changed condition of health, which he forwarded, together with the Mutual Reserve policy and an assignment of all his ward's rights against that company's assets and its receivers, to the Postal Company. That company refused to recognize the application and accompanying documents on the ground that they were not executed by Edward I. Robinson; he being the person whose life was insured under the Mutual Reserve policy and the only person entitled to accept the Postal Company's offer.

April 10, 1909, Edward I. Robinson died, and letters testamentary were duly issued to the complainants as executors of his last will and testament by a competent court of Missouri, and subsequently ancillary letters by the Surrogate's Court of New York county. It is stipulated that the amount due the complainants, if any, is \$3,669.93 with interest from June 10, 1909. The District Judge was of opinion that, though the guardian did not come literally within the offer of the Postal Company, still it should be construed to include him for the following six reasons:

"First. It must be remembered that there was nothing here required of the assured that a guardian could not do for him. Second. The insurance risk of a lunatic, though no doubt a bad one, was certainly no worse than many others which the defendant must necessarily have intended to cover by virtue of its impairment lien. Third. The proposal being to take all the policy holders of the defined classes as they stood, including impaired lives of any sort, any actuary would at once have seen that a percentage of lunatics must be included within the general terms used. If so, some exclusion of them seems reasonable, if so intended. Fourth. Where in the contract a limitation was intended, it was expressed; for example, those under 60 years of the 'contract reserve' policy holders. Fifth. While the sixteenth clause is intended to prevent insurance by assignees and those who insure the lives of others, it can hardly, without violence to its obvious purpose, be held to exclude, without any sufficient reason, from the included classes any one whose life in fact had been insured. Sixth. The offer is subject to the canon *contra proferentem*."

We think the court erred in respect to the most material of the above reasons, to wit, in saying that the Postal Company took over all the Mutual Reserve legal reserve policy holders with certain immaterial exceptions. On the contrary, the offer was to such of "the policy holders * * * as may accept the terms of this proposal in accordance with the conditions thereof." One of the conditions was:

"The words 'policy holder,' wherever used in this agreement, mean the person whose life is insured under any policy."

That person in this case was Edward I. Robinson, who did not, and, being of unsound mind, could not, accept the proposal. Conceding that what the learned judge suggests would be reasonable, we cannot, therefore, alter the offer as actually made. We must take it as we find it, and enforce its terms, because they read without ambiguity.

No doubt the guardian, by virtue of the appointment of the Mis-

souri court, had a right to collect and dispose of his ward's policy in the Mutual Reserve Company and to protect all his rights under it. *Wheeler v. Insurance Co.*, 82 N. Y. 543, 37 Am. Rep. 594. But the election in question does not arise out of that policy, but out of the agreement with the receivers, whose terms the Missouri court could not alter. The purpose and meaning of the first sentence of clause 16 was, we think, that nothing in the agreement between the receivers and the Postal Company was intended to affect in any respect the rights of any one under the Mutual Reserve Company's policies, be he the insured, or his assignee, or beneficiary.

Decree reversed.

FORD MOTOR CO. v. DONALDSON.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 82.

1. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLDING—LABOR LAW.

Labor Law N. Y. (Consol. Laws, c. 31) § 18, making an employer liable for injuries to a servant resulting from a defective scaffold, is applicable, though the injured workman built or helped to build the scaffold.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

2. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD—"PAINTING."

Where plaintiff was employed to paint defendant's showroom, and was injured by the breaking of a defective scaffold as he was washing the kalsomine from the walls preliminary to applying the paint, he was engaged in "painting," within Labor Law N. Y. § 18, providing that a person employing or directing another to paint a house shall not furnish or erect a defective scaffold, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

3. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD—LABOR LAW—"HOUSE, BUILDING, OR STRUCTURE."

Where a servant was employed to paint the walls of defendant's showroom, and while washing the kalsomine from the walls was injured by the breaking of a defective scaffold, he was engaged in painting a "house, building, or other structure," within Labor Law N. Y. § 18, making an employer liable for injuries to a servant by the breaking of a scaffold furnished for painting a house, building, or structure.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

Where the court charged that a servant could not recover for injuries under Labor Law N. Y. § 18, from the breaking of a defective scaffold used in painting defendant's showroom, if the servant knew, or in the exercise of ordinary care should have known, that the plank that broke was unsafe, in which case he would be guilty of negligence in using it, etc., such instruction constituted a full submission of the issue of contributory negligence, and covered requests to charge that it was the servant's duty to use reasonable care to examine the planks before using them in the scaffold, and if he was careless in the slightest degree, which con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tributed to the accident, either in using a defective plank, or in going thereon, he could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

In Error to the District Court of the United States for the Eastern District of New York.

This cause comes here to review a judgment of the District Court, Eastern District of New York, entered on the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought by an employé to recover for personal injuries predicated on the alleged negligence of the employer.

L. E. Ginn, of New York City, for plaintiff in error.

G. F. Hickey, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The walls and ceilings of defendant's showroom were to be painted; plaintiff and another employé were ordered to do the work. It was necessary as a preliminary to this work to wash or otherwise remove kalsomine from the ceiling. In order to reach the ceiling a platform was constructed by making two horses about 10 feet high and 5 feet long, on which planks were placed so as to obtain a platform for the men to stand on. This work was done by plaintiff and the other painter, Hughes. Not finding planks on the premises which they thought suitable, Hughes with the consent of the superintendent got some from his brother-in-law. At least five of the planks were put on the horses to make the platform; the horses were about 9 or 10 feet apart, and the planks extended about 10 feet from each end beyond the horses. Plaintiff and Hughes worked on the platform washing the kalsomine off the walls and ceiling for a few hours, moving the platform from place to place as their work required, and were so engaged when a piece of one of the outside planks broke out under one of plaintiff's feet, causing him to fall to the floor. After the accident it was discovered that the plank had a knot and weather check in it, and had split lengthwise from the end along the check and then crosswise to the outside.

The main question in this case is the construction to be given to section 18 of the Labor Law of the state of New York, which reads:

"18. Scaffolding for the Use of Employés.—A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

Defendant contends that the facts do not bring the case within the purview of that law.

[1] We find nothing in the statute which supports the proposition contended for and supported by several Appellate Division decisions

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the section does not apply when the injured party himself builds or helps build the scaffold. On the contrary, it seems to be the object of the act to make the master have scaffolds built by men competent to build them properly, not by the workman who is to use them—quite frequently not himself an experienced carpenter. We have construed this statute in *MacDonald v. Manns*, 177 Fed. 203, 101 C. C. A. 373, and in *Steel & Masonry Company v. Reilly*, 210 Fed. 437, 127 C. C. A. 169, holding that if the scaffold furnished to the servant is unsafe the master is liable for the result. In so holding we followed the New York Court of Appeals. *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662. We see no reason to modify our former opinions, and are referred to no decisions of the Court of Appeals which are persuasive to such modification. See *Caddy v. Interborough*, 195 N. Y. 415, 88 N. E. 747, 30 L. R. A. (N. S.) 30, and *Gombert v. McKay*, 201 N. Y. 27, 94 N. E. 186, 42 L. R. A. (N. S.) 1234.

[2] There was no error in the refusal to charge that the plaintiff was not engaged in painting when he fell, and therefore not within the statute. As the washing off of the kalsomine was an essential preliminary to making a good job of his painting, it was as much a part of the painting as would be the adding of ingredients to the paint pot.

[3] So, too, plaintiff was engaged in painting "a house, building, or structure." He was painting part of a house, a room in the house; we can see no reason why the statute should be confined to the *whole* house, or to the outside of the house. The court instructed the jury that the burden was on the plaintiff to prove by a preponderance of the evidence that the plank was unsafe.

[4] Error is assigned to the refusal to charge the following requests:

"(5) That it was plaintiff's duty to use reasonable care to examine the planks, to see to it that those put upon the horses by himself and Hughes were not defective."

"(8) If plaintiff was careless in the slightest degree, which contributed to the accident, he cannot recover.

"(9) If plaintiff did not use reasonable care to see to it that no defective plank was put on the horses, or in going upon the defective plank, such lack of care is contributory negligence."

The court had already charged the jury that, under the statute, the defense of contributory negligence was still available for the defendant; that—

"plaintiff cannot go about with his eyes shut. He must use, under all circumstances, ordinary care for his own safety. * * * If you find from the evidence that the plaintiff knew, or in the exercise of ordinary care should have known, or have reason to believe or suspect, that this plank was not safe, then he was not justified in using it. He would be guilty of contributory negligence in so doing."

After calling attention to a conflict of testimony as to whether there were any other planks available, the court said:

"Then it goes back to this question of care on the part of the plaintiff that I have already referred to, whether he knew that any of the planks that he did use were defective or unsafe, or could, in the exercise of ordinary care for his own safety, have discovered that they were unsafe."

We think the jury were fully instructed on this branch of the case, and that there was no error in refusing to charge as requested.

We find no other assignment of error which calls for discussion. There was a conflict of medical testimony as to the extent and character of his injuries.

Judgment affirmed.

E. I. DU PONT DE NEMOURS POWDER CO. v. SCHLOTTMAN.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 51.

1. FRAUDS, STATUTE OF (§ 128*)—APPLICATION—ADDITIONAL COMPENSATION.

Where, as supplemental to a contract with a fuse company, defendant agreed that if at the end of a year, in the judgment of its president, the property for any reason had been worth \$175,000 to defendant, and it had manufactured double tape fuse at \$2 per thousand with powder at \$3.60 per keg, defendant would pay plaintiff's assignor \$25,000 in bonds or stock, such supplemental agreement was one for additional compensation for additional value, to be construed with the original contract of sale, and therefore was not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 278; Dec. Dig. § 128.*]

2. CONTRACTS (§ 221*)—CONSIDERATION—IMPLIED PROMISE.

Where defendant contracted to pay plaintiff's assignor \$25,000 in bonds or stock, provided a purchase of a fuse company was consummated and in the judgment of defendant's president, after it had the property for a year, it had for any reason been worth \$175,000 to defendant, and it had manufactured double tape fuse at a specified price, the contract impliedly required defendant to operate the plant for a year, and hence, on defendant selling the plant to another, who dismantled it within a year, it was liable for breach of contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1015-1032; Dec. Dig. § 221.*]

3. CONTRACTS (§ 349*)—BREACH—DAMAGES—PROOF.

Where defendant contracted to pay plaintiff's assignor \$25,000 in case a fuse plant, after purchase and operation for a year, showed that it was worth \$175,000, but defendant sold the plant to one who dismantled it, rendering it impossible for plaintiff to prove its value by the test specified in the contract, he was entitled to show the value of the plant in other ways.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

4. DAMAGES (§ 126*)—CONTRACT—BREACH—MODE OF PAYMENT.

Where defendant's contract to pay plaintiff \$25,000 in bonds or stock of defendant company in case a fuse plant was purchased and after a year's operation disclosed that it had been worth \$175,000, defendant having sold the plant within a year to a purchaser who dismantled it, and having refused to pay the additional amount in securities, plaintiff was entitled to recover money.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 344-353; Dec. Dig. § 126.*]

In Error to the District Court of the United States for the Southern District of New York.

For opinion below, see 210 Fed. 356.

W. H. Button, of New York City, for plaintiff in error.

L. L. Kellogg, of New York City, for defendant in error.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. In July, 1908, one Grubb was negotiating with T. C. Du Pont, president of the Du Pont Powder Company, for the sale of the whole capital stock of the Pittsburgh Fuse Company to the Du Pont Company. July 20th Du Pont wrote to Grubb as follows:

"Mr. Chas. G. Grubb, Building—Dear Sir: Should the deal now under discussion for the Pittsburgh Fuse Mfg. Co. go through, and after we have had the property a year, it is understood that if in my judgment the property has for any reason been worth \$175,000 to our company, and we manufactured double tape fuse at \$2 per thousand with powder at \$3.60 per keg, we are to pay you \$25,000 in either bonds, preferred or common stock of our company as we may elect.

"Yours truly,

T. C. Du Pont, President."

On July 24th the deal referred to in the letter went through in a formal agreement whereby the Du Pont Company agreed to pay Grubb \$75,000 of its preferred and \$75,000 of its common stock for the whole capital stock of the Pittsburgh Fuse Company. Grubb delivered the Fuse Company's stock and the Du Pont Company transferred to it its own stock, but, after operating the plant for about six months, sold it to other parties, who dismantled it.

Grubb, the plaintiff's assignor, died before suit brought, and Mr. T. C. Du Pont did not testify to the circumstances attending the writing of the letter of July 20th. At the conclusion of the case each party asked Judge Ray to direct a verdict in his favor, and he did direct a verdict in favor of the plaintiff for \$25,000.

The complaint treats the letter and the formal agreement as one contract, alleges that the defendant by selling the plant of the Fuse Company wrongfully prevented the test agreed upon, and claims damages for the difference between the fair and reasonable value of the Fuse Company's capital stock alleged to be \$175,000 and the market value of the defendant's stock actually received, alleged to be \$120,000.

[1] The defendant contends that the letter of July 20th is a separate contract, and, as it is not to be performed within the year, is void under the statute of frauds, because it does not state any consideration. We think, however, that the two documents are to be considered together. The Du Pont Company was to pay \$25,000 more in securities if in the judgment of T. C. Du Pont upon operating for one year, the plant was worth \$175,000 to his company and was capable of making double tape fuse at \$2 per thousand feet with powder at \$3.60 a keg. This was to be additional compensation for additional value, so that the objection of the statute of frauds is unavailing.

[2] The letter does not contain any express promise to operate the plant for one year, and the question is whether such a promise is to be implied. We think the court below rightly held that it was. The seller evidently thought the plant worth \$175,000 in the defendant's securities, and the buyer was willing to pay the additional \$25,000 if such value was demonstrated in the way provided. The letter implies a

promise on the Du Pont Company's part to operate the plant for a year, and that promise must be taken as part of the consideration for which Grubb sold the capital stock. The authorities support this conclusion. Allen, J., said in *Booth v. Cleveland Mill Co.*, 74 N. Y. 15, 21:

"There is no particular formula of words, or technical phraseology, necessary to the creation of an express obligation to do, or forbear to do, a particular thing or perform a specified act. If, from the text of an agreement, and the language of the parties, either in the body of the instrument, or in the recital or references, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for nonperformance of which an action of covenant or assumpsit will lie. It is a cardinal principle that every agreement or covenant must be interpreted according to its peculiar terms, and so as to carry out the intent of the parties, and it follows that the ruling upon, and the interpretation of, one agreement will seldom aid in the construction of another, except as it may illustrate some general rule of interpretation applicable to both."

See, also, 9 Cyc. 639; *Telegraph Co. v. McLean*, 8 Ch. App. 658; *Horton v. Clark*, 94 App. Div. 404, 88 N. Y. Supp. 73; *Hearn v. Stevens*, 111 App. Div. 101, 97 N. Y. Supp. 566; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Wilson v. Orguinette Co.*, 170 N. Y. 542, 63 N. E. 550; *Pritchard v. McLeod*, 205 Fed. 24, 123 C. C. A. 332.

[3] The question of damages is the only other question we think needing consideration. If the plaintiff could now perform or secure a performance of the agreed test, he might be obliged to do so as a condition of recovering the contract price. But the defendant has made performance impossible by selling the plant within the period of one year to a purchaser who has dismantled it. No similar test can be substituted. It was personal in its nature, viz., the operation for a year by a wealthy and expert corporation actuated by self-interest to make tape fuse at \$2 a thousand feet. Because the defendant has made the performance of this test impossible, the plaintiff should not be remediless. We think he had the right to show, if he could, in other ways, that the value of the plant was greater by \$25,000 than the sum paid for it. As Judge Bartlett said in *Hopedale Co. v. Electric Storage Battery Co.*, 184 N. Y. 356, 364, 77 N. E. 394, 397:

"In other words, the performance of a condition for valuation having been prevented by the act of the vendee, the price of the thing sold was to be fixed by the jury on a quantum valebat."

[4] Though the contract contemplated that the defendant should pay the additional amount in its own securities, having refused to pay at all, the plaintiff has a right to recover money. *New York Publishing Co. v. Steamship Co.*, 148 N. Y. 39, 42 N. E. 514. One witness stated that the plant was worth \$175,000, and the Du Pont Company actually sold it for \$150,000. The plaintiff's assignor received \$122,000, the market value of the defendant's securities, aggregating \$150,000. Therefore there was evidence to support the finding of the trial judge that the plant was worth \$147,000, which may be implied from his direction of a verdict for \$25,000.

Judgment affirmed.

HOGG v. MAXWELL et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 35.

1. FRAUD (§ 34*)—ACTION—CONDITION PRECEDENT—NECESSITY OF REFORMATION OF INSTRUMENT.

In the federal courts a party cannot in an action at law be relieved from the effect of a sealed instrument because of fraud, except where the fraud was connected with the actual execution of the instrument, and to be relieved, because of collateral fraudulent representations, must resort to equity; and hence a wife, induced to execute a separation agreement by the husband's false representations as to the amount of his income, could not sue for damages without having the separation agreement reformed or set aside in equity, especially where the agreement contained an express covenant not to sue for anything occurring prior to its execution.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 29; Dec. Dig. § 34.*]

2. ABATEMENT AND REVIVAL (§ 52*)—REFORMATION OF INSTRUMENTS—PARTIES AS TO WHOM INSTRUMENT MAY BE REFORMED.

The death of a husband did not affect the right of a court of equity to reform or set aside a separation agreement, by which he agreed to make certain quarterly payments to the wife during his life, and to make provision in his will for the continuation of such payments during the wife's life or until her remarriage.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248-254; Dec. Dig. § 52.*]

3. REFORMATION OF INSTRUMENTS (§ 47*)—RELIEF AWARDED—DAMAGES.

Where a court of equity reforms a contract, it may do complete justice between the parties by awarding damages for the breach of the contract as reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 195-198; Dec. Dig. § 47.*]

On rehearing.

WARD, Circuit Judge. We heretofore reversed the judgment in this case in favor of the defendant on the ground that the stipulation made at the trial did not establish jurisdiction because of citizenship of the parties. 215 Fed. 360, 131 C. C. A. 502. Subsequently both sides agreed that it was the intention of the stipulation to state that the plaintiff was a citizen as well as a resident of New Jersey and the defendants citizens of New York, as alleged in the complaint. Accordingly we now proceed to examine the case further and to express the opinion of the majority of the court. The defendants moved to dismiss the complaint upon among other grounds that:

"Fifth. The plaintiff's complaint does not constitute a cause of action at law. Sixth. The plaintiff's complaint does not constitute a cause of action at law for fraud."

[1] The difference between jurisdiction at law and in equity is rigorously maintained in the federal courts. *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991. In those courts no one can be relieved in an action at law of the effect of a sealed instrument because

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of fraud, except where the fraud was connected with the actual execution of the instrument. If the party sought to be bound by the instrument was induced when he executed it to think it was something else than what it was—e. g., that it was a receipt when it was really a release—he may treat it as void and nonexistent. A plea of non est factum would have been good in an action at common law. But to be relieved because of collateral fraudulent representations he must resort to a court of equity. The leading case is *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605, an action at law to recover damages for infringement by the assignee of a patent against persons claiming title under the same assignor. The plaintiff, whose was the later title, sought to avoid the earlier title of the defendants by showing, among other things, that it had been obtained by means of fraudulent representations. Mr. Justice Nelson held that this could not be done in an action at law, saying at page 222 of 19 How. (15 L. Ed. 605):

"Evidence was given on the trial in the court below, for the purpose of proving that the agreement of the 6th of September was procured from Chaffee by the fraudulent representations of Judson, which was objected to, but admitted. The general rule is that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed, and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed. Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. 2 J. R. 177; 12 J. R. 430; [*Franchot v. Leach*] 5 Cow. (N. Y.) 506; [*Stevens v. Judson*] 4 Wend. (N. Y.) 471; [*Taylor v. King*] 6 Munf. (Va.) 358 [8 Am. Dec. 746]; [*Wyche v. Macklin*] 2 Rand. (Va.) 426; 10 W. & R. 25; 14 W. & R. 208; [*Mordecai v. Tankersly*] 1 Ala. 100; [*Burrows v. Alter*] 7 Mo. 424; [*Ingersoll v. Long*] 20 N. C. 436; C. & H. Notes, part 2, p. 615, note 306 (Ed. Gould & Banks, 1850)."

The same rule was followed in *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Stephensen v. Supreme Council* (C. C.) 130 Fed. 491; *Levi v. Matthews*, 145 Fed. 152, 76 C. C. A. 122; *Pacific Ins. Co. v. Webb*, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752. Judge Wallace, in this circuit, in a case involving an unsealed instrument, recognized the law to be so in the case of a sealed instrument. Such v. Bank (C. C.) 127 Fed. 450. Citing *Hartshorn v. Day*, he said:

"If the receipt thus alleged to have been given had been a release under seal, it is plain that upon the authorities which control in this court the complainant would have to resort to the equity side of the court to avoid its effect upon the ground of fraud."

See, also, an interesting review of the cases by Van Fleet, J., in *American Sign Co. v. Electro-Lens Signal Co.* (D. C.) 211 Fed. 196. The instrument there involved was not under seal, but the difference

between cases arising out of simple contracts and out of specialties was pointed out and approved. This court has on at least two occasions recognized it. *De Lamar v. Herdeley*, 167 Fed. 530, 93 C. C. A. 239; *Drobney v. Lukens*, 204 Fed. 11, 122 C. C. A. 325.

The plaintiff seeks to bring herself within such cases as *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, and *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. Whatever may be our opinion of the reasonableness of allowing the same defense in an action at law upon a simple contract and refusing it upon a specialty, we cannot suppose that the Supreme Court in these cases intended to reverse by implication their other decisions. In these cases the court held that when the plaintiff was asking for a sum of money only, there being a plain, adequate, and complete remedy at law, there was no jurisdiction in equity. Nothing was said about the distinction between simple contracts and specialties. It is to be noted, however, that there is nothing to show that the instruments against which the plaintiff sought relief in the *Buzard Case* were not simple contracts. The policy of insurance in the *Bailey Case*, though under the company's seal, was not a specialty. Originally and technically the way in which corporations execute contracts is under the corporate seal, and the question whether an instrument so executed is a simple contract or a specialty depends upon the character of the instrument. Corporate deeds, mortgages, and bonds are specialties, without the addition of a second seal to the corporate seal; whereas corporate notes, stock, charter parties, bills of lading, and bills of sale remain simple contracts, even if executed under the corporate seal. There is no reason for considering a policy of insurance under the seal of the corporation a specialty.

[2, 3] The death of the plaintiff's husband in no way affects the right of a court of equity to reform or to set aside the contract and if the relief granted were to reform it, the court could go on and do complete justice by awarding damages for the breach. The plaintiff is not asking for a sum of money simply. The separation agreement set forth in her complaint is the evidence of her rights, and as it reads is fatal to her present claim for damages. In addition, she expressly covenanted on the face of it not to bring a suit for anything occurring before its execution. She cannot recover, unless it be set aside or reformed. Therefore she does need equitable relief, which in the federal courts she cannot get in an action at law on a sealed instrument. As the judgment was one dismissing the complaint, the plaintiff can take such further and other proceedings as she may be advised.

The judgment is affirmed without prejudice.

NORTHWESTERN THEATRICAL ASS'N v. HANNIGAN.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 37.

1. TRIAL (§ 252*)—INSTRUCTION—APPLICABILITY TO EVIDENCE.

In an action on an agreement by defendant, a manager of theaters in several cities, to pay plaintiff's assignors a specified amount for "your sole representation" in such cities, in which it appeared that plaintiff furnished attractions for 1 to 7 weeks only, it was error for the court to submit the question of a recovery on quantum meruit, in case the jury found that the contract meant, as claimed by defendant, that attractions were to be furnished throughout the theatrical season of 25 to 30 weeks, in the absence of any testimony as to the value of the services rendered by plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. CONTRACTS (§ 319*)—SUBSTANTIAL PERFORMANCE—MEASURE OF RECOVERY.

Where a contract is substantially performed, the amount recoverable is not the value of the services performed as upon a quantum meruit, but the contract price, less compensation for unsubstantial omissions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. § 319.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—ABSENCE OF EVIDENCE.

In an action for the amount claimed to be due on a contract to furnish attractions for theaters, in which it appeared that attractions were furnished for only 1 to 7 weeks, the submission of the question of substantial performance, in case the jury should find that the contract required the furnishing of attractions each week during the theatrical season of 25 to 30 weeks, was error, in the absence of any testimony upon which the proper deductions could be ascertained, especially in view of the facts as to performance, and the verdict, which was for less than one-sixth of the contract price, showing that the jury did not find substantial performance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 173*)—RESERVATION OF GROUNDS OF REVIEW—MATTERS FIRST RAISED ON MOTION FOR NEW TRIAL.

An objection that the contract sued on was void, because in restraint of trade, and in violation of the statutes against monopolies, first made in a motion for a new trial, after the verdict had been rendered, was not the subject of an exception, and could not be considered on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

In Error to the District Court of the United States for the Southern District of New York.

Gerald B. Rosenheim, of New York City, for plaintiff in error.

G. E. Joseph, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment entered on the verdict of a jury in favor of the plaintiff for the sum of \$1,000. Stair & Havlin, the plaintiff's assignors, were engaged in the business of procuring for theaters throughout the United States com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

panies which usually play for a week and whose charge for admission is not over \$1. The business is known as booking popular priced attractions.

The defendant was manager of theaters in Denver, Salt Lake City, San Francisco, Tacoma, and Seattle. In 1908 it had a separate booking contract with Stair & Havlin for the term of five years as to each of its theaters in those cities. August 31, 1909, all these contracts were annulled, and a new contract made for San Francisco, Los Angeles, and Salt Lake City, as follows:

"New York, August 31, 1909.

"Stair & Havlin, Long Acre Building, New York—Gentlemen: Referring to my conversation a few days ago with your Mr. Nicolai, I hereby agree to pay your firm \$2,000 per annum for your sole representation for the cities of San Francisco and Los Angeles, Cal., and for Salt Lake City, Utah, payable in two payments, January 1st and July 1st of each year, commencing January 1, 1910; this contract to take effect July 1, 1909, and to continue for four years, from that date.

"This is in view [lieu] of any and all other contracts signed by the Northwestern Theatrical Association and your firm.

"I also agree to pay \$1,250 balance due in full for the season of 1908 and 1909.

Northwestern Theatrical Association,

"John Cort, Manager.

"Accepted: Stair & Havlin,

"Per Geo. H. Nicolai, Secy."

The theatrical season covers a period of from 25 to 30 weeks and the plaintiff furnished, in the season 1909-1910, attractions for 4 weeks at Salt Lake City, 1 week at Los Angeles, and 1 week at San Francisco; for the season 1910-1911, 1 week at Salt Lake City, 2 weeks at Los Angeles, and 2 weeks at San Francisco; for the season 1911-1912, 2 weeks at Salt Lake City, 7 weeks at Los Angeles, and 7 weeks at San Francisco.

In December, 1912, the plaintiff began this action on the contract, alleging full performance by his assignors, nonperformance by the defendant, and demanding a judgment for \$6,000, being \$2,000 due for each of the seasons 1909-1910, 1910-1911, and 1911-1912. The defendant answered, denying performance by the plaintiff's assignors and nonperformance by itself.

The crucial question was as to the meaning of the expression "your sole representation for the cities of San Francisco, Los Angeles, and Salt Lake City," for which the defendant agreed to pay \$2,000 per annum. It was testified for the defendant that this meant that Stair & Havlin were to furnish responsible bookings to fill its theaters throughout the season and to book for no one else in the cities named. On the other hand, the plaintiff's testimony was that it meant that Stair & Havlin would book for no other theaters in those cities and would give the defendant their services whenever called for.

[1] The court charged the jury that if they found the contract to mean that Stair & Havlin were to furnish the defendants 25 or 30, or a reasonable number, of companies for its theaters during the 3 years in question, and had not done so, their verdict should be for the defendant, or "for the plaintiff for such an amount as you think should reasonably be given for the services which Stair & Havlin did perform." This proceeded on the theory that the plaintiff was entitled to recover

on a quantum meruit, but it was error to submit the question to the jury, because there was no testimony whatever upon which a finding of the value of the services rendered for each season could be made. Any verdict on this ground would be pure guesswork.

[2, 3] Later the court charged:

"If the agreement was that they should furnish the companies necessary to run the theaters there, it is for you to say whether they substantially or partially complied with the contract, or whether what was done was so insufficient a compliance with the contract as to amount to a complete breach of the contract. If you think it was a complete breach, you should find a verdict for the defendant. But if you think the plaintiff should be compensated for the companies which Stair & Havlin did furnish, then you should find a verdict for the plaintiff for such a proportionate part of the \$6,000 claim as those services were worth."

This proceeds upon the theory of substantial performance. In such a case, however, it was for the jury to find, not what the services were worth as upon a quantum meruit, but, for the whole contract price, less what would compensate the defendant for unsubstantial omissions. *Spencer v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. Not only was there error in the instruction as to the method of ascertaining the amount due in case of substantial performance, but the question of substantial performance should not have been submitted at all, because there was no testimony upon which the proper deductions for substantial omissions in each season could be ascertained. Indeed, the idea of substantial performance of a contract in view of the undisputed facts is inconceivable, and a verdict for less than one-sixth of the contract price shows that the jury could not have found substantial performance.

[4] The defendant further contends that the contract was void, because a restraint of trade and an attempt to monopolize, in violation of the Sherman Law (Comp. St. 1913, §§ 8820-8830), as well as the law of the state of New York. It is enough to say that this objection, having been first made in a motion for a new trial, after the jury had rendered its verdict, is not the subject of an exception, and cannot be considered by us.

Judgment reversed.

STANDARD BOILER & PLATE IRON CO. v. McWEENY.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1914.)

No. 2632.

MASTER AND SERVANT (§ 116*)—APPLIANCES USED IN BUILDING OPERATIONS—
CONSTRUCTION OF STATUTE—"STRUCTURE."

Gen. Code Ohio, § 12593, which provides that whoever, employing another to labor "in erecting, repairing, altering or painting a house, building or other structure, knowingly or negligently furnishes, erects or causes to be furnished for erection * * * unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances which will not give proper protection to the life and limb of a person so employed," shall be subject to a fine, is broad enough to apply to any "structure" in the erection of which it is necessary to use scaffolding, hoists, etc., and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

includes within its scope an iron tank, in erecting which a derrick was used to hoist the plates into position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, First and Second Series, Structure.]

In Error to the District Court of the United States for the Northern District of Ohio; William R. Day, Judge.

Action at law by John J. McWeeny against the Standard Boiler & Plate Iron Company. Judgment (210 Fed. 507) for plaintiff, and defendant brings error. Affirmed.

Charles Fillius, of Warren, Ohio, for plaintiff in error.

R. B. Newcomb and H. F. Payer, both of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. McWeeny recovered verdict and judgment for damages on account of personal injuries suffered while he was employed by the Standard Company. The substantial question in dispute was whether, inasmuch as defendant below had brought itself within the Ohio Workmen's Compensation Act, then in force (the essential parts of which are given in the margin),¹ the action could be maintained at all; and this in turn, under the provisions of section 21-2, depended upon whether the injury either had arisen from the willful act of defendant's foreman or was the result of a negligent violation of section 12593 of the Ohio General Code (which is also given in the margin).²

¹ Sec. 21-2. But where a personal injury is suffered by an employé, or when death results to an employé from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the willful act of such employer or any of such employer's officers or agents, or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employé, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employé, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury; and such employer shall not be liable for any injury to any employé, or to his legal representative in case death results, except as provided in this act. 102 Ohio Laws, 529.

² Sec. 12593. Whoever, employing or directing another to do or perform labor in erecting, repairing, altering or painting a house, building or other structure, knowingly or negligently furnishes, erects or causes to be furnished for erection for and in the performance of said labor unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances which will not give proper protection to the life and limb of a person so employed or engaged, shall be fined not more than five hundred dollars or imprisoned not more than three months, or both.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Defendant was engaged in erecting, for use in connection with a manufacturing plant, an iron tank, intended to be used for storing chemicals. It was cylindrical in shape, 30 feet in diameter, and built of iron plates riveted together. At the time of the injury two complete circular tiers or courses had been erected, and the plates of the third tier were being elevated and put in position. Each tier was 8 feet high. In the interior, and at the top level of the second tier, was a scaffold upon which a derrick was erected, and by the aid of this derrick and its swinging arm the plates, each of which weighed about 2,000 pounds, were being elevated and carried to position. It was plaintiff's theory that this derrick was negligently permitted to become and continue out of order, so that it was dangerously unsafe, and that it was this negligence which led to the falling of the derrick and the ensuing injury to plaintiff.

It is not denied by defendant that section 12593 is a statute intended for the protection of life and limb of employes; but it is contended that the tank in process of erection, while clearly a "structure" in the broad sense, was not such a structure as is contemplated by this section, and, accordingly, that its violation did not bring the case within the exception to the Workmen's Compensation Act. This contention is based upon the rule of *ejusdem generis*, and with special reference to the fact that in the General Code, as enacted in 1910, this section is associated with several others and grouped under the head, "Buildings," and some of the other sections (and, it may be assumed, all of them) use the phrase "buildings and other structures" in such a way that it cannot refer to this tank, but must reach only a structure having separate stories with floors, or be otherwise confined to an ordinary factory, residence, store, or office building.

It is true that associated statutes must often be read together in order properly to interpret one of them; but this is an aid to interpretation, which cannot prevail over a clear meaning shown by the words and the history of the statute involved. Such force as there might be in defendant's theory of construction is distinctly lessened by the history of the section. Although now in force by reason of its re-enactment in the Code, we find that it was originally enacted independently of any other section on the same subject, and was not associated with the sections where it is now found until it was so grouped by the compilers of the Code. We can find no other intent in the words of this section, save that it refers to any structure in the erection of which there is occasion to use "scaffolding, hoists, stays, ladders or other mechanical contrivances," which, according to their character, will or will not give proper protection to the life and limb of the laborers. The section has not lost this clear meaning because it has been re-enacted in company with other sections which use the word "structure" in a more limited sense; and it follows that the negligent furnishing of an unsuitable and improper hoist or derrick for the erection of the tank in question prevented the final part of section 21-2 from operating as a bar to this action.

The question whether the trial judge properly instructed the jury as to the meaning of "willful act" has been argued at length. We find

it unnecessary for decision. The case was submitted to the jury upon both theories—that the jury might find a willful act, or might find a violation of section 12593—and that in either event plaintiff might recover. In answer to special questions, the jury found that the act was willful and that negligence existed which constituted violation of the statute. Upon the latter subject the question and answer were:

"Did the defendant knowingly and negligently furnish an unsuitable or improper hoist or derrick, which did not give proper protection to the life and limb of the plaintiff, John J. McWeeny? Answer: Yes."

In this state of the record, it is immaterial whether the foreman's act was willful. The statutory violation so found to exist was of itself sufficient to, and did, take full effect under section 21-2. Plaintiff's case was no better because there were two ways of preventing escape from the bar of this section, and no worse if there was only one.

It is suggested that the jury would be prejudiced because of the supposed error in the definition of "willful act," and because the charge so fully discussed this subject; and it is said that the amount of the verdict was probably thereby increased. We cannot see any reasonable probability that there was prejudice in this respect. See *Hocking Co. v. New York Co.* (C. C. A. 6th Cir., Nov. 4, 1914) 217 Fed. 727, 132 C. C. A. 387. Every item of evidence which was received on the subject of willfulness, and which might have created a bad impression upon the jury, would almost certainly have come into the case in exactly the same form if the only issue had been one of statutory violation. This evidence constituted only a complete statement of the circumstances attending the accident, and would have been proper to determine the extent and character of the negligence involved.

The judgment must be affirmed, with costs.

WERTHNER et al. v. GIRARD AVE. FARMERS' MARKET CO.

(Circuit Court of Appeals, Third Circuit. December 4, 1914.)

No. 1848.

1. MUNICIPAL CORPORATIONS (§ 807*)—DEFECTIVE STREETS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, in the daytime, with full knowledge of the defective and rounded character of a curbing of a street, chose to walk on it to avoid mud and water that had gathered over certain sunken bricks in the pavement, and in doing so fell and was injured, when it was possible for her to have taken a few steps to either side of the depression and pass in safety, she was guilty of contributory negligence, precluding a recovery against the owner of the adjoining property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.*]

2. COURTS (§ 367*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

While the streets and sidewalks differ somewhat from real estate, as to which the federal courts are bound to follow the state rule, there is nevertheless a propriety in the federal courts enforcing the settled decisions of the state courts as to such streets and sidewalks.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Christiana Werthner and another against the Girard Avenue Farmers' Market Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Francis C. Menamin, of Philadelphia, Pa., for plaintiff in error.

J. S. Levin, of Philadelphia, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below George Werthner and Christiana, his wife, subjects of the German emperor, brought suit and recovered a verdict against the Girard Avenue Farmers' Market Company, a corporate citizen of Pennsylvania, for damages suffered by Mrs. Werthner, through the alleged negligence of the Market Company in failing to keep the pavement abutting its market house in proper repair. On entry of judgment on such verdict, defendant sued out this writ, and assigned for error the denial of defendant's point that "under all the evidence your verdict must be for the defendant." We have carefully examined the proofs and pleadings, and have reached the conclusion that in denying such point the trial court erred.

The defendant maintains a market house on the northwest corner of Hutchinson street and Girard avenue, public streets in the city of Philadelphia. At the northernmost end of the market is a driveway opening from Hutchinson street. The pavement on Hutchinson street extends over the head or entrance of this driveway. The passing of teams around the corner has in time rounded the curb outwardly, and the brick pavement, for say two feet back from the curb, slopes down toward the curb, so that for a distance of two feet along such curb it was higher than the pavement. In that regard Mrs. Werthner testified:

"The pavement is sunken in about an inch and a half or two inches, and about two or two and a half feet wide. Q. When you say it is sunken, do you mean it is sunk down even, or in what condition? A. No, sir; it is steep. It is pretty near something like two inches deeper than the curb. * * * Near the curb it is deep, then it comes out kind of slight like. * * * The curb sticks out on the inside toward the pavement, and the outside of the curb is round and slippery and slanty, kind of worn off. The top of the curb is slippery, but at the inside it is kind of coming up pointed and kind of steep."

With respect to the accident itself Mrs. Werthner testified:

"Q. Tell us just what happened. You said you were coming along Hutchinson street. Which way were you walking? A. I came from Girard avenue up Hutchinson street near home. As I came on that crossing, I wanted to step across over that sunken paving, and I stepped with my right foot up on the curb, pretty carefully, of course; I was not going fast. When I stepped there, my foot, from about the middle of the sole, slipped off like that (illustrating), and my heel caught on the inside of the curb, on the pointed part; then I fell down. Q. In what manner did you fall? A. Frontwards. Q. Did you fall quickly, or slowly, or how? A. No; I think I fell pretty quick. I fell pretty heavy. I was all bruised on my elbows and my knees. * * *

A. I came from Girard avenue up Hutchinson street, and right in here is that sunken part that the pavement is sunken in, and this curb, that stands up on the inside of the pavement about an inch and a half or so, and on the outside of the curb it is slippery and slanty and worn off, and this is where I put my right foot. While I put the foot there it slid off the outside like that (illustrating), and my heel caught in the inside of the curb, and then I fell. My toes must have got caught in here, in this street (illustrating), in these cobbles. Then I could not get my foot out afterwards. The foot was twisted around. The heel was front. The toes were back. Then right after, a few minutes after that, if I remember, it was as big as two fists right on that ankle."

On cross-examination she testified:

"Q. In order to get from your house to Girard avenue, along Hutchinson street, you would be crossing directly over the spot where this accident occurred? A. Yes; I have passed there. I thought I could pass it safely. It never looked to me dangerous. * * * Q. You think the condition was there for a year before? A. I think so. * * * Q. When you passed over it, going up and down the street, you did not notice anything wrong with it before that, did you? A. I had seen the pavement is sunken in, but I thought I could pass it safely, as I had done it before, and I would not have fallen if the curb would not have been so slippery and slanty and worn off. Naturally I had to step over the curb. I did not want to step in the broken paving. A lot of water stays there, and mud. * * * A. When I came there, I wanted to pass; and I noticed the bricks are sunken in, and uneven like, and naturally I had to step onto the curb. I could not step out on the pavement. I would have to go out on Hutchinson street, and I would run the risk of getting run over with the child, and then I slipped. Q. What caused you to fall was the slipping of your foot from the curbstone, was it not? A. Yes. * * * Q. You have said you stepped over this hole in the pavement, and so as not to trip over it, you put your foot upon the curb at the time when you fell. A. I did not want to step in the broken pavement. I had to step on the top of the curb, and when I was stepping on the top of the curb, then my foot slipped, and while I slipped my heel caught on the sharp edge of the curb. On the outside it is very round, slanty, and worn off from teams, and I suppose other uses."

[1,2] It will thus appear that the bricks and curb had been in the same condition for a considerable time. Mrs. Werthner was familiar with the place and had passed over it before. On the day of the accident she came to it in daylight. Her attention was called to it, and with full knowledge she chose to avoid the mud and water that had gathered over the sunken bricks, by stepping on the curb, which she knew and saw was rounded. It was possible for her to have taken a few steps to either side of the depression and passed in safety. If the condition of the pavement charged the owner with negligence, it certainly warned Mrs. Werthner to avoid all danger by passing by, instead of over, the depression. With full knowledge, she chose to step over the water and onto the curb. If it was negligence for the owner to maintain such a pavement, it was equally negligent for the passer-by to deliberately, knowingly, and needlessly subject herself to such danger. The undisputed facts being that Mrs. Werthner, with full knowledge of the condition of the street, voluntarily chose to test the alleged defect, we are constrained to hold she cannot recover. This conclusion is in accord with the uniform, settled, and continuous holdings of the Supreme Court of Pennsylvania on that subject. Passing over the numerous intervening cases, we limit ourselves to noting Forks

Township v. King, 84 Pa. 230, decided in 1877, Robb v. Connellsville Boro., 137 Pa. 45, 20 Atl. 564, in 1890, and Lerner v. City of Philadelphia, 221 Pa. 294, 70 Atl. 755, 21 L. R. A. (N. S.) 614, in 1908.

The judgment below is therefore reversed.

BOLDT v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 45.

MASTER AND SERVANT (§ 295*)—ACTIONS FOR DEATH—QUESTIONS FOR JURY.

A railway yard conductor, in a yard in which cars were allowed to run by gravity to the point where they were made up into trains, was injured while working on a car by cars running down and driving other cars against him. There was no rule to regulate the speed of the moving cars, and the practice of running them down on standing cars was the usual practice in that yard and in other yards generally. *Held* that, if the negligent operation of the cars by the conductor's fellow servants caused the violent striking of the standing cars by those running down the incline, such negligent operation having been a matter of common occurrence, the jury were justified in finding that it was a risk which he assumed; and hence, where the jury were told to find defendant negligent if the rule adopted as to posting a lookout while working between cars was insufficient, and the question as to the necessity of a rule to regulate the movement of cars was left to the jury, it was not error to refuse an instruction that the risks assumed under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]) were those incident to the employment, not including risks incident to the negligence of defendant's officers, agents, or employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

In Error to the District Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Western District of New York, entered upon a verdict in favor of defendant in error, who was defendant below. The action is brought under the federal Employers' Liability Act, to recover damages on account of the death of plaintiff's intestate (hereinafter referred to as deceased), which, the complainants alleges, resulted from the negligence of defendant.

H. A. Adams, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The only point raised on this writ of error which calls for any discussion is the exception to a request to charge that:

"The risk the employé now assumes, since the passage of the federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employés."

Deceased was a yard conductor. He was at work in what is known as a "gravity yard," in which cars are pushed up to the crest of a hump

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and are then allowed to run down, singly or in groups, under the control of a brakeman, into a fan-shaped arrangement of tracks intended for the making up of trains. He was at work on a car on track 4, one of a group of five cars forming one end of a train to be made up. Some additional cars to be attached to these had been brought down into contact, but the two sections failed to couple. These cars were then drawn off 20 to 30 feet, and deceased and an assistant superintendent went to examine and overhaul the coupler. While thus engaged another group of cars came over the hump and ran down on track 4, striking the head group and driving them down over deceased.

The charges of fault were twofold; negligence in failing to promulgate a rule which would require a lookout to be posted to ward off approaching cars, and negligence in operating its cars so as to come down on standing cars with force sufficient to drive them on. Defendant had promulgated a rule, which reads:

"Rule 180. Employés must not go between or under cars in a train until some other member of the crew is made aware of the fact and the latter takes the necessary precautions to prevent the train from being moved while the employé is between or under the cars."

The testimony abundantly sustains the conclusion that deceased violated this rule. His violation of the rule, however, is important only on the question of contributory negligence, which under the federal act would require merely an apportionment of damages, if defendant were also found negligent. The court so instructed the jury.

The court left it to the jury to say whether or not rule 180 was a sufficient rule to adopt, telling them that if they concluded that it was insufficient they might find defendant negligent. It went further, and instructed the jury specifically that it was for them to decide whether it was necessary for the defendant to make and enforce some rule to regulate the movement of cars sent over the hump, so that they would not impinge on other standing cars—a practice usual in this yard and in other railroad yards generally. The court also instructed the jury that assumption of obvious risk would bar recovery under the federal Employer's Liability Act in cases not coming within section 4 of that act, which is in accord with the decision of the Supreme Court in *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062.

We think the plaintiff was not entitled to have the jury instructed in the manner he requested. If negligent operation of the cars by deceased's fellow servants caused the violent striking of the standing cars by other cars running down from the hump, it was a negligent operation of almost daily occurrence. There was no rule to regulate the speed of the moving cars, and the practice of running them down on standing cars was a practice usual in this yard and in other railroad yards generally. Defendant presumably assumed that the enforcement of rule 180 would make the practice harmless. If it was a negligent mode of operation, it was a mode obvious to deceased, and we cannot see why, under the *Seaboard Air Line Case*, *supra*, the jury might not find that such usual operation was a risk which he assumed.

Judgment affirmed.

WELSING v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 41.

1. POST OFFICE (§ 49*)—LARCENY FROM MAIL—EVIDENCE.

Evidence *held* to sustain a conviction of a mail carrier for larceny from the mails.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.*]

2. CRIMINAL LAW (§ 868*)—TRIAL—EXHIBITS—TAKING TO JURY ROOM.

It was not error to permit a jury to take a broken box, introduced as an exhibit, to the jury room, without specific instructions as to how they were to examine it, where no objections were taken at the time, or instructions concerning it requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2070; Dec. Dig. § 868.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review a judgment of the District Court, Southern District of New York, convicting plaintiff in error, a letter carrier who was defendant below upon an indictment under section 195 of the federal Penal Code (Comp. St. 1913, § 10365). The relevant parts of the section are:

"Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, * * * or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than \$500, or imprisoned not more than five years, or both."

The indictment charged that defendant unlawfully and feloniously did steal and abstract and remove a brooch pin with imitation stone in center from and out of a certain package of mail matter particularly described.

Mirabeau L. Towns, of New York City, for plaintiff in error.

J. C. Knox, Asst. U. S. Atty., of New York City, for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The main proposition advanced on behalf of defendant is that the court should have dismissed the indictment because the evidence was inadequate to sustain it.

[1] It is unnecessary to rehearse all the evidence. The jury was carefully instructed as to presumption of innocence, interest or bias of witnesses, etc. There was testimony from which the jury might very well conclude that a test package was prepared containing the brooch, the package being a small pasteboard box securely sealed and addressed to a house on defendant's route; that this package in good condition was placed in defendant's box of mail matter about 5:30 p.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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m.; that it remained there, untouched by any one, until a few minutes later, when defendant put it with other mail matter in his pouch; that a few minutes later he put a hand in the pouch and fumbled around, and then put both hands in the pouch and again fumbled around, immediately thereafter withdrawing the box with its side broken in and the brooch gone. After having the broken package marked with the appropriate stamp, he started on his route, delivered the empty box, and, upon being intercepted by Post Office Inspectors, his pouch was searched, and the brooch found in the bottom below all mail matter and some straps. Had the pouch been carried around some time after the unbroken package was put in, there might be some doubt as to whether the side was broken in by defendant's fingers or by other mail matter contained in the pouch. But it is difficult to see how the jury, if they believed the government's witnesses rather than the defendant, as their verdict shows they did, could have reached any other conclusion than the one indicated by their verdict of "guilty." They might, if they believed the testimony, find the existence of felonious intent from the action of the accused in opening the package, and removing the contents, and placing them under the straps in the bottom of his bag, and making delivery of the empty box. That he permitted the pin to remain in the bag does not help him; he concealed it in the bottom of his bag. The case is not different from what it would have been if he had concealed it somewhere in the post office building.

[2] It has been argued that the court erred in allowing the jury to take the box to the jury room without specific instructions as to how they were to examine it. No objection to the jury's taking the box was raised at the trial, nor were any instructions about it asked for. There seems to be no merit in the point.

Judgment affirmed.

TRENTON OIL CLOTH & LINOLEUM CO. v. MUNROE et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 42.

1. EVIDENCE (§ 130*)—RELEVANCY—RES INTER ALIOS ACTA.

In an action for cork sold and delivered, evidence as to whether another customer of plaintiff paid all his bills for cork delivered to him, whether the cork called for by his contract was delivered to him, and whether plaintiffs said anything to him as to their ability or inability to receive cork from foreign countries was irrelevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.*]

2. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE—RELEVANCY.

In an action for cork sold, questions to plaintiffs' treasurer as to the place of storage, date of shipment, difficulties in obtaining cork, and contracts with others were properly excluded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendants in error who were plaintiffs below. The judgment was entered upon a verdict directed by the court at the close of the trial.

The plaintiffs are assignees of the firm of Weber and Lea, and the word "plaintiffs," when used hereinafter, denotes the last-named firm. The action was brought to recover balance alleged to be due for various shipments of imported cork waste alleged to have been sold and delivered by plaintiffs to defendants. The defendant does not question the delivery and acceptance of the merchandise, but avers by way of recoupment and set-off that it had been delivered only a part of a large quantity which plaintiffs had contracted, but had failed, to deliver and defendant claimed damages on account of such non-delivery in excess of plaintiffs' demand. This is the second time the cause has been before this court. On the first trial a verdict was directed in favor of the defendant. Our opinion reversing the judgment then reviewed will be found in 206 Fed. 456, 124 C. C. A. 362.

R. L. Tarbox, of New York City, for plaintiff in error.

S. M. Stroock, of New York City, for defendants in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The material and important evidence in the cause, showing the contractual obligations entered into by the parties and their action under the contracts, consists of a long series of letters exchanged between them. This correspondence was exhaustively examined and carefully collated on the former appeal, and the conclusions were reached that two contracts were entered into whereby plaintiffs undertook to deliver monthly 150 tons under the first and 83 tons under the second, and that no modification or amendment of these contracts was agreed to. Also that the first actionable breach of the contract was by defendants' failing to pay for the shipment due September 2, 1909.

A number of additional letters exchanged between the parties during the period in question have now been introduced, but they do not in any way materially alter the situation. Indeed the argument on this appeal is practically a reargument of the propositions advanced when the cause was here before. We do not find these additional letters persuasive to any different conclusions.

[1] Exceptions to the exclusion of certain testimony are made the basis of assignments of error. It is sufficient to say that the questions put to the witness Loog, another customer of plaintiffs, inquiring whether he had paid all *his* bills for cork delivered to him, whether the cork called for under *his* contract was delivered to him and whether plaintiffs said anything to *him* as their ability or inability to receive cork from the other side of the Atlantic are obviously irrelevant.

[2] We find no error in the exclusion of questions put to plaintiffs' treasurer as to place of storage, date of shipment, difficulties in obtaining cork, and contracts with other persons. The correspondence very clearly reveals the true condition of affairs.

As the amount alleged to be due was not disputed and the only reliance of defendants is on the recoupment, counterclaim, or set-off, verdict was properly directed.

Judgment affirmed.

MEYERS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 12, 1914.)

APPEAL AND ERROR (§ 628*)—RECORD—TIME FOR FILING—EXTENSION.

Under Act Feb. 13, 1911, c. 47, 36 Stat. 901 (Comp. St. 1913, §§ 1656, 1657), providing that, on writ of error to review a final judgment, plaintiff in error shall cause to be printed and filed in the Circuit Court of Appeals 25 transcripts of the record, one of which shall be certified by the clerk, and District Court rule 26, providing that the parties shall stipulate what shall be printed as the record, and that plaintiff in error shall present one copy to the clerk, with a stipulation that it is a true transcript as agreed upon by the parties or settled by the court, and that the clerk shall thereupon certify it without charge, except for the certificate, where a bill of exceptions was settled, and plaintiffs in error had printed it at considerable expense, and the parties had stipulated that the record need not be certified, but might be corrected by either party upon comparison with the bill of exceptions, it was unreasonable for the United States, the defendant in error, to refuse to stipulate that the record was correct, without suggesting any corrections, thereby necessitating the authentication of the record by the clerk at a considerable expense, and until it did so stipulate the time for the filing of the record by plaintiffs in error would be extended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.*]

In Error to the District Court of the United States for the Southern District of New York.

Chas. R. Bradbury, of New York City, for plaintiffs in error.

Henry N. Arnold, of New York City, Sp. Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The act of February 13, 1911, provides that, where it is sought to review a final judgment by writ of error from the United States Circuit Court of Appeals, the plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and file in this court, 25 transcripts of the record of the lower court, one of which shall be certified under the hand of the clerk and seal of that court.

Rule 26 of the District Court provides that the parties shall stipulate what shall be printed as the record by the plaintiff in error, who shall present one copy thereof to the clerk, with a stipulation by the parties that it is a true transcript as agreed upon by the parties or settled by the court. Thereupon the clerk shall certify that it is so without any charge, except for the certificate. The object of both the act and of the rule was to diminish the expense of proceedings on appeal or writ of error or of certiorari.

In this case Judge Martin has settled the bill of exceptions. The plaintiffs in error have printed it at great expense, and the parties have stipulated in writing that the record so printed need not be certified, but may be corrected by either party upon comparison with the bill of exceptions. The plaintiffs in error now present the record, saying that it is correct, while the United States, suggesting no corrections, refuses to stipulate that it is correct, with the result that it cannot be filed in this court until authenticated by the clerk of the District Court at a charge to the plaintiffs in error of 15 cents per folio, aggregating large sums.

Apart from the affidavits as to the poverty of the plaintiffs in error, we think the attitude of the United States unreasonable under the foregoing circumstances. The agreement to waive certification implies that the United States was satisfied that the record was correct, or that it would be made so. It cannot now ignore this obligation. Therefore we shall continue to extend the time of the plaintiffs in error to file the record until the United States has stipulated that the record as printed is correct, or after comparison has been corrected, so that it may be authenticated by the clerk of the District Court and filed in this court.

STANDARD PAINT CO. v. BIRD.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 48.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATERPROOF ROOFING.

The Rugen and Abraham patents, No. 775,635 and No. 775,636, respectively for flexible roofing or flooring and a waterproof covering, and processes of manufacturing the same, construed, and *held* valid, but not infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LIQUID CEMENTING PAINT.

The Abraham patent, No. 824,898, for a liquid cementing paint, *held* valid, but not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from decrees of the District Court, Southern District of New York, dismissing the bills in two suits for infringement of patent. The first suit charges infringement of patent No. 775,635 (hereinafter called the first patent), issued November 22, 1904, to Louis C. Rugen and Herbert Abraham for flexible roofing or flooring, and also of patent No. 775,636 (hereinafter called the second patent), issued November 22, 1904, to the same patentees for a waterproof covering. The second suit charges infringement of patent No. 824,898 (hereinafter called the third patent), issued January 3, 1906, to Herbert Abraham for liquid cementing paint. The District Court, recognizing the validity of all three patents (the first and second had been so adjudicated), held that defendant's process and liquid paint did not infringe any of them. Upon appeal no question is made as to the correctness of the ruling on the first patent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The opinion of Judge Mayer in the District Court is as follows:

Two suits in equity for infringement of three letters patent as follows: (1) Suit involving letters patent Nos. 775,635 and 775,636, called "first" and "second" patents; (2) suit involving letters patent No. 824,898, called "third" patent. Both suits come up on a single record.

The three patents relate to producing colored flexible hydrocarbon roofings. The validity of the "first" and "second" patents was sustained by the Circuit Court and the decree affirmed by the Circuit Court of Appeals on the opinion below. (C. C.) 175 Fed. 346; 182 Fed. 1023, 104 C. C. A. 669. Judge Ray's opinion so fully describes the inventions that repetition here is unnecessary.

The "First" Patent. The defendant argues that the leading feature of the invention is the thorough union with a hydrocarbon roofing or other foundation of a thick colored facing by the application of the facing to the foundation in the presence of heat, so as to cause the two to fuse together or "interlock," thereby contrasting their process with the ordinary painting process, by which a thin film of paint is applied cold in the form of a liquid. "The real gist of the invention," complainant claims, "lay in the discovery of a peculiar pigment carrier for durably uniting the pigment to the underlying foundation. * * * The resinous part gave the necessary hardness and toughness and weatherproof qualities to the roofing, while the fatty part gave the flexibility and tended to prevent undue brittleness." The process is described in the first six claims of the patent and the product in the last two.

At the outset, it is clear that there is a marked distinction between a paint which only adheres and a facing interlocked by heat to the foundation. The proof, it seems to me, is convincing that the "Proslate roofing" of defendant is manufactured by applying a colored asphaltic paint cold to felt roofing. Mr. Thompson, an employé of complainant, testified to a conversation with Murphy, a night fireman, in the employ of defendant, in which the latter told him "that the coating covering was applied hot with the use of steam"; but this testimony is of no value as against that of Mr. Poore, defendant's superintendent, and in view of the subsequent visit of Mr. Abraham and complainant's counsel to the defendant's factory.

The general process of defendant was concisely described by Mr. Poore, as follows: "The foundation of this roofing is practically Patoid roofing, the only difference being a slightly coarser surfacing material. This base material is wound up in large rolls and transported from the building where it is made to the Proslate building, about 1,400 feet distant. There we apply a thin layer of paint to the surface of the roofing by means of a Waldron rotary painting machine. The paint is of ordinary consistency and could be applied by means of a brush, if this were considered good manufacturing practice. We spread the paint, however, more uniformly and in a thin layer, as we desire, by means of the painting machine. The painted material is then festooned on a rack similar to that used in wall paper factories, and the paint is allowed to dry by the evaporation of the solvent. This drying process takes usually about 15 hours, although with especially good ventilation the time has been somewhat shortened. When the paint has dried sufficiently, the roofing is then passed through a waxing machine, which applies a thin coat of wax to the underside of the roofing. The purpose of this wax is to prevent sticking of the roofing when wound up in rolls. The roofing is then rewound into small rolls, and after wrapping is ready for the market." Mr. Poore also stated that the paint was applied to the roofing at ordinary temperature and at the same consistency as one would use with an ordinary paint brush.

Complainant insists that the heat from the waxing was sufficient to cause some interlocking and to that extent is an infringement. Without analyzing in detail the technical and practical descriptions fully spread out in the record, I may say that I am satisfied that in defendant's process there is no interlocking, and that the treatment of the foundation is on a theory different from and inconsistent with complainant's process. Therefore defendant has not infringed.

Second Patent. The invention of this patent was mainly addressed to cheapening the product of the first patent and extending the range of usable carrier materials. The gist of this invention, as claimed by complainant, lay in the discovery that pitches and bitumens could be used for the carrier if brown in a thin layer, with the result that the color would not die out but, on the contrary, develop on exposure.

It is alleged that claims 4 (for process) and 9 and 11 (for product) are infringed by defendant. I agree with complainant that the absence of heat in defendant's process does not relieve of infringement under this patent. The controversy is thus narrowed down to the meaning of the claims as applied to the constituents of defendant's Proslate paint.

Defendant's formula is as follows:

Proslate Paint.	Complete Paint.	Carrier or Binder.
Gilsonite	21.1%	52.7%
Kauri gum	6.2	15.5
Linseed oil	12.3	31.0
Manganese resinate	0.3	0.8
Red oxide	12.8
Benzol 90%	47.3
	100.0%	100.0%

In analyzing this formula, it must be remembered that the sole novelty of the claims of this patent sued on is that the carrier contains "a pitch or bitumen of a brownish color when viewed in a thin layer." It seems to me that the phraseology of the claims cannot be extended to comprehend the mixture of a pitch with something else, but means a pitch which in and of itself is of a brownish color when viewed in a thin layer. The illustration in the specification to produce, for instance, a yellow covering, is stearin pitch or its equivalent and linseed oil melted together and after that yellow ochre stirred in. Obviously stearin pitch or its equivalent (not stearin pitch and linseed oil) constitutes the pitch. Mr. Abraham's testimony showed that he experimented elaborately to get just the right kind of stearin pitch.

The definition of pitch advanced by the complainant unduly monopolizes a large field and is too comprehensive. If stearin pitch or its equivalent and linseed oil made a pitch as now contended, why did not the specification and the claims use some such expression as "stearin pitch and linseed oil together constituting a pitch," etc.? Of course, if the defendant uses a pitch of the character described, in a combination to which it adds an element, it cannot escape infringement unless relieved by the prior art.

We are thus led to the inquiry as to whether defendant's formula discloses the use of a pitch. Gilsonite was a well-known asphalt. Kauri gum is a chemical resin. Gilsonite is a dark material in a thin layer. Kauri gum is lighter when viewed in a thin layer than a brown pitch. Defendant, by mixing these ingredients with linseed oil, produces a paint binder light enough in color so that it immediately permits the roofing to assume the desired color and does not mask the color of the pigment.

If, however, Gilsonite alone is a pitch, then its use is met by the prior art. C. H. Parker Company, of Valparaiso, Ind., made colored asphalt paints comprised of Gilsonite, linseed oil, Venetian red, and the usual drier and solvent. Mr. Elliott, of the Elliott Varnish Company, of Chicago, testified to making, as far back as 1890, when in employ of Baker Wire Company, a deep maroon asphaltic paint composed of asphalt (usually Gilsonite) rosin and linseed oil, with the usual Venetian red and solvent. Later he began and has continued to make "Roofleak" of Gilsonite and linseed oil, with a drier, Venetian red, and solvent. The Armstrong Paint & Varnish Works made from 1899 a colored asphaltic paint of Gilsonite and vegetable oil, with Venetian red and the usual solvent.

It is evident, therefore, that if the claims in issue of this second patent were construed to cover the use on a roofing of a paint comprising Gilsonite and a pigment, they would not escape the prior art.

Third Patent. This patent has never been adjudicated. The alleged invention was, in some sense, a development of the invention of the second patent,

but related to paints adapted to be applied to the roofing foundations cold by means of a solvent.

The complainant outlines the essentials of the alleged invention in the following chart:

THIRD PATENT, 824,898.
(Liquid Cementing-Paint.)

VOLATILE SOLVENT	
PIGMENT	
BINDER	
	containing or
	consisting of a
PITCH	WEATHERPROOF
	PLASTIC
	LIGHT-COLORED
	NONGELATINIZING

Adapted for use on weatherproof flexible hydrocarbon roofings.

The six claims sued on are as follows:

"1. The hereindescribed process of manufacturing liquid cementing paint, which consists in dissolving in a volatile solvent, under the application of heat, a *weatherproof plastic pitch* of a color adapted to be dominated by that of an added pigment, allowing the solution to cool, and then adding a pigment which is relatively inert to the other ingredients.

"2. The herein described process of manufacturing liquid cementing paint, which consists in dissolving in a volatile solvent a *weatherproof and nongelatinizing plastic pitch* of a color adapted to be dominated by that of an added pigment and incorporating an inner (inert) pigment with the solution.

"3. The herein described process of manufacturing liquid cementing paint, which consists in incorporating or mixing with each other a volatile solvent, a *weatherproof plastic pitch* of a color adapted to be dominated by that of an added pigment, and a pigment which is relatively inert to the other ingredients.

"4. A liquid adapted for use as a paint, cement, or the like, the said liquid containing a volatile solvent, a *weatherproof and nongelatinizing plastic pitch*, and an inert pigment, the color of which dominates that of said pitch.

"5. A liquid adapted for use as a paint, cement, or the like, the said liquid containing a volatile solvent, a weatherproof plastic binder, which contains a *weatherproof pitch*, which appears light-colored and more or less pervious to light when viewed in a thin layer, and a pigment the color of which dominates that of said binder.

"6. A liquid adapted for use as a paint, cement, or the like, the said liquid containing, as a solvent, one of the lighter hydrocarbon distillates; as a binder, a *weatherproof pitch* which appears light-colored and more or less pervious to light when viewed in a thin layer; and, as a pigment, a metallic oxid the color of which dominates that of the pitch."

It will be noted that in each of these claims the reference is to a weatherproof plastic pitch and not to any weatherproof plastic binder. This patent, if as broad as contended for by complainant, is for the use of the pitch already made known by the second patent with a solvent to make it liquid. It may well be questioned whether patentable novelty has been disclosed, but that question may be left open, because here there is no infringement, for reasons which may be summarized as follows:

1. The claims (as above stated) refer to a weatherproof plastic pitch. This construction is clearly supported by the file wrapper.

2. The "improved paint" of the patent comprises three ingredients: First, a body or binder; second, a pigment; and, third, a more or less volatile solvent. These are ingredients common to all paints.

3. None of the ingredients used in defendant's carriers can be regarded as falling individually within the scope of the terms "pitch or bitumen," except possibly Gilsonite and B asphalt. Each of these (if they are pitches) is hard and brittle, and therefore not weatherproof or plastic. I think, also, that the B asphalt is black in thin layers, and that the Gilsonite is too dark to be used alone, and, if so used, would gelatinize.

This latter conclusion is supported, not only by the testimony adduced on behalf of defendant, but also, as it seems to me, by the testimony of Mr. Abraham.

Briefly, in conclusion, if the claims of the third patent must be limited in their construction to comprehending a weatherproof plastic pitch, instead of a weatherproof plastic binder (as I think they must be), then the paint and cement of defendant do not infringe.

For the reasons outlined, the bills are dismissed, with costs.

A. D. Kenyon, of New York City, for appellant.

W. K. Richardson, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The first and second patents, in a suit for infringement by complainant here against a different defendant, also named Bird, came before Judge Ray. His opinion will be found in 175 Fed. 346. Upon that opinion this court affirmed decree against defendant, without itself writing anything. Judge Ray's opinion is a very full one, discussing at length the prior art and the novelty and utility of the invention disclosed, with copious excerpts from specifications and claims. So complete an understanding of the questions therein discussed will be found on reference to that opinion that further discussion of the point therein decided is not necessary here.

The leading object of these two patents was to produce flexible weatherproof roofings in colors other than black: the flexible waterproof and weatherproof roofings of the prior art were black, or of a brownish black, unless painted. There is a foundation of felt, heavy paper, or what not, which is saturated or coated with a waterproof compound containing hydrocarbon material. Upon this foundation there is spread a facing which, with other ingredients, contains the desired pigment. In the prior art this facing was applied by painting it on the foundation, so that it became an adherent coating, as would ordinary paint when spread over the surface of wood. There were defects and difficulties attendant on this old method of coating, which are pointed out in opinion above referred to. The patentees overcame these defects and difficulties, and their process and product was held to be novel and meritorious.

This was done, to quote from the specifications, "by combining with the foundation a carrier or binder and a pigment so constituted and applied that they not only are thoroughly united with the foundation, so as to prevent cracking and peeling off, but, further, all injurious interaction between the constituents of the foundation and those of the pigment and its carrier is avoided." The foundation is first prepared by saturating the felt with one of the many suitable waterproofing compounds then on the market. The pigment carrier or binder—the facing of the completed roofing—is next prepared. Careful instructions as to its composition are given, so as to insure its coating with the saturated foundation.

"Then the colored facing * * * is applied in the presence of heat to the foundation, which preferably should be in a heated condition, so that the * * * hydrocarbon mixture may be in a soft or molten state. When ready-made fabrics are used for the foundation, they may first be heated to bring the saturating * * * compound into a plastic state. In many cases the

temperature of the colored facing is sufficiently high to soften the foundation."

The novelty of the patented process, as contrasted with the prior art of coating the foundation with a paint, is pointed out:

"It will be observed that the hydrocarbon material of the foundation and the colored facing are brought together while both are in a molten or plastic condition and that they are subjected to pressure while in such condition. This causes the foundation and the facing to interlock or amalgamate at their junction. Thus the finished article comprises three portions, one of which is formed by the facing exclusively, another by the foundation exclusively, and the third intermediate portion by an interlocking of the two first named."

The invention is very clearly expressed in the third claim of the first patent. We quote that one, as it is the shortest:

"The herein-described process of manufacturing a flexible material, which consists in treating a suitable material with a hydrocarbon to form a foundation, and applying to the said foundation in the presence of heat, a colored facing consisting of a pigment and a mixture containing a resinous body and a fatty body."

The second patent was, as Judge Ray held, a carrying forward, extension, and perfection of the first patent. It gives further instructions as to the composition of the facing. Of the three claims in suit here 4, 9, and 11, we need only quote:

"4. The herein-described process of producing weatherproof coverings, which consists in applying to a suitable foundation a facing containing a bitumen or pitch exhibiting a brownish color when viewed in a thin layer, said facing also containing a pigment adapted to become clearly visible or to develop upon exposure to the atmosphere."

That the defendant's covering in the suit in 175 Fed. 346, was an infringement of both these patents is not questioned by the defendant here. The covering now before us is prepared by coating the foundation with the pigment carrier by a painting process, in the absence of heat, which was the old way of making such coverings, coating the foundation with the facing instead of interlocking the two.

Complainant contends that the absence of heat in defendant's process does not take it out of the field of this second patent. It is pointed out that the claims do not contain the words "in the presence of heat," or their equivalent (as did those of the first patent), and that the instructions in the second patent as to the process of making the weatherproof covering, which include heat, are prefaced with the words: "We will now describe in detail one particular way of making our approved covering." Judge Mayer agreed with this contention, but we do not find it persuasive. There is nothing to show that the *interlocked* facing—the novel idea which differentiated patentee's invention from the mere adherent coating of the prior art, which was full of painted adherent coatings—was cast aside in the second patent. It was on this theory of novel method of securing a durable interlocking that the patents were originally sustained. No method other than heat to effect interlocking and durable attachment is described or suggested in the second patent. It is true that the patentee says that his pigment carrier

is "applied to the fabric in any approved manner"; but the testimony seems to indicate that unless heat is used in its application the interlocking or durable attachment will not result, that if it were applied in the old way, the only way in use before the applications for these patents, viz., painting it on cold, the desired result would not be obtained. It is suggestive that in manufacturing its products under these two patents the complainant invariably uses heat. Maybe a durable attachment effected in some other way would effect the desired result, but apparently a further exercise of inventive faculty is required to discover such third method as a substitute for hot application under pressure or cold painting. The patentee testified that he could "conceive of a method by which the mixture could be applied cold; in fact, several methods," although he suggested only one method. He said that he "believed it was at least feasible" to comminute the pigment carrier mixture and then apply the particles under suitable pressure and without heat, so as to cause them to recombine and to attach themselves to the foundation. He had never tried this and did not know how practical it would be, although he did not think it would be as durable as though the interlocking actually took place. This, then, seems to be the situation. There are only two known methods of applying the facing—by cold painting or by heat. If the facing of the second patent is applied in the presence of heat, as taught by the first patent, the result will be satisfactory; if applied as a cold paint, the result will not be satisfactory. There may be some third method of applying it, which will also give satisfactory results, but no one has yet by experiment demonstrated its existence. Under these circumstances, to construe these claims as covering every method of durably attaching, known or unknown, at the date of the issue of the patent, would make them like the claim which was condemned by this court in *Matheson v. Campbell*, 78 Fed. 910, 24 C. C. A. 384, where we said:

"The patentee proposes to set himself in the pathway of future experimenters, * * * and, as the result of each new experiment is disclosed, will fire away at it, calculating to 'hit if it is a deer and miss if it is a cow.'"

Judge Mayer, however, held that the combination of materials used in defendant's facing did not infringe the combination of materials covered by the claims of the second patent. With his reasoning and conclusion on that branch of the case we concur.

[2] The third patent departs from the heat-interlocking feature altogether. Its facing is applied cold as a paint would be either with rollers or a brush or in any other similar way known to the art. The claims relied on are:

"3. The herein-described process of manufacturing liquid cementing paint, which consists in incorporating or mixing with each other, a volatile solvent, a weatherproof plastic pitch of a color adapted to be dominated by that of an added pigment, and a pigment which is relatively inert to the other ingredients."

"5. A liquid adapted for use as a paint, cement or the like, the said liquid containing a volatile solvent, a weatherproof plastic binder which contains a weatherproof pitch which appears light-colored and more or less pervious to light when viewed in a thin layer, and a pigment the color of which dominates that of said binder."

As originally filed, the third claim, instead of the words "a weatherproof plastic pitch," used the words "a weatherproof plastic binder"; and the fifth claim, instead of stating that the binder "contains a weatherproof pitch," stated that it "contains a pitch." Similar changes were made in the other four original claims. These amendments were made because of rejections on prior art, the patentee in the course of discussion with the Patent Office pointing out that three pitches referred in the prior art, viz., coal tar pitch, wool pitch, and rosin pitch, are "all deficient in that they are not weatherproof." We concur with Judge Mayer in the conclusion that to infringe these claims whatever pitch there may be in the binder (the pigment carrier or coating) must itself be weatherproof. Since the Gilsonite pitch which defendant uses is not itself weatherproof, as the testimony clearly shows, we concur in the conclusion that infringement of the third patent is not shown. Decrees affirmed, with costs.

BARTLETT v. OKLA OIL CO. et al.

(District Court, E. D. Oklahoma. September 29, 1914.)

No. 2012.

1. INDIANS (§ 18*)—LANDS—DESCENT ON DEATH OF ALLOTTEE.

Under the legislation of Congress, culminating in Act April 28, 1904, c. 1824, 33 Stat. 573, and the Oklahoma Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267), the lands of Indian allottees of the Five Civilized Tribes who died after admission of the state, both as respects homesteads and surplus lands, descend in accordance with the laws of the state, which, as provided by the Enabling Act and the state Constitution, were the laws in force in Oklahoma Territory until changed by state legislation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*]

2. INDIANS (§ 15*)—CONVEYANCE OF LANDS OF DECEASED ALLOTTEE—APPROVAL BY COURT.

Act May 27, 1908, c. 199, § 9, 35 Stat. 315, provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." *Held* that, in approving a deed under such provision, the judge of a county court in Oklahoma acts ministerially, and not judicially, and that his finding of fact that the deceased allottee was a resident of that county at the time of death is subject to collateral attack.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

3. INDIANS (§ 15*)—CONVEYANCE OF LANDS OF DECEASED ALLOTTEE—JURISDICTION TO APPROVE.

The approval of a deed under such provision can only be made by the county court of the county of which the deceased was a resident, and which has jurisdiction of his estate, and its approval by the court of another county is unauthorized and void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

4. INDIANS (§ 15*)—CONVEYANCE OF LANDS—ESTOPPEL.

Because of the disabilities under which Indians are placed by the restrictions on the alienation of their lands, and their status as wards of the government, misrepresentations made by an Indian to secure the necessary approval of a deed made by him do not estop him, nor a subsequent grantee, from asserting the invalidity of such deed.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

In Equity. Suit by H. U. Bartlett against the Okla Oil Company and others. On motion to dismiss amended bill. Denied.

Ramsey & De Meules, of Muskogee, Okl., for plaintiff.

Sherman, Veasey & O'Meara, of Tulsa, Okl., for defendants.

CAMPBELL, District Judge. The question is on defendants' motion to dismiss the amended bill. From the bill it appears that Chunna Gouge was a duly enrolled full-blood member of the Creek Tribe, who had during her lifetime secured an allotment of the lands in controversy, and who died on November 17, 1907, intestate, unmarried, leaving no issue surviving her, but leaving surviving her Jack Gouge, her father, and her mother, Lucinda Gouge, both duly enrolled full-blood members of the Creek Tribe; that her mother, Lucinda, died intestate and without issue surviving her on the 19th day of January, 1908, leaving surviving her the said Jack Gouge, and Big Jack and Bettie, her father and mother, respectively, both duly enrolled full-blood members of the Creek Tribe; that both Chunna Gouge and Lucinda Gouge were at the time of their respective deaths residents of McIntosh county, Okl., and the county court of that county had jurisdiction of the settlement of their respective estates; that on May 13, 1912, the said Jack Gouge and Big Jack and Bettie conveyed the land in controversy to the plaintiff by warranty deed, which was on the same day duly approved by order of the county court of McIntosh county, Oklahoma; that the defendants claim title by virtue of the following transactions: That on August 11, 1909, the said Jack Gouge executed and delivered to one Nix and one Regan an instrument in form of a warranty deed, purporting to convey to them the lands in controversy; that on August 17, 1909, the said Big Jack executed and delivered to the said Nix an instrument in form of a warranty deed, purporting to convey to him the lands in controversy; that on April 18, 1910, the said Jack Gouge executed to the said Nix an instrument in form of warranty deed, purporting to convey to him the land in controversy, which deed was on the same date approved by order of the county court of Hughes county, Okl., which order was made by the said court under a gross mistake of fact and on false representations that said Chunna Gouge died within the limits of said Hughes county; that by a series of subsequent conveyances from the said Nix and Regan and their grantees the defendants now claim the title to said land; that the deed of August 11, 1909, from Jack Gouge to Nix and Regan, and the deed of August 17, 1909, from Big Jack to Nix, and the deed of April 18, 1910, from Jack Gouge to Nix, and the several subsequent conveyances under which defendants claim, are void, and are clouds upon plaintiff's title.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prayer that the several conveyances under which defendants claim be canceled and plaintiff's title quieted.

[1] Who were the heirs of Chunna Gouge? This depends on whether the Creek law, the Arkansas law, or the Oklahoma law of descent and distribution applies. She died on November 17, 1907, just one day after the admission of Oklahoma as a state. It is conceded that, had she died prior to statehood, the descent and distribution of her allotted lands would have been according to chapter 49 of Mansfield's Digest of the Laws of Arkansas.

An examination of congressional legislation relating to the allotment in severalty of Indian lands other than those belonging to the Five Civilized Tribes, which were the subject of the legislation to be hereinafter examined, discloses a uniform policy on the part of Congress to provide that the descent and distribution of such lands upon the death of the allottee shall be subject to the general local laws of descent and distribution of the state or territory in which the allotment is situated.

In the General Allotment Act of February 8, 1887 (24 Stat. 388, c. 119 [Comp. St. 1913, § 4201]), under which act and amendments thereof by far the greater portion of the Indian lands outside of Indian Territory have been allotted in severalty, it was provided (section 5):

"That the laws of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided."

In the Osage Allotment Act (Act June 28, 1906, c. 3572, § 6, 34 Stat. 539), it was provided:

"That the lands, moneys, and mineral interests herein, provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereafter incorporated, except where the decedent leaves no issue nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

Similar provisions are found in many other such acts.

By reference to the Choctaw-Chickasaw Agreement, approved July 1, 1902 (Act July 1, 1902, c. 1362, 32 Stat. 641), it is seen (section 16) that Congress had in mind the fact that the lands would, upon the death of the allottee, pass to his heirs, and the surplus land is made inalienable in the hands of the heirs in case the allottee should die within the term of the restrictions. It is provided (section 22) that, where a member dies before receiving his allotment, the land shall pass direct to his heirs, according to the provisions of chapter 49 of the Laws of Arkansas, theretofore extended over the Indian Territory. No special provision, however, is made in this legislation relating to allotment of land in severalty to the Choctaws and Chickasaws for the descent and distribution of the lands so allotted to living allottees. In the case of these two tribes, Congress leaves the matter of descent and distribution of allotted lands to be controlled by general legislation.

Likewise, by reference to the Cherokee Agreement, approved July 1, 1902 (Act July 1, 1902, c. 1375, 32 Stat. 716), it is seen that while it contemplates the passing of the lands allotted thereunder from the allottee to his heirs, and the restriction upon alienation following it into

the hands of the heirs (section 14), and provides, in case of the death of an enrolled member before receiving his allotment, the lands to which he would have been entitled if living shall pass direct to his heirs according to the laws of Arkansas in force in the Indian Territory, no special provision is made in this act in relation to the descent and distribution of allotted lands of deceased Cherokee allottees. Here again Congress has left the matter of such descent and distribution to be controlled by general local laws.

Turning now to the Seminole Agreements: The only provision relating to laws of descent and distribution is found in the agreement approved June 2, 1900 (Act June 2, 1900, c. 610, 31 Stat. 250), reading as follows:

"Second. If any member of the Seminole Tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the state of Arkansas, and be allotted and distributed to them accordingly: Provided, that in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and then to the brothers and sisters, and their heirs, instead of the father."

But the foregoing provision has no relation to cases where the allottee dies after having received his allotment, but is clearly confined in its operation to cases where the allottee dies before receiving his allotment, as in the other agreements referred to, and provision is made for the allotment of his share of the lands direct to his heirs according to the Arkansas law. Here again Congress refrains from legislating especially with regard to the descent and distribution of Seminole allotted lands, leaving that matter, as in the case of the other tribes mentioned, to be controlled by general law. The question then arises: What general law controlled as to the devolution of these Indian estates?

By act of Congress approved May 2, 1890 (26 Stat. 81, c. 182), certain laws of the state of Arkansas, as published in Mansfield's Digest, so far as not locally inapplicable or in conflict with any other act of Congress, were extended over and put in force in Indian Territory until Congress should otherwise provide. Among these laws was chapter 49 of said Digest, providing in detail for the descent and distribution of real and personal property. But by the same act it was provided that the judicial tribunals of the several nations or tribes should retain exclusive jurisdiction of all civil and criminal cases in which members of such nations should be the only parties, and that nothing in the act should be so construed as to deprive any such courts of exclusive jurisdiction over all cases where members of the tribes were the sole parties, and that as to all such cases the laws of the state of Arkansas, extended over Indian Territory by the act, should not apply. This no doubt reserved from the effect of chapter 49 of the Arkansas law so extended the devolution of the property of deceased members of the Five Civilized Tribes, leaving that to be controlled by tribal laws. By the Indian Appropriation Act of June 7, 1897 (30 Stat. 83, c. 3), it was provided:

“Provided, further, that on and after January first, eighteen hundred and ninety-eight, the United States courts in said territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said territory, and the United States commissioners in said territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said territory; and the laws of the United States and the state of Arkansas in force in the territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts.”

By act of Congress approved June 28, 1898 (30 Stat. 495, c. 517), it was provided (section 26) that the laws of the several tribes should no longer be enforced at law or in equity in the United States courts in Indian Territory, and (section 28) that after the 1st day of October, 1898, the Creek and other tribal courts should be abolished. Clearly this had the effect of subjecting the members of the Creek and other tribes and their property to the Arkansas law of descent and distribution already extended in Indian Territory. *Nivens v. Nivens*, 4 Ind. T. 30, 64 S. W. 604; *Id.*, 4 Ind. T. 574, 76 S. W. 114; 25 Ops. of Atty. Gen. 163.

By act of Congress approved March 1, 1901 (31 Stat. 861, c. 676), the original agreement with the Creek Tribe was ratified and confirmed, subject to ratification by the Creek Council, which followed in due time. Provision was made in this agreement for the completion of the tribal rolls and the allotment of the tribal lands to the several tribes. In section 7 of this agreement, the alienation of allotted lands by the allottees or *their heirs* is prohibited for a term of years. This, of course, contemplates the passing of the allotted lands to the heirs upon the death of the allottees, according to some law of descent and distribution. In the same section it is then provided that each allottee shall select from his allotment a homestead of forty acres, to be inalienable for 21 years, to remain after his death for the use and support of children, if any, born to him after the ratification of the agreement, but if none such, and it be not disposed of by will, to descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from restrictions. By section 28 of this agreement it is provided that citizens of the tribe entitled to enrollment and living upon April 1, 1899, should be enrolled, and if any such should die before receiving his allotment the land to which he would be entitled if living should “descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.” In the same section it is also provided that children born to citizens entitled to enrollment up to July 1, 1900, and then living, should also be enrolled, and if any such child should die before receiving its allotment the land which it would be entitled to if living should likewise “descend to its heirs according to the laws of descent and distribution of the Creek Nation,” etc.

A supplemental agreement was entered into with the Creek Tribe, and ratified by act of Congress approved June 30, 1902 (32 Stat. 500, c. 1323), section 6 of which is as follows:

"The provisions of the act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

By the amendment, the *descent and distribution*, to which the Creek law is applied in the original agreement, is made subject to the Arkansas law "now in force in Indian Territory." But, as we have seen, the descent and distribution of lands other than homesteads—that is, surplus lands—was not especially provided for in the Original Agreement. Hence such lands are not affected by section 6 of the Supplemental Agreement. The descent of these surplus lands, not having been especially provided for in the agreements, was controlled by the laws of Arkansas in force in the Indian Territory, applicable to Indian estates by virtue of the acts of June 7, 1897, and June 28, 1898, *supra*, and the amendment, effected by section 6 of the Supplemental Agreement, substituting the Arkansas law for the Creek law, in connection with the other legislation noted, had the effect of making the Arkansas law apply uniformly for the purpose of determining descent and distribution of Creek lands, alike in cases where the allottee died after receiving his allotment and in the case of heirs of a deceased member who died before receiving his allotment. Then, as if to remove any possible doubt as to its policy of submitting the descent and distribution of these allotted lands in Indian Territory to the operation of the general law upon that subject, in force in the territory, Congress provided, in the act of April 28, 1904 (33 Stat. 573, c. 1824):

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise."

From the date of this last-mentioned act up to statehood, it is clear that the descent and distribution of all Indian estates in Indian Territory, was subject to the Arkansas law in force generally in the territory. In other words, Congress by the legislation above reviewed, culminating in the act last quoted, had provided that the descent and distribution of Indian estates in the Indian Territory should be controlled by the local laws on that subject, in keeping with the policy of the General Allotment Act and other legislation above referred to. *Labadie v. Smith*, 41 Okl. 773, 140 Pac. 427. It is true the laws of descent and distribution, like all other general laws in force in Indian Territory, were established by act of Congress, there being

no local legislative body as in organized territories; but they were none the less local territorial legislation, as contradistinguished from those acts of Congress relating especially to the Indians and their lands. *Shulthis v. McDougal*, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205.

But the Oklahoma Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267) provided (section 13) "that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof," and (section 21) that "all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union, shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state." The Constitution of the state provided that the laws in force in Oklahoma Territory upon the intervention of statehood, should be in force in the state until changed by the Legislature. This extended to the Indian Territory portion of the state the law of descent and distribution on and after the admission of Oklahoma on November 16, 1907. By the Enabling Act Congress evinced its intention to provide, so far as it might do so, for the application of the laws of Oklahoma Territory throughout the new state.

It is urged that it was beyond the power of Congress to stipulate what should be the laws of the new state, so far as matters of purely state cognizance were concerned, and this is true; but it was within the province of the state constitutional convention to determine what laws should control as state laws until the state Legislature had an opportunity to provide otherwise, and the constitutional convention did so, and, following the terms of the Enabling Act, provided that the laws in force in Oklahoma Territory at the time of the admission of the state should become the laws of the state until changed by the Legislature. But Congress did have power to provide laws of descent and distribution controlling the devolution of lands of the members of the several Indian tribes from which the restrictions upon alienation had not been removed. There is nothing, however, in the Enabling Act to indicate that Congress intended to change the policy established by the act of April 28, 1904, and other legislation heretofore reviewed, that the lands of Indians should be controlled by the local general laws of descent and distribution. It is provided that this local general law after statehood shall be that in force in Oklahoma Territory upon the admission of the state.

The purpose of the Enabling Act was to provide for the formation of the state of Oklahoma by combining Oklahoma Territory and Indian Territory. To this Congress gave its consent. The Indians of the Five Civilized Tribes and all other Indians of the Indian Territory were by the terms of the act made eligible to citizenship in the new state, and subject in their person and property to the operation of its laws, except as to certain restrictions upon the alienation of their allotted lands and kindred matters, with regard to which Congress had especially legislated. The descent and distribution of their lands Congress had, as we have seen, committed to the operation of the local laws of the Indian Territory. This law of descent and dis-

tribution, together with all other general laws peculiar to Indian Territory, must of course, upon the advent of statehood, give place to the laws provided for the new state. This Congress contemplated when it provided in the Enabling Act that the laws in force in the territory of Oklahoma should apply. The constitutional convention so provided. The several state courts established by the Constitution became by the terms of the Enabling Act the successors of the United States courts in Indian Territory; the court having probate jurisdiction thereby succeeding to the full and complete jurisdiction conferred upon district courts in said territory by the act of April 28, 1904, in the settlement of all estates of decedents and guardianship of minors and incompetents, whether Indians, freedmen, or otherwise. Clearly Congress contemplated that, in the exercise of this jurisdiction over the persons and property of the Indians, these courts would administer the state laws as applied to matters of descent and distribution and kindred matters, except in regard to features as to which Congress had especially legislated otherwise.

It is argued that because, in section 9 of the act of May 27, 1908, it is provided that the homestead shall descend according to the laws of descent and distribution of the state of Oklahoma, the Arkansas law must have controlled as to homesteads up to that time, else it would have been unnecessary to specifically mention the Oklahoma law. This, however, does not in my judgment necessarily follow, when it is considered that the controlling purpose of the section is the removal of restrictions upon alienation of lands of deceased allottees, with the limitation in case of certain issue surviving. The provision that the descent and distribution shall be according to the Oklahoma law is but another manifestation of the policy of Congress that the devolution of these Indian estates shall be controlled, except as otherwise specifically provided, by the local general laws of descent and distribution.

I therefore conclude that when Chunna Gouge died on November 17, 1907, her allotment, both homestead and surplus, descended to her heirs according to the law in force in Oklahoma Territory on November 16, 1907, when the state was admitted, which had then become the law of the state of Oklahoma.

[2] The law in force in Oklahoma Territory, relating to "wills and successions," on November 16, 1907, when the state was admitted, provided:

"When any person having title to any estate not otherwise limited by marriage contract dies, without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the chapter on probate court, subject to the payment of his debts, in the following manner: * * * (2) * * * If decedent leave no issue, nor husband, nor wife, the estate must go to the father." Wilson's R. S. Oklahoma, vol. 2, § 6895.

Chunna Gouge left no issue, nor husband, nor wife; therefore upon her death the land in controversy passed to her father, Jack Gouge, who survived her. Both the plaintiff and the defendants claim title through Jack Gouge—the plaintiff, by his deed of May 13, 1912, approved on the same day by order of the county court of McIntosh

county, which the bill alleges was the residence of Chunna Gouge at the time of her death; the defendants, through their deed of August 11, 1909, from Jack Gouge to Nix and Regan, and deed of April 18, 1910, from Jack Gouge to Nix, which latter deed was approved by the county court of Hughes county, the former deed not appearing to have been approved by order of any court. By the act of Congress approved May 27, 1908 (35 Stat. 312, c. 199), it is provided:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The bill alleges that both Chunna Gouge, the deceased allottee, and Jack Gouge, her father and heir, were full-blood Indians. Hence, while the death of Chunna Gouge operated to remove the restrictions from the land allotted to her, Jack Gouge, her full-blood heir, could not make a valid conveyance of the same, unless approved by the court having jurisdiction of the settlement of her estate. The bill alleges that she was a resident of McIntosh county, Okl., at the time of her death. In that case the county court of McIntosh county was the court having jurisdiction of the settlement of her estate. Wilson's Revised and Anno. Stats. of Oklahoma, vol. 1, §§ 1483-1485.

But it is contended by the defendants that inasmuch as it appears from the order of the county court of Hughes county, approving the deed of April 18, 1910, from Jack Gouge to Nix, which order is made an exhibit to the bill, that that court found as a fact that Chunna Gouge was a resident of Hughes county at the time of her death, that finding cannot be collaterally attacked in this proceeding. While it may be conceded that if the county court of Hughes county, in approving this deed, acted in the exercise of its judicial functions as such county court, its findings as to facts relating to its jurisdiction to so act cannot be collaterally attacked, still the question arises: Was its action the exercise of a judicial function, or was it merely a ministerial act? In 11 Cyc. at page 693, it is said:

"Where courts of general jurisdiction do not act within the scope thereof, but exercise other and special statutory powers in derogation of, or not according to, the course of the common law, or where such special powers are purely ministerial, no presumption of jurisdiction favors the judgments of said courts, since by the exercise of such special powers a court stands in this respect on the same footing with courts of limited and inferior jurisdiction."

By section 22 of the act of April 26, 1906 (34 Stat. 137, c. 1876), it was provided that adult Indian heirs of deceased Indians of either of the Five Civilized Tribes might sell lands inherited from them, with the further proviso that:

"All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Section 9 of the act of May 27, 1908, above quoted, merely continues this right of alienation so far as adult heirs are concerned, but provides that the approval shall be by the court mentioned, rather

than by the Secretary of the Interior. That that action of the Secretary of the Interior in approving or disapproving deeds under the provision of section 22 of the act of April 26, 1906, above quoted, was in no sense judicial, but was purely ministerial, is established by *Jennings v. Wood*, 192 Fed. 507, 112 C. C. A. 657, wherein the effect of the Secretary's approval of an Indian lease was involved. Now, so far as these full-blood conveyances of inherited lands are concerned, the act of May 27, 1908, merely appoints in the place of the Secretary of the Interior, for the purpose of their approval, the court having jurisdiction of the settlement of the estate of the deceased Indian from whom the land is inherited. The power and authority conferred upon the court is merely that, therefore, conferred upon the Secretary of the Interior by the former act. In *Van Fleet on Collateral Attack of Judicial Proceedings*, § 799, this principle is laid down in this wise:

"In a collateral assault on a right or title held by virtue of the action of a tribunal, it is of vital importance whether its action was judicial or ministerial; because, if judicial, no error will affect the right or title unless so grave as to prevent jurisdiction from attaching or to destroy it afterwards, *but, if ministerial, any substantial error will defeat it.*"

In *Black on Judgments*, § 379, it is said:

"It is said, in a New Hampshire decision, that whenever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be impeached collaterally by showing that the court or magistrates have acted in a case where they have no jurisdiction, or by modes of procedure which they are not authorized to adopt. The same principle, under a slightly different aspect, is stated in a Connecticut case as follows: Where a statute confers upon a tribunal of limited and statutory jurisdiction a special power, to be exercised under particular circumstances and in a particular manner, it is indispensable to the valid exercise of the power that such circumstances exist at the time and that the court proceed in the exact manner prescribed; and where the record of such court finds the existence of those circumstances, and that such manner of proceeding was adopted, the finding is only *prima facie* proof of those facts and they may be disproved by parole evidence."

In the case of *State ex rel. Thomas Adamson, Petitioner, v. Lafayette County Court, Respondent*, 41 Mo. 222, wherein the sheriff sought by writ of mandamus to compel the county court to approve his bond, the court said:

"Now is the approval or rejection of a sheriff's bond by the county court the exercise of such judicial function or discretion as will preclude this court from any supervisory control of its action? G. S. § 2, p. 113, provides that the sheriff shall give bond and security to the state, to the satisfaction of the county court. The only duty of the court is to be satisfied that the bond and security is sufficient. There is nothing presented before the tribunal for adjudication, and its action is not the exercise of a judicial discretion or judgment within the meaning of the rule. The approval or rejection of the bond is essentially a ministerial act, though coupled with a discretion."

In *re Saline County Subscription*, 45 Mo. 52, 100 Am. Dec. 337, was an application for a writ of certiorari to review the action of a county court in subscribing to railroad stock and issuing bonds for payment thereof. The court, after holding that a writ of certiorari

would only lie to review the judicial action of the court, further held that the act of the county court in subscribing for the railroad stock, and issuing the bonds, was ministerial, and not judicial, and therefore denied the writ. The court in its opinion said:

"A county court is certainly a judicial body for some purposes, but no more so for the name, nor for the fact that it has a seal and a clerk and keeps a record. The character of its action in a given case must decide whether that action is judicial, ministerial, or legislative, or whether it be simply that of a public agent of the county or state, as in its varied jurisdiction it may by turns be each. * * * The proceedings in general of county courts in probate matters have been treated as judicial, especially when they are adverse, and parties are brought in, or are supposed to be in court. * * * The case of *St. Joe & Denver City Railroad Company v. Buchanan* County expressly decides the case at bar; and all the cases are inconsistent with the idea that the exercise of a discretionary power, given by law to the county court of Saline county, if it be given to make a subscription to the stock of a railroad, can be in any sense a judicial proceeding. A court has no discretion, but must render judgment according to the facts and the law, while this subscription might have been made or refused. The judges were bound, it is true, to act with good judgment, judiciously; but exercising a sound judgment is by no means synonymous with rendering judgment, and acting judiciously is not always acting judicially."

In the case of *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, was involved the question as to whether the district court acted judicially in removing the disabilities of a minor under a statute similar to that in force upon the same subject in this state, and the court said:

"Can an order which, under the statute, removes the disabilities of a minor, be deemed in strict language the judgment of a court? We think not. It fixes no right; it settles no dispute. It acts merely upon the status of the applicant, enlarges his capacity as a free agent, and, as to all matters not political, places him upon the plane of persons who have attained their majority. If the proceeding should be deemed judicial, we should be compelled to hold the statute in conflict with the Constitution, for the reason that it attempts to confer upon the district courts a jurisdiction not embraced in these courts as defined by the Constitution. This court has repeatedly held that the jurisdiction of these courts is strictly limited to the suits mentioned in section 8, art. 5, of our Constitution. *Harrell v. Lynch*, 65 Tex. 140; *Ex parte Towles*, 48 Tex. 413; *Williamson v. Lane*, 52 Tex. 344; *State v. De Gress* [72 Tex. 242] 11 S. W. 1029."

[3] I conclude that the action of the court having jurisdiction of the settlement of the estate of the deceased allottee, in approving or disapproving conveyances by his full-blood heirs, is in no sense judicial. The only court having authority in the matter is one having the jurisdiction prescribed. In this case it was the county court of McIntosh county, because Chunna Gouge, the allottee, was a resident of that county when she died. It is not necessary that the jurisdiction should first have been exercised by the taking of some steps looking to the settlement of the estate. *Mullen v. Short*, 38 Okl. 333, 133 Pac. 230. But such jurisdiction must inhere in the court assuming to approve such conveyances. The approval by any other court is unauthorized and void, and any finding made by such court may be collaterally attacked.

It follows that in this case the approval of the county court of Hughes county of the deed from Jack Gouge to the defendant lends

no validity to that instrument. It stands as an unapproved deed, and is therefore void.

[4] It is urged that, because of representations made by or on behalf of Jack Gouge in the proceedings before the county court of Hughes county, he and his privies are now estopped from questioning the validity of the action of that court. There is no merit in this contention. The disabilities under which these wards of the government are placed as to the alienation of restricted lands is very similar to those attaching to minors with reference to their contracts, and in the latter case it is established that the acts and declarations of a minor during infancy cannot estop him from asserting the invalidity of his debts after he has attained his majority. *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87.

The motion to dismiss in this case will be overruled. It is so ordered.

RILEY et al. v. KELSEY et al.

(District Court, E. D. Oklahoma. November 2, 1914.)

No. 2034.

INDIANS (§ 16*)—HOMESTEAD OF DECEASED ALLOTTEE—ROYALTY FROM OIL AND GAS LEASE.

Act May 27, 1908, c. 199, § 9, 35 Stat. 312, provides that, if any member of the Five Civilized Tribes of Indians of half or more Indian blood "shall die leaving issue surviving born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable * * * for the use and support of such issue during their life or lives until April 26, 1931." Section 2 of the act authorizes the leasing of restricted lands for oil and gas with the approval of the Secretary of the Interior. *Held*, that the provision of section 9 restricting alienation of the homestead for the use and support of the issue of the deceased allottee contemplates its use only for agricultural or grazing purposes, or such other use as would not conflict with the provision against alienation of the land, and does not authorize its leasing for oil and gas, which is to that extent inconsistent with the restriction, but that such authority is found only in section 2; that where such a homestead is leased by the heirs in whom the title is vested, with the approval of the Secretary, the royalties received from the oil or gas produced belong to the heirs according to their several interests.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

In Equity. Suit by Tootie Riley, by U. G. Stockton, guardian, and James Riley against Dana H. Kelsey and others. Decree distributing fund in hands of defendants.

Horton & Smith, of McAlester, Okl., for plaintiffs.

C. H. Tully, of Eufaula, Okl., and Carter Smith, Asst. U. S. Atty., of Muskogee, Okl., for defendants.

CAMPBELL, District Judge. From the evidence and admissions in the pleadings in this case the facts are found to be substantially as follows: Emma Derrisaw was a duly enrolled full-blood member of the Creek Tribe of Indians. The plaintiff Tootie Riley is her illegitimate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

child by the plaintiff Thomas Riley. Thomas Riley and Emma Derrisaw were never married according to the laws of the Creek Nation, nor according to the laws of Arkansas in force in Indian Territory, nor were their relations such as to constitute a common-law marriage. Some two or three years after the birth of Tootie Riley, and in July, 1905, Emma Derrisaw married the defendant Dock Willingham. As a result of this marriage the defendant Julie Willingham was born to Dock Willingham and Emma Derrisaw Willingham on February 11, 1907. During her lifetime there was allotted to Emma Derrisaw Willingham, as her homestead allotment in the Creek Nation, the land involved in this controversy, of which she was seised in fee at the time of her death. She died intestate in November, 1908, leaving surviving her Dock Willingham, her husband, Tootie Riley, her illegitimate child by Thomas Riley, and Julie Willingham, her child by her husband, Dock Willingham. On October 3, 1912, Thomas Riley, Tootie Riley, then a minor, by her guardian, Dock Willingham, for himself, and Julie Willingham, by her guardian, executed an oil and gas mining lease upon the land in controversy, in accordance with the rules and regulations prescribed by the Secretary of the Interior, to one James A. Chapman, which lease was duly approved by the Secretary of the Interior, and was thereafter, with the approval of the Secretary, assigned by Chapman to the defendant Prairie Oil & Gas Company. Pursuant to this lease, oil wells have been drilled upon the property, resulting in oil production, royalties from which, as provided by the lease, now amounting to over \$15,000, have accumulated in the hands of the defendant Dana H. Kelsey, as United States Indian superintendent, Union Agency. The question to be determined is to whom and in what amounts these royalties should be distributed by the Indian superintendent.

When Emma Derrisaw Willingham died in November, 1908, the law of Oklahoma controlled the devolution of her estate (*Bartlett v. Okla Oil Co.*, 218 Fed. 380), and under that law her husband, Dock Willingham, and her children, Tootie Riley and Julie Willingham, would each be entitled to inherit a one-third interest in her real and personal property. Under the act of Congress approved May 27, 1908, the land in controversy, being the homestead allotment of a full-blood Creek Indian, was inalienable during the lifetime of the allottee, Emma Derrisaw Willingham, but by the same act of Congress, it was provided:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the state of Oklahoma, free from all restrictions: Provided further, that the provisions of section

twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

The allottee having died leaving her child, Julie Willingham, surviving her, born after March 4, 1906, the case falls within the second proviso of the section just quoted; that is, "that if any member of the Five Civilized Tribes shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue during their life or lives, until April 26, 1931." While the general effect of the section, aside from the provisos, is to make the death of any allottee operate to remove all restrictions upon the alienation of his allotted lands, the effect of the second proviso is to make the existence of surviving issue, born after March 4, 1906, operate to extend restrictions upon the alienation of the homestead until April 26, 1931, or until the death of such surviving issue, if that occur prior to the last-mentioned date. In other words, in such case the homestead continues inalienable after the death of the allottee, just as it was before his death. The allottee before his death, owner in fee of the homestead, of course had the right of possession and occupancy of the homestead for his use and support; that is, such use and support as he might derive from it by means other than alienation. At the death of the allottee, intestate, the title to the homestead of course vests in his heirs. But, if there be among them a child or children born after March 4, 1906, then it still remains inalienable pending the term provided for in such contingency, and such child or children by force of the act have the same right of possession and occupancy for their use and support which their ancestor had during his life, to the exclusion of the other heirs, for the term of years extending from the death of the allottee to April 26, 1931, or to the date of the death of such child or children, if that shall happen before the last-mentioned date.

But the use and support which such child or children are permitted to derive from the land is only such use and support as they may derive from it by means other than alienation, for it continues inalienable. The use permitted, therefore, could not have contemplated the leasing of the land by such child or children for oil and gas purposes, because the taking of the oil and gas under the right granted by an oil and gas lease amounts to a disposition of that portion of the very corpus of the property, represented by the oil and gas, and is, to that extent, an alienation of a portion of the land. *Eldred v. Okmulgee Loan & Trust Co.*, 22 Okl. 742, 98 Pac. 929; *Moore v. Sawyer* (C. C.) 167 Fed. 826. The use contemplated by the act was clearly only its use for agricultural or grazing purposes, or such other use as would not conflict with the provision against alienation of the land. The language of the act is that the land is to remain inalienable for the use and support of such child or children, clearly contemplating that such use and support shall not involve any alienation of the land itself. It is further provided that this restriction against alienation of the land may be removed by the Secretary of the Interior at any time within the term. If this shall

occur, then the heirs may join in a sale of the land immediately upon the removal of such restrictions, and the proceeds of such sale would be divided among the heirs according to their several interests. Such removal of restrictions from the land would terminate the right of children born after March 4, 1906, to the exclusive occupancy of the land for their use and support.

It follows that in this case the execution by Julie Willingham, through her guardian, of the oil and gas lease referred to, was not authorized by virtue of that provision of the law above considered which continued restrictions upon the land for her use and support. But by section 2 of the act it is provided:

"That leases of restricted lands for oil and gas or other mining purposes * * * may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

We have seen that under the circumstances of this case the land in controversy continues to be restricted land by reason of the birth of Julie Willingham after March 4, 1906; but the last-quoted provision of the act authorizes the leasing of restricted lands for oil and gas and other mining purposes with the approval of the Secretary of the Interior. Under this provision of the act, notwithstanding the continuation of the restrictions upon the land, the several heirs might join in an oil and gas lease upon the land, with the Secretary's approval. This was done. It has resulted in the development of the property and the discovery of oil by the assignee of the lessee, and the taking of a large amount of oil therefrom, resulting in the royalties mentioned. The money accruing from these royalties under the terms of the lease in effect represents the proceeds of the sale of the oil taken from the land. If the Secretary had removed the restrictions from the land and the heirs had sold it, each of the three heirs would have been entitled to one-third of the proceeds. The taking of the oil under the lease approved by the Secretary effects the sale of that portion of the land represented by the oil, and each of the three heirs is entitled to his one-third share of the proceeds of that sale; that is, one-third of the accumulated royalties. The use and support from the land, as restricted land, to which Julie Willingham is entitled, does not contemplate that she may lease the land for oil and gas purposes; for, as we have seen, that is an alienation inconsistent with restrictions. Therefore the taking of the oil under the lease cannot be said to in any way conflict with the use of the land, which the statute gives her, for her support. Therefore the contention that she is entitled, in addition to her share of the royalties, to interest upon the entire amount of the royalties, cannot be sustained.

Decree may enter herein, ordering and directing the defendants Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, general disbursing agent, Union Agency, to pay to the defendant Dock Willingham, and to the guardian of the plaintiff Tootie Riley, and to the guardian of the defendant Julie Willingham, each, one-third of the accumulated royalties now in his hands arising from the production of oil and gas from said land, such payments to be made in accordance and compliance with the rules and regulations prescribed by the Secretary of the Interior in such cases.

GATZERT v. LUCEY et al.

(District Court, N. D. New York. November 18, 1914.)

1. ASSIGNMENTS (§ 8*)—VALIDITY—RIGHTS ASSIGNABLE—DISTRIBUTIVE SHARE IN ESTATE.

An agreement by which persons claiming an interest in the estate of an intestate as heirs at law, in consideration of the withdrawal of a contest of their claims, assign and set over to the contestants a stated sum out of their distributive shares in the estate, is based on a valuable consideration, and is valid and enforceable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. § 8.*]

2. COURTS (§ 262*)—FEDERAL COURTS—EQUITY JURISDICTION—ESTABLISHING INTEREST IN ESTATE OF DECEDENT.

Where, under the law of a state, a probate court having charge of the settlement of the estate of a decedent is without power to recognize and enforce an assignment of the share of a distributee, the validity of which is denied, a federal court of equity, where there is the requisite diversity of citizenship, has jurisdiction to determine the validity of the assignment, and make such decree as will establish the rights of the assignee thereunder, which may be recognized and enforced by the probate court in the distribution of the estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 614, 615; Dec. Dig. § 262.*]

In Equity. Suit by Milton Gatzert against Michael L. Lucey, as executor of the will of John Carney, deceased, James Carney, and Elizabeth Carney Pratt, commonly known as Lizzie Pratt. Decree for complainant.

This is a suit in equity to have the rights and interests of Milton Gatzert in the estate of John Carney, deceased, determined and established, and so declared as to be enforced by the probate court of Cook county, state of Illinois, on the distribution of the balance of such estate.

Max Rothman, of New York City, and H. D. Bailey, of Troy, N. Y., for complainant.

James Farrell, of Troy, N. Y., for defendants.

RAY, District Judge. In March, 1910, and prior thereto, there was a proceeding pending and being heard in the probate court of the county of Cook, state of Illinois, in reference to and in the matter of the estate of Anna F. Baker, deceased, and in which proceeding James Carney, John Carney and Elizabeth Carney Pratt, who sometimes used the name Lizzie Pratt, were seeking to establish themselves and obtain recognition as next of kin and heirs at law of the said Anna F. Baker, deceased. This attempt on their part had been and was being opposed by William B. Remmey and others associated with him. March 12, 1910, an agreement for the distribution of such controversy and settlement thereof was entered into, and John Carney, James Carney, and Elizabeth Carney Pratt signed, executed, and delivered an agreement in writing, of which the following is a copy, viz.:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Whereas, in the matter of the estate of Anna F. Baker, deceased, now pending in the probate court of Cook county, Illinois, the legitimacy of the undersigned as lawful heirs of William D. Remmey, a brother of the half-blood of said Anna F. Baker, deceased, is now being contested by William E. Remmey, William T. Remmey, Ida Remmey Lawton, and James A. Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased, on the ground that said William D. Remmey left no lawful heirs, and that the undersigned are not the lawful heirs of said William D. Remmey; and

"Whereas, the said last-mentioned parties and the undersigned have consented and agreed to settle said controversy out of court, in the manner hereinafter set out:

"Now, therefore, this agreement witnesseth, the said William W. Remmey, William T. Remmey, Ida Remmey Lawton, and James A. Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased, do hereby consent that an order may be entered in the probate court of Cook county, Illinois, finding the undersigned to be lawful heirs of the said William D. Remmey, deceased, and do hereby further agree to prosecute no appeal from the said order or finding of said probate court of Cook county, Illinois; and, in consideration of the aforesaid, we, the undersigned, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over, unto the said William W. Remmey, William T. Remmey, Ida Remmey Lawton, and James A. Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased, the sum of seventy-seven hundred dollars (\$7,700) out of our shares as heirs at law of Anna F. Baker, deceased, the said sum to be paid in cash to Albert Martin, as attorney for the said William W. Remmey, William T. Remmey, Ida Remmey Lawton, and James A. Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased, and to be due and payable out of the first distribution made to us as heirs at law of Anna F. Baker, deceased. This assignment shall be of no effect if any of the heirs herein appeal from the order adjudging the undersigned heirs of the estate of said Anna F. Baker, deceased.

"It is further understood and agreed that this agreement and assignment shall become effective and binding upon the entry of the first order of distribution in said estate of Anna F. Baker, deceased, ordering and awarding a distribution to the undersigned, as heirs at law of Anna F. Baker, deceased.

"In witness whereof, the parties hereto have set their hands this 12th day of March, A. D. 1910.

John Carney.

Lizzie Pratt.

James Carney.

"State of New York, County of Rensselaer, City of Troy—ss.:

"John Carney, Lizzie Pratt, and James Carney, being first duly sworn, depose and say that they have read the foregoing instrument, that they are acquainted with the contents thereof, that they have subscribed their names thereto, and that they have executed the within instrument on their own accord and with the full knowledge of the contents and meaning thereof.

John Carney.

Lizzie Pratt.

James Carney.

"Subscribed and sworn to before me this 12th day of March, A. D. 1910.

Harry E. Clinton, Com. of Deeds, Troy, N. Y.

"State of New York, County of Rensselaer, City of Troy—ss.:

"On this 12th day of March, 1910, before me, personally appeared John Carney, James Carney, and Lizzie Pratt, all to me personally known and known to me to be the same persons described in and who executed the within instrument, and they severally and duly acknowledged that they executed the same.

"Harry E. Clinton, Com. of Deeds, Troy, N. Y."

And as a part of such instrument, and connected with it, William W. Remmey, William T. Remmey, Ida Remmey Lawton, and James A.

Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased, other parties interested in said controversy, in writing ratified and approved and consented to the said agreement, and consented that the money mentioned and to be paid under and pursuant to such agreement when paid should be paid and distributed, etc., as set forth in the following ratification and agreement, viz.:

"We, the undersigned, William W. Remmey, William T. Remmey, Ida Remmey Lawton, and James A. Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased, do hereby ratify and approve, and herewith consent to the agreement hereinbefore and in the two preceding pages set forth, and hereby consent that said money, when received by Albert Martin, shall be distributed to us, less his fee, as follows:

"One seventh to William W. Remmey.

"One seventh to Ida Remmey Lawton.

"Two and five-tenths sevenths to William T. Remmey.

"Two and five-tenths sevenths to James A. Starkweather and Elizabeth Remmey Starkweather, executors of the estate of Martha P. R. Starkweather, deceased.

William W. Remmey.

"Ida Remmey Lawton.

"William T. Remmey.

"Elizabeth Remmey Starkweather.

"James A. Starkweather."

Indorsed:

"John Carney, James Carney, and Lizzie Pratt, with William W. Remmey and Others. Assignment and Agreement. Dated March 12th, 1910."

The decree, etc., referred to was entered, and no appeal was taken, and in or about the month of May, 1910, the probate court of said Cook county, entered a decree in distribution, ordering and awarding a distribution to said John Carney, Lizzie Pratt, and James Carney, as heirs at law of Anna F. Baker, deceased, of a sum of money in distribution, to wit, more than \$7,700, the sum to be paid by said agreement. Instead of complying with the said agreement when the sum awarded was paid to them, the said John Carney, Lizzie Pratt, and James Carney only paid over to the parties entitled thereto the sum of \$4,000, and which sum was paid on or about the 20th day of May, 1910. The sum awarded and paid to said distributees was more than enough to pay the sum agreed to be paid out of the first distribution or dividend, and since that time there has been paid to apply on the sum agreed to be paid under said agreement certain other sums, reducing the amount still due and unpaid under such agreement to the sum of \$1,850 of the principal and interest from May 20, 1910, when same should have been paid according to the terms of such agreement.

Since that time, or the making of said agreement, all the title, right, and interest of the said parties for whose benefit said agreement was made have been duly sold, assigned, and transferred to the complainant herein, Milton Gatzert, with the balance of the moneys so due, and their right, title, and interest under said agreement, and the said complainant is now the owner thereof and entitled to such balance, with interest as aforesaid. There is a sum of money in said estate of said Anna F. Baker, deceased, not yet distributed, the exact amount of which has not yet been determined, and distributable, when distri-

bution is made, to the estate of John Carney, now deceased, and to said James Carney and Elizabeth Carney Pratt, or Lizzie Pratt. Although demand has been made, the said balance due under said agreement has not been paid, and the said defendants have ignored and denied the right of the said Milton Gatzert or of his assignors under said agreement, but not questioning the validity of the assignment to the complainant; the denial going to the validity of the said agreement and the right of the said Milton Gatzert and of his assignors to receive the moneys directly or indirectly pursuant to such agreement.

[1] Under the laws of the state of Illinois, as under the laws of the state of New York as they existed at the time said agreement and distribution before referred to were made, the probate court of Cook county, state of Illinois, was and is without power to determine the controversy thus arising, and to enforce such agreement and assignment and protect the rights and interests of the complainant herein under such agreement and the assignment thereof, and in the sums of money to be paid in accordance with the provisions thereof, and it has become necessary to have the rights of the complainant in and to the estate of said Anna F. Baker adjudicated and determined, and his rights in the distribution of the remainder of the estate, when made, adjudicated and determined, to the end that, when such distribution is made, the rights of the complainant in said estate or the moneys to be distributed may be recognized and enforced by the probate court aforesaid. The facts are such that the complainant has no full, complete, and adequate remedy at law.

The consideration for the agreement was valid, and a valuable consideration, and the agreement itself was a valid agreement. The allegations of the answers, alleging invalidity, fraud, etc., have not been sustained by any evidence whatever. It will be noted that by the terms of the agreement John Carney, Lizzie Pratt, and James Carney sold, assigned, transferred, and set over unto the said William W. Remmey, William T. Remmey, Ida Remmey Lawton, and James R. Starkweather and Elizabeth Remmey Starkweather, as executors of Martha P. R. Starkweather, deceased, the sum of \$7,700 out of their shares as heirs at law of said Anna F. Baker, deceased, and provided that the said sum was to be paid to Albert Martin as attorney for them, and by express terms was to be and became due and payable out of the first distribution made to said John and James Carney and Lizzie Pratt. The defendants have ignored the rights of the complainant and his assignors, except to the extent above stated, and since such payments have absolutely and wholly ignored and denied the rights of the complainant, and, as stated, deny the validity of the agreement and assignment of such fund declared in such agreement.

[2] The real question is: Has the complainant any remedy in equity by and through which he can have his interest in this estate adjudicated, to the end that the probate court of Cook county, Ill., may recognize that right and decree payment to the complainant when the next distribution is made under such assignment and a decree to be made by this court of equity. The complainant, Milton Gatzert, is a citizen and a resident of the state of Illinois; but the defendants, who deny the

right of the complainant as above stated, are each and all citizens and residents of the Northern district of New York.

On the face of this agreement the said parties sold and assigned \$7,700 of their interest in said estate and in the sums to be distributed to them. It was agreed that it should be paid to the attorney of the assignors of the complainant out of the first dividend or distribution made. This was not done; but this court does not see that this breach of the agreement in any way impairs the right of the complainant, or that it in any way impaired the right of the complainant's assignors to an interest in this estate to the extent of that part of the \$7,700 remaining unpaid. Under the Probate Law of the state of New York, as well as the state of Illinois, the probate court is without power to recognize and enforce an assignment of a legacy or distributive share, when the validity of the assignment is denied; but a court of equity has power to try and determine the validity of the assignment, and make such decree as will protect and enforce such right.

In *Pulver v. Leonard* (C. C.) 176 Fed. 586, it was held that a person entitled to a distributive share of the estate of a deceased person may maintain a suit in a Circuit Court of the United States against the administrator concerning his right to such share. And in *Laws v. Fleming* (C. C.) 177 Fed. 450, it was held that a court of equity is not deprived of jurisdiction if the remedy at law is doubtful, difficult, and not adequate to the object to be attained, nor so complete as in equity, nor so efficient and practicable to the ends of justice and its prompt administration.

Here we have not only a direct, but an equitable, assignment of a part of the fund to be distributed and paid to the parties who executed the above agreement. This gives to the complainant here an interest in this estate, and the right, if the agreement be valid, to have paid to him the balance found due. The complainant is under no obligation to wait until the money is paid to those parties and then seek to recover in an action at law. The right, when duly established by a decree, may be recognized and enforced by the probate court of Cook county. *Byers v. McAuley*, 149 U. S. 608, 614, 615, 13 Sup. Ct. 906, 37 L. Ed. 867; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80. In the *Byers* Case, *supra*, it was held that a citizen of another state may proceed in the federal courts to establish a debt against an estate, but the debt thus established must take its place and share in the estate as administered by the probate court; it cannot be enforced by direct process against the estate itself; also:

"Therefore a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or against other persons liable therefor, or proceed in any way which does not disturb the actual possession of the property by the state court."

The same case holds that the federal court in equity cannot make any decree looking to the mere administration of the estate. This is, of course, true, as the property is in the possession of the probate court; but the right of the person to share in the estate may be established, and such decree, when made, will be recognized by the probate court. In the *Waterman* Case, *supra*, it was held:

"While federal courts cannot seize and control property which is in the possession of the state courts, and have no jurisdiction of a purely probate character, they can, as courts of chancery, exercise jurisdiction, where proper diversity of citizenship exists, in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them. Although complainant in this case asks in some of her prayers for relief which is beyond the jurisdiction of the court, as being of a purely probate character, if the allegations of the bill support them, the court may grant other prayers for relief which are within its jurisdiction, and, as a court of equity, shape its decree according to the equity of the case. Where the bill does not seek to set aside the probate of a will, or interfere with the possession of the probate court, the federal court of equity, in a case where diverse citizenship exists, may determine, as between the parties before the court, their interests in the estate, and such decree will be binding upon, and may be enforced against, the executor. It will be assumed that the state probate court will respect the decree of the federal court having jurisdiction settling the rights of parties in an estate, and the denial of effect of such a decree presents a claim of federal right which can be protected by this court."

There are several cases in the Supreme Court of the United States, cited in the *Waterman Case*, 215 U. S. 43, 30 Sup. Ct. 10, 54 L. Ed. 80, holding the same doctrine. In *Matter of Randall*, 152 N. Y. 508, 46 N. E. 945, it was held, reversing 80 Hun, 229, 29 N. Y. Supp. 1019:

"1. Surrogates—Jurisdiction.—The general powers of a court of equity do not belong to a Surrogate's Court. Code Civ. Pro. §§ 2472, 2481, 2743.

"2. Accounting—Disputed Assignment of Distributive Share.—When, upon an accounting in Surrogate's Court, the same distributive share is claimed by two persons, one by original title and the other by an assignment apparently valid, resort must be had to a court of equity to settle the dispute.

"3. Assignment of Distributive Share to Administrator—Surrogate without Power to Set Aside, on Accounting.—A Surrogate's Court has not power, upon the final settlement of the accounts of an administrator, to set aside or treat as invalid a written assignment, valid upon its face and made for a good consideration, whereby one of the next of kin has assigned to the administrator, as an individual, a distributive share in the estate; but the question of the validity of the assignment is for a court of equity."

As the defendants have denied the validity of the agreement which assigns an interest in the estate, and which agreement and all rights thereunder were assigned to the complainant, the probate court of Cook county, Ill., cannot decree payment to the complainant; but a court of equity, duly appealed to, can establish, and it is its duty to establish, the right of the complainant in the estate of Anna F. Baker, and, as was said by the Supreme Court of the United States, it is assumed that the probate court of Cook county, on the presentation of the decree of this court establishing such interest and right of the complainant, will recognize same and decree distribution accordingly. As was said in those cases, should a probate court, or should the probate court of Cook county, fail to respect and enforce such decree establishing the right of the complainant, it could be compelled so to do in an appropriate proceeding.

There will be a decree, therefore, in favor of the complainant and against the defendants, establishing the right of the complainant and his interest in the estate, and the validity of the agreement and the assignment to him, and, of course, fixing the amount due the complainant, with costs.

LIVELY v. PICTON et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1914.)

No. 2491.

1. COURTS (§ 514*)—CONFLICTING JURISDICTION—PRIORITY—APPOINTMENT OF RECEIVER.

The appointment of a receiver for a corporation by a state court, with authority to bring suit on a cause of action existing in favor of the corporation, if the court obtained jurisdiction, excludes the right of a receiver subsequently appointed by a court of another state to maintain a suit on the same cause of action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1434-1436; Dec. Dig. § 514.*]

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

2. JUDGMENT (§ 486*)—COLLATERAL ATTACK—GROUNDS—WANT OF JURISDICTION.

On a collateral attack upon the judgment of a court of competent jurisdiction, only jurisdictional defects can be considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 919, 920-923; Dec. Dig. § 486.*]

3. CORPORATIONS (§ 668*)—ACTIONS AGAINST FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Gen. Code Ohio, § 11290, which provides that, "when the defendant is a foreign corporation having a managing agent in this state, the service may be upon such agent," is permissive only, and does not render invalid a service upon the president of a foreign corporation, made under section 11288, which authorizes such service upon corporations generally, without distinction between domestic and foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

Service of process on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

4. APPEARANCE (§ 9*)—PROCEEDINGS CONSTITUTING—FILING GENERAL DEMURRER—"GENERAL APPEARANCE."

The filing by a corporation defendant of a general demurrer and motion to set aside an order appointing a receiver, unless limited, constitutes a "general appearance."

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

5. CORPORATIONS (§ 499*)—ACTIONS AGAINST AFTER DISSOLUTION—APPEARANCE.

Code W. Va. 1906, § 1058 (Code 1913, § 1269), which prohibits any person from exercising any powers under the authority of a corporation after the issuance of the Governor's proclamation declaring its delinquency in payment of its license tax, was not intended to interfere with the right to sue such a corporation, nor to prevent an appearance on its behalf in such a suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1912-1919, 2030; Dec. Dig. § 499.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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6. CORPORATIONS (§ 553*)—INSOLVENCY—CREDITORS' SUIT.

A suit against a corporation, by a creditor on behalf of himself and other creditors, alleging its insolvency and that its property was being unlawfully dissipated by its officers, and alleging the diversion of a trust fund, and praying for a receiver and distribution of its assets, may be maintained, although the debt to the plaintiff is not due.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

7. CORPORATIONS (§ 559*)—RECEIVERS—ORDER APPOINTING—COLLATERAL ATTACK.

An order of a court of equity appointing a receiver for a corporation is not subject to collateral attack because the court in the exercise of its discretion dispensed with the notice or affidavit on personal knowledge required by its rules.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252, 2259; Dec. Dig. § 559.*]

8. COURTS (§ 514*)—RECEIVERS APPOINTED IN DIFFERENT JURISDICTIONS.

Where a court of equity appointed a receiver for the property of a foreign corporation, which, so far as appears, had its only place of business and all of its tangible assets, and its officers and stockholders resided, within the jurisdiction of the court, authority given the receiver to bring suit on a cause of action arising there, for the alleged diversion of a trust fund, excludes the right of a receiver subsequently appointed in the state of incorporation to maintain a suit on the same cause of action, although his suit was first instituted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1434-1436; Dec. Dig. § 514.*]

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by Frank Lively, receiver, against John R. Picton, as an individual and as trustee, and the German National Bank. Decree for defendants, and complainant appeals. Affirmed.

Henry Bentley, of Cincinnati, Ohio, for appellant.

Constant Southworth and C. H. Stephens, both of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from a decree sustaining pleas to the bill of complaint and dismissing the bill. The material facts are these:

In the year 1901 the National Endowment Company was organized as a corporation under the laws of West Virginia, for the purpose of carrying on a co-operative investment business on the partial payment plan. On June 16, 1911, Margaret Frost began suit in a common pleas court of the state of Ohio, alleging that she was a creditor of the Endowment Company; that on or about July 1st then next she would be entitled to receive from defendant nearly \$400, by virtue of endowment certificates issued by it; that there was a large number of other such certificate holders, many at least of whose claims would mature on or about the same July 1st; that at least \$25,000 in cash would be required to satisfy the Endowment Company's ob-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ligations, in addition to the amount needed to pay the installment vouchers; that the company's liabilities were largely in excess of its assets; that its expenses and costs of administration absorbed its entire income; that its affairs had been improperly managed; that it had then on hand no funds, securities, or other available assets, and, as then managed, could have no funds to meet its obligations at maturity; that its directors had not held a meeting for more than seven years; that several of them had attempted to resign, but there had been no meeting to act upon the attempted resignations; that it was not meeting its monthly redemption payments; that its principal place of business was originally in Covington, Ky.; that attempt has been made to change such place of business to New York City, but that no business of any kind had ever been transacted there, nor did the Endowment Company have there at any time any assets of any kind; that all the business of every kind transacted by the company for the past nine years was done in the city of Cincinnati (which was within the jurisdiction of the court), where its office, all of its officers, and nearly all, if not all, of its assets were situated. The petition alleged an unlawful diversion and misapplication by the Endowment Company's officers of a trust fund of upwards of \$16,000, in which petitioner and other certificate holders were beneficially interested. It prayed judgment in petitioner's favor for upwards of \$400, with interest and costs, for a receivership of the property and assets of the Endowment Company within the jurisdiction of the court, including the trust fund mentioned, with power to recover the property and assets, including the trust fund, for an accounting of the assets and liabilities of the Endowment Company, and the distribution of its property among its certificate holders in accordance with their respective interests, as the same should be ascertained.

On the same date William J. McCauley was appointed receiver of the Endowment Company's assets of every kind in Ohio, including choses in action, with full powers of suit, recovery, and collection, the Endowment Company and its representatives being required to deliver to the receiver all the company's assets of every description within the state of Ohio, with injunction against interference with the receiver's official action. The receiver at once qualified, and on the next day took possession of all the Endowment Company's tangible property at its office in Cincinnati. This property consisted of the company's books of account, records, letters and papers, stock certificate book, and corporate seal, together with a deposit account of \$1.50 in the German National Bank. There have since come into the possession of the receiver further sums of money aggregating \$22. It is stipulated that, so far as the parties know, the foregoing are all the tangible assets of the Endowment Company. Its intangible assets, so far as ascertained by the receiver, consist of the disputed claims against the bank and Picton, its then president, on account of the alleged diversion of trust fund, and certain unpaid stock subscriptions amounting to \$5,500. On June 19th service of process was made on Picton, the Endowment Company's president. Although the Endowment Company had never obtained authority to do business in

Ohio, and its stockholders had passed a resolution changing its place of business from Covington, Ky., to New York City, it is stipulated that since the place of business at Covington was closed, in 1902, it had transacted business and had an office in Cincinnati, which was also Picton's office for the doing of his individual business, and from which office most of the Endowment Company's business was transacted, and at which its records were all kept. On June 26th proof of service on Picton was filed. Meanwhile, on June 24th, the Endowment Company demurred to the bill, and moved to set aside the receivership. On September 9th the demurrer was overruled and the motion denied, and the Endowment Company later answered. On November 17th the receiver was granted leave to sue the bank and Picton on the \$16,000 demand, as well as six other parties to recover unpaid subscriptions; and thereupon suits were begun against the bank and Picton and against one of the subscribers mentioned.

It is alleged in the bill in the court below, and alleged or admitted in the pleas thereto, that on August 4, 1911, and thus 1 month and 18 days after the appointment of receiver by the Ohio common pleas court, appellant was, by a state court of West Virginia, appointed receiver of the National Endowment Company, and the bill alleges that appellant was by said court directed to bring suit in equity in the court below, against the German National Bank and Picton, individually and as trustee, and such other persons as might in the opinion of the receiver be proper parties to such action. This suit was accordingly begun August 12, 1911, for the recovery of the same \$16,000 trust fund involved in the proceedings in the state court. Both defendants pleaded the state court receivership and the proceedings thereunder in bar of the present action. Upon hearing had on the pleas and replications thereto, the pleas were adjudged to be true in fact and sufficient in law and equity; and, complainant not desiring to plead further, the bill of complaint was dismissed, with costs.

[1] The ultimate question is simply: Which of these two receivers is entitled, as representing the Endowment Company, to maintain suit upon the alleged cause of action against the bank and Picton? The two pending suits relate to precisely the same cause of action. They cannot properly coexist. The authority of one receiver excludes that of the other. A question of conflict of jurisdiction between the West Virginia court and the Ohio common pleas court is presented. Action by the Ohio state court in appointing its receiver preceded similar action by the West Virginia court, on which the action in the court below is based; and if by its receivership the common pleas court obtained jurisdiction and control of the cause of action in question, and has not lost control by subsequent proceedings, the property right represented thereby was completely withdrawn from the jurisdiction of the West Virginia state court and the court below, and vested in the Ohio Common Pleas Court. *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, and cases there cited; *Palmer v. Texas*, 212 U. S. 118, 125, 29 Sup. Ct. 230, 53 L. Ed. 435; *Porter v. Sabin*, 149 U. S. 473, 480, 13 Sup. Ct. 1008, 37 L. Ed. 815, and cases there cited;

Phelps v. Mutual Reserve, etc., Ass'n (C. C. A. 6th Cir.) 112 Fed. 453, 464, 50 C. C. A. 339, 61 L. R. A. 717, and following; High on Receivers (4th Ed.) § 47a; McKay v. Van Kleeck, 133 Mich. 27, 33, 94 N. W. 367.

We say this because the record does not justify a finding that the West Virginia court had, on or before June 16, 1911, by virtue of the proceedings under which appellant was appointed receiver, obtained jurisdiction over either the person of the Endowment Company or the subject-matter of its right of action, against the bank and Picton, unless an admission of such fact is contained in the allegation in Mrs. Frost's bill in the Ohio common pleas court that:

"Through the proper legal sources, the officials of the state of West Virginia have begun proceedings to forfeit its charter for noncompliance to the laws of said state, in which proceedings a receiver is prayed for, in addition to the forfeiture of its franchise; said authorities claiming said defendant has not paid its franchise taxes for three years last past. That several of the stockholders are threatening suit against defendant."

But this allegation was apparently inserted to show the desperate condition of the Endowment Company, and we think falls short of an admission that a court of West Virginia had acquired prior jurisdiction to appoint a receiver over the company's person or the asset in question. Under the statutes of that state, the company was not required to have its principal place of business, or even to have any property or to do any business, therein. Code 1906, §§ 2270, 2295, 2312 (Code 1913, §§ 2874, 2899, 2916). Its principal place of business not being within the state, although it was a domestic as distinguished from a foreign corporation, it was classified by the statute as nonresident. Section 1046 (section 1257). The statute provided for suit in equity by the Attorney General for the recovery of annual license taxes for which the Governor's proclamation might declare a corporation delinquent; and upon entry of decree therefor, if the same is not immediately paid, for decree forfeiting the corporate charter and franchises, the amount of the judgment or decree therefor to be collected by certain officers, "in the same manner that other claims due the state are collected," with power in the court to make in such suit or proceeding "such orders and decrees as he shall deem necessary and proper for a court of equity," including power to "appoint a receiver for any such corporation and order its assets marshaled and distributed among its creditors." Section 1058 (section 1269).

But the statute made no provision even for obtaining judgment for the license taxes, or for forfeiture of charter, receivership, or other remedy (apparently ancillary or supplemental to the recovery of judgment for taxes), except after service of process or notice, either on some officer, director, agent, or stockholder in the state, or on an attorney of record provided to be appointed under section 2313 (section 2917), or by certain substituted service by mail or publication. Section 1059 (section 1270). Nor did the statute attempt to confer upon its courts exclusive jurisdiction over such receivership and distribution. The allegation in question is not an admission that such service, actual or constructive, was had or even attempted, or even

that receivership was prayed over assets such as the right of action here in question, or that the company had any property in the state subject to receivership and distribution. There is no presumption that a court of a foreign state has obtained by the mere filing of a bill jurisdiction over either the person or property of a nonresident defendant, where neither such person nor property is shown to be within the territorial jurisdiction of the court; and there is even now no competent evidence that such jurisdiction ever in fact attached through service of process or notice, or otherwise.

We need not consider what presumption of jurisdiction would arise, had the defendant been a resident corporation, or had its person or property, or both, been shown to be within the territorial jurisdiction of the court, or under a different state of the law as to remedy. In reaching the conclusion that jurisdiction in the West Virginia court has not been shown, we have not overlooked the fact that in the answer of one of the parties, other than the bank and Picton, to the suit of Receiver McCauley on an alleged stock subscription, the jurisdiction of the West Virginia court over the company's person and property is alleged, and the date of the suit given as February, 1909. But it need scarcely be said that this is not competent proof of the fact; and as we are not advised that the Endowment Company, in its defense to the Ohio receivership, set up prior jurisdiction in the West Virginia court (the record not showing the contents or nature of the demurrer or answers, or the grounds of motion to set aside the receivership), we are justified in disregarding the question of prior jurisdiction in that court.

[2] Turning, then, to the receivership proceedings in the Ohio court: The initial question thus is whether the Ohio court had jurisdiction to appoint a receiver; for as the order of that court is not directly, but only collaterally, attacked, the question of jurisdiction can alone be considered. That the order may have been erroneous, inequitable, or ill-advised would not be enough to invalidate it here. *Barbour v. Bank*, 45 Ohio St. 133, 140, 141, 12 N. E. 5. Upon the general proposition that under collateral attack upon a judgment of a court of competent jurisdiction, only jurisdictional defects can be considered, see *Butterfield v. Miller* (C. C. A. 6th Cir.) 195 Fed. 200, and cases cited at page 203, 115 C. C. A. 152.

[3] Appellant challenges the jurisdiction of the common pleas court appointing the receiver, both as respects the person of the Endowment Company and the subject-matter of the suit. It is urged that under the Ohio statute personal service must be made upon the managing agent of a foreign corporation, and that a return showing service merely upon the president is insufficient to confer jurisdiction. We think this objection not good. True, Gen. Code, § 11290, provides that:

"When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

But we think this permissive mode of service upon a foreign corporation was not intended to be exclusive of the authority of section 11288, which provides, without discrimination between domestic and

foreign corporations, that "a summons against a corporation may be served upon its president. * * *" However, the Endowment Company's by-laws expressly give the president "general management of the business of the company." The service would thus seem good, even under section 11290. *American Express Co. v. Johnson*, 17 Ohio St. 641; *Toledo Computing Scale Co. v. Computing Scale Co.* (C. C. A. 6th Cir.) 142 Fed. 919, 922, 74 C. C. A. 89.

[4] Moreover, by section 11287 of the General Code of Ohio "the voluntary appearance of a defendant is equivalent to service"; and the action of the Endowment Company of June 24th (and previous to the appointment of receiver by the West Virginia court) in demurring to plaintiff's petition, and moving to set aside the entry appointing receiver, without (so far as shown by the record) limiting its appearance to the sole purpose of objecting to the jurisdiction of the court over its person, was a voluntary appearance within the section referred to. *Handy v. Insurance Co.*, 37 Ohio St. 366; *Elliott v. Lawhead*, 43 Ohio St. 171, 172, 1 N. E. 577.

[5] It is objected, however, that, as the Endowment Company's corporate existence had been dissolved, no attorney could lawfully appear for it, because of the general prohibition in section 1058 of the Revised Statutes of West Virginia against the exercise by any person "of any powers under the authority of any such corporation after issuing of the Governor's proclamation" of delinquency in payment of license tax. But it seems clear that this statute was not intended to interfere with the right to sue an expired or dissolved corporation, which was expressly reserved by section 2287 of the Revised Statutes, nor to prevent appearance on its behalf in such suit. *Lumber Co. v. Coal Co.*, 66 W. Va. 696, 703, 66 S. E. 1073, 26 L. R. A. (N. S.) 1101; *White Mountain Paper Co. v. Morse Co.* (C. C. A. 1st Cir.) 127 Fed. 643, 645, 62 C. C. A. 369. Indeed, it does not affirmatively appear that the company was actually dissolved prior to the appearance in question, which antedates the appointment of receiver by the West Virginia court.

[6] In support of the objection that the common pleas court had no jurisdiction over the subject-matter of the suit in which the receiver was appointed, it is urged that the suit, so far as it sought recovery of money judgment in Mrs. Frost's favor, was prematurely brought, because her demand was not yet due, and that so much of the cause of action as related to the appointment of receiver was merely a prayer therefor, without any action to which the appointment is ancillary. We are not impressed with these propositions. The petition must be considered as a whole. So considered, the proceeding was not a mere suit at law by a creditor to collect a debt, nor was it merely an application for a naked receivership; it was essentially an equitable proceeding for the combined purpose of impounding the corporate assets within the jurisdiction of the court and applying those assets, as a trust fund, to the payment of obligations to petitioner, as well as to others similarly situated. If the Endowment Company was in the insolvent and moribund condition alleged in the petition, the plaintiff therein was justified in beginning the suit without waiting for

the maturing of her debt. *Christian v. Mich. Debenture Co.*, 134 Mich. 171, 177, 96 N. W. 22.

It is further urged that, regardless of the nonmaturity of plaintiff's claim, she had no right, as a debenture holder, to have the affairs of the Endowment Company wound up and to interfere with the internal management of a foreign corporation. It is enough to say of this objection that Mrs. Frost's suit was not instituted for the purpose of forfeiting the corporate franchise or of interfering with the internal management of an active corporation. According to the allegations of her petition, the corporation had, to all intents and purposes, ceased to do business; and the court, under its general control over trusts, had jurisdiction to grant relief against the corporation upon the same terms as against an individual under similar circumstances. *Stamm v. Northwestern Mutual Benefit Ass'n*, 65 Mich. 317, 329, 32 N. W. 710. The petition does not, in our opinion, show that plaintiff is in equal fault with defendant as respects the contract and dealings which form the basis of her suit.

[7] The objection is also made that the common pleas court violated its local rules, which are said to require notice of application for receivership, unless upon the filing of affidavit. The petition alleged that:

"If required to give notice herein, defendant will defeat her action by further dissipating its assets and trust funds," etc.

The order appointing the receiver recites a finding that:

"It would be detrimental to the interests of said creditor and certificate holders to require notice."

If, under the circumstances stated, the court disregarded its local rule by dispensing with affidavit, from the fact, as alleged, that the verification of the petition was only on information and belief (as is permitted under sections 11351 and 11354 of the General Code of Ohio), jurisdiction to appoint the receiver was not thereby lost. The dispensing with notice or affidavit on personal knowledge was matter of judicial discretion, an abuse of which would be reviewable directly, but not collaterally. *Taylor v. Easton* (C. C. A. 8th Cir.) 180 Fed. 363, 367, 103 C. C. A. 509.

[8] It is said, however, that the order appointing the receiver did not ipso facto put the receiver into possession of the right of action on the part of the Endowment Company against the bank and Picton, and, further, that suit was not begun upon that claim until after appellant had commenced suit on the same cause of action, and against the same parties, in the court below. True, there was and could be no physical possession by the receiver of the intangible right of action mentioned, and a mere constructive possession by the common pleas court of property, tangible or intangible, might not exclude an actual taking of possession by another court; but this case does not involve that proposition. Neither the West Virginia court nor the court below has had possession of any of the Endowment Company's assets, except as the suit against the bank and Picton may involve a constructive possession of that right of action. The company's business seems

to have been largely at least conducted in Ohio. All its officers, directors and stockholders lived in Cincinnati, except its president, who lived across the river at Covington, and who had an office in Cincinnati; and it is admitted that the company had more than 100 resident certificate holders in Ohio. It does not affirmatively appear that it had an actual place of business elsewhere than in that state; complainant contenting himself upon the hearing below with a bare general denial of defendant's assertion that the company "had no other office and transacted no business elsewhere than at said company's office at Cincinnati, Ohio."

In our opinion, the assumption by the common pleas court of jurisdictional authority over all the assets, tangible and intangible, of the Endowment Company within the jurisdiction of the court, coupled with an actual possession, through its receiver, of all the tangible assets within such jurisdiction, and, so far as appears, all such assets anywhere existing, carried with it the right to control the intangible right of action of the Endowment Company, maintaining its office within the jurisdiction of the court, against parties, one of whom resided within such jurisdiction (the other having his place of business therein), and upon a cause of action arising within such jurisdiction, for the alleged diversion of the trust fund referred to in the petition for receivership, invoked for its protection. See *Porter v. Sabin*, supra, 149 U. S. at page 480, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Palmer v. Texas*, supra, 212 U. S. at page 129, 29 Sup. Ct. 230, 53 L. Ed. 435, and cases there cited. If this is so, surely jurisdiction once so obtained was not lost because, through a race of diligence, the receiver appointed by the West Virginia court was able to bring suit in the court below before the receiver appointed by the common pleas court could, in view of the delays occasioned by the Endowment Company's opposition to the maintenance of the receivership in that court, bring his action in the state court.

Other objections are made to the jurisdiction in the common pleas court to appoint a receiver. We have considered them all, and are satisfied they are without merit. These views make it unnecessary to consider whether appellant is, as he claims, the statutory receiver of, and successor to, the Endowment Company (rather than a mere chancery receiver), and so entitled to sue in the court below; for if appellant has, since the acquirement of jurisdiction by the common pleas court over the Endowment Company, succeeded to the rights of that company, he is, with the corporation he so represents, equally affected by such jurisdiction.

In our opinion, the court below rightly sustained the pleas of the appellees, and its decree is accordingly affirmed, with costs.

PETERS v. McLAREN et al.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1914.)

No. 2636.

1. TRUSTS (§ 41*)—SUIT TO ESTABLISH—BURDEN AND MEASURE OF PROOF.

The burden rests on one asserting that a trust was created by a deed, either express or implied, to prove its existence by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. § 41.*]

2. DEEDS (§ 25*)—QUITCLAIM—EFFECT AS CONVEYANCE.

A quitclaim deed is as effective to convey whatever title or interest the grantor had in the property as a deed in the form of a grant, bargain, and sale.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 49; Dec. Dig. § 25.*]

3. DEEDS (§ 95*)—CONSTRUCTION—EFFECT OF PREAMBLE.

If the dispositive or operative portions of a deed are ambiguous and difficult of interpretation, resort may be had to a preamble to show the intention of the grantor, but not to create a doubt or uncertainty which otherwise does not exist, for if the deed exclusive of the preamble, is clear and unambiguous, the preamble does not control.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238, 241-254; Dec. Dig. § 95.*]

4. EVIDENCE (§ 419*)—EXTRINSIC EVIDENCE.

The preamble to a deed is explanatory of the reasons for the making of the deed, but not necessarily of all of them; and if there were reasons and considerations for its execution other than those expressed in the preamble, the party whose interest requires proof of the same may, under proper circumstances, show what they are.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

5. DEEDS (§ 93*)—CONSTRUCTION.

A court of equity looks at the real object of a deed and the intention of the parties, and will compel the fulfillment of both, and, if possible, their intention will be gathered from the whole instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

6. EVIDENCE (§ 448*)—EXTRINSIC EVIDENCE.

If the intention of the parties to a deed is plain, parol evidence is not admissible to prove an intention different from the terms of the deed; but, if there is an element of uncertainty, parol evidence, the admissions of the parties, and other extraneous circumstances may be proved to ascertain its true meaning.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.*]

7. DEEDS (§ 93*)—CONSTRUCTION—RULES GOVERNING—INTENTION OF PARTIES.

When the intention is manifest, it will control in the construction of a deed, without regard to technical rules of construction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

8. PARTNERSHIP (§ 183*)—TRUSTS (§ 25*)—INSOLVENCY—CONVEYANCE OF INTEREST BY ONE PARTNER TO ANOTHER—CONSTRUCTION OF DEED.

An insolvent partnership made an assignment for the benefit of its creditors. One of the partners was in poor health, unable to attend to business, and died soon afterwards. He had a personal estate, large life insurance, the greater part of which under the statute of the state could be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

reached by creditors, and the partnership had also given to his wife a preferential mortgage of doubtful validity. He desired to protect himself and his estate in such matters as far as possible, and it was apparent that the property of the partnership, if sold, would pay but a small percentage of the indebtedness. In such circumstances he executed a quit-claim deed to all of the property, assets, and good will of the firm to his partner, conditioned that the latter should obtain the consent of not less than 87 per cent. of the creditors to a composition, and carry out such composition; otherwise, the deed to be void at the grantor's election. The partner effected and carried out the composition and the deed was recorded. *Held*, that its effect was to end the partnership and to convey absolutely and without any resulting trust all of the grantor's interest in the partnership property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 312, 319-336, 348; Dec. Dig. § 183; * Trusts, Cent. Dig. §§ 34-37; Dec. Dig. § 25.*]

9. EVIDENCE (§ 419*)—PROOF OF CONSIDERATION.

The real consideration for a deed, although different from the nominal consideration expressed, may be shown, if it is not inconsistent with that named.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by Caroline L. Peters, as administratrix de bonis non with the will annexed of the estate of George M. Peters, deceased, against Daniel McLaren, receiver of the Columbus Buggy Company, Valentine & Co., and the Columbus Buggy Company. Decree for defendants, and complainant appeals. Affirmed.

D. F. Pugh and L. R. Pugh, both of Columbus, Ohio, for appellant.
J. E. Todd and A. T. Seymour, both of Columbus, Ohio, for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and TUTTLE, District Judge.

PER CURIAM. At the suit of Valentine & Co. against the Columbus Buggy Company, Daniel McLaren was appointed receiver of the Columbus Buggy Company, and appellant by intervention sought to recover the property in the hands of the receiver, claiming that such property was a trust fund belonging to appellant because of a partnership contract between appellant's testator and one Clinton D. Firestone, and because of the particular manner in which certain of the partnership property passed to the Columbus Buggy Company, a corporation in which Firestone was the controlling stockholder. Two grounds of defense were urged: (1) That the trust claimed by appellant did not exist; and (2) that in any event appellant through her own conduct was estopped from making such claim. In the District Court Judge Sater sustained the appellees on both defenses. We approve of those portions of Judge Sater's opinion which are printed below.

The decree is affirmed, with costs.

SATER, District Judge. On June 29, 1882, George M. Peters (hereinafter designated as Peters), Oscar G. Peters, and Clinton D. Firestone (hereinafter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

called Firestone), entered into articles of copartnership to conduct the business of manufacturing and selling carriages, buggies, and dashes under the name of the Columbus Buggy Company and Peters Dash Company of Columbus, Ohio. * * * On November 9, 1894, Oscar G. Peters died. His interest was withdrawn from the business, and his estate settled but not wholly released from the partnership debts. The articles of copartnership, as originally drawn, remained in force excepting in so far as affected by his death. The extinguishment of his interest left Firestone and Peters as equal partners in and owners of the business. On August 1, 1896, * * * the partnership made an assignment under the (Ohio) state statute in trust for the benefit of its creditors. * * * Its liabilities at that time were about \$1,250,000. Prior to the execution and filing of the deed of assignment the partnership * * * gave certain preferences, one of which was, at Peters' instance, in the form of a chattel mortgage for thirty or more thousand dollars, to Mrs. Peters on property in Kansas City, Mo. * * * Peters had an individual estate outside of his partnership belongings. He also had life insurance of some importance, the amount of which was from \$60,000 to \$75,000. A composition with creditors was suggested, at their first meeting, which was held * * * in October or November, 1896. Peters had become seriously ill, and on his account the meeting had been deferred. He was, however, present, although a very sick man. A creditors' committee was appointed to work out a composition. A preliminary meeting of the committee was held, at which Peters and all others present were of the opinion that if the partnership estate was converted into money it would yield but a small dividend to the creditors, that some arrangement ought to be made to continue the business, and that Firestone should get his resources together and make some sort of a proposition with that end in view. Peters' health was such that he was at the office and around but a few days only after such meeting. Firestone and the creditors' committee agreed upon a composition proposal, after which he devoted himself almost exclusively to its accomplishment until it was finally wrought out. Both Peters and the creditors looked to Firestone to bring about that result. Peters desired to protect his individual estate, his life insurance, and his wife's preferential mortgage. * * * To effectuate the settlement and accomplish the desire of creditors and of both Peters and Firestone, Peters on December 16, 1896, executed and delivered to Firestone the quitclaim deed whose import is the subject of this controversy. As it embodied agreements as to certain matters to be done by each of the parties, it was executed and acknowledged by both grantor and grantee. The preparation and consideration of the deed extended through some weeks. * * * The deed was executed at the Peters residence, he then being confined to his bed. * * * The deed was fully read to Peters and its purport explained to him, although he had prior knowledge of it and its contents, and on two or three occasions he interrupted the reading to ask an explanation as to the legal effect of certain provisions, his counsel responding to his inquiries. * * *

The following is a copy of the instrument in question omitting the acknowledgment:

"Whereas, on the first day of August, 1896, George M. Peters and Clinton D. Firestone, partners as the Columbus Buggy Company and Peters Dash Company, made, executed, and delivered a certain deed of assignment, and thereby transferred and conveyed to William A. Miles and John M. Thomas, their successors and assigns forever, in trust for the benefit of all creditors, all the real and personal property and assets of the said partnership, wherever the same might be situated or located, which said deed of assignment was duly filed on said day in the probate court of Franklin county, Ohio, as will more fully appear, reference being had to said deed and the records of said court, and which said assignment so made is now pending in said probate court of Franklin county, Ohio; and

"Whereas, it is desirable that a proposition to compromise, settle, and liquidate the debts and obligations of said partnership and the claims and demands against said assigned estate should be made by one or both of said partners; and,

"Whereas, for the purpose of enabling Clinton D. Firestone to make an offer of compromise, liquidation, and settlement to the creditors of said part-

nership, the said George M. Peters is ready and willing to relinquish all his right, title, estate, and interest in said partnership property and assets and in the business of said partnership, including the good will thereof and all the estate, right, title, and interest reserved to him in said deed of assignment:

"Now, these presents witnesseth: That I, George M. Peters, of Columbus, Ohio, in consideration of one dollar (\$1.00) to me paid by Clinton D. Firestone, the receipt of which is hereby acknowledged, and in consideration of the covenants, agreements, and conditions hereinafter contained and set forth to be kept, observed, and performed by the said Clinton D. Firestone, have covenanted and agreed to, and do hereby, remise, release, relinquish, and forever quitclaim to the said Clinton D. Firestone, his heirs and assigns forever, all my right, title, estate, interest, claim, and demand of, in, and to all and singular the lands, tenements, appurtenances, fixtures, machinery, goods, chattels stock, wares, merchandise, patents, tools, appliances, apparatus, patterns, franchises, leases, promissory notes, credits, choses in action, evidences of debt, claims, and demands, and all the real and personal property and assets of said partnership, including the right to use said partnership name, and the good will of said business, of whatsoever kind or description, and where-soever the same may be situated or located. To have and to hold unto the said Clinton D. Firestone, his heirs and assigns forever, each and every item, piece, and parcel of said above-mentioned property, with all the privileges and appurtenances thereof or thereunto belonging, provided, nevertheless, and these presents are upon this express condition: That the said C. D. Firestone has agreed and does hereby agree to use his best efforts and to endeavor to obtain the assent and acceptance of the offer of compromise, settlement, and liquidation so to be made by him, by each and all of the creditors of the said partnership. Now, if the said Clinton D. Firestone shall not obtain the assent or acceptance of said offer of compromise and settlement by eighty-seven (87%) per cent. of all the creditors of said partnership in amount, then this release, transfer, quitclaim, and instrument shall be void, if the said George M. Peters, or his executors or administrators so elect; otherwise, to be and remain in full force and virtue in law forever.

"It is expressly understood and agreed by and between the said George M. Peters and Clinton D. Firestone that each of them shall be and remain liable to the other for his proportionate part of any debt now existing against them as partners, or any judgment that may be rendered against either by any court of competent jurisdiction upon any debt now existing against them as partners, and shall be liable each to the other for their proportionate part of any attorney's fees or court costs incurred in defending any suit that may be brought or any debt or obligation now existing against them as partners. And on any such debt or claim it is mutually agreed that neither shall have the right to confess judgment without the consent of the other, and each of them hereby agrees to use all reasonable efforts to notify the other of any and all suits that may be brought and to defend the same so far as a legal defense thereto may exist.

"And the said C. D. Firestone does further stipulate and agree for himself and for the officers and employes of any new firm or company, into whose possession the books and papers heretofore used by the said partnership may go, so far as his control and influence can require, that the said George M. Peters, his executors or administrators, shall have his and their earnest co-operation and assistance in any litigation against the said George M. Peters or his estate arising out of said partnership, and it is expressly understood that this provision shall be held to include reasonable time, help, and assistance which the said George M. Peters or his attorneys, executors, and administrators may desire or need in the production, inspection, or explanation of the books and papers of said partnership.

"In witness whereof, the said George M. Peters and Clinton D. Firestone have hereunto set their hands this sixteenth day of December, 1896.

"George M. Peters,
"Clinton D. Firestone."

After the instrument was executed it was duly filed in the recorder's office of Franklin county, Ohio, on July 17, 1897. Peters died on January

17, 1897. * * * Two administrators with the will annexed were appointed, Mrs. Peters being named in the will as the sole beneficiary. * * * The composition which Firestone offered to the creditors was 25 per cent. in cash or 35 per cent. in notes. Some were unwilling to accept his offer. It was found that there was some indebtedness on which the estate of Oscar G. Peters was still liable. * * * To bring about the composition the Oscar G. Peters estate deposited * * * about \$10,000 and Mrs. Peters about \$27,000, to be applied on certain creditors' claims to get them out of the way, so that they would not fall back on the two Peters estates. The two Kansas City banks with whom the assignors had transacted business were embittered by the preference given to Mrs. Peters, and sharply assailed her mortgage as a fraudulent conveyance and without consideration. Her attorneys concluded, or at least feared, that there was a failure of consideration as to some of the notes secured by the mortgage, and that it was tainted with fraud and might fall as an entirety. Negotiations resulted, the outcome of which was that the banks agreed to accept 35 per cent. offered by Firestone, but exacted that Mrs. Peters should pay an additional 35 per cent., and to this she assented. * * * The composition was effected, and neither of the Peters estates was ever called upon to pay any of the partnership debts. After it was consummated, for the purpose of lifting the assignment, an order was prepared and filed on July 17, 1897, in the probate court in the matter of the partnership assignment, which order was approved by the assignees, the administrators of the Peters estate, * * * Firestone, (Chas. E.) Morris, and the State Savings Bank & Trust Company. The order recites, *inter alia*, the making and filing for record of the deed from Peters to Firestone, the compliance of Firestone with the conditions therein made, and that he "has settled with the requisite number of creditors to make said deed absolute; that said deed has become absolute, and the estate conveyed thereby indefeasible;" the appointment of the administrators; the ownership by the State Savings Bank & Trust Company or by Chas. E. Morris of all the claims due and owing by the partnership which had been presented to the assignees for allowance, excepting such as were secured by mortgage or otherwise; and the desire of all parties appearing and of all creditors secured and preferred that the assignment should be discontinued and vacated and the property and assets of the assignor be transferred, conveyed, and delivered to Firestone. It was therefore ordered that the assignees execute and deliver to Firestone a deed or conveyance for all of the real estate conveyed to them, and also execute and deliver to him an assignment, transfer, and conveyance of all of the other property of the assigned estate in their possession and that they make due return of their proceeding. Thereupon the assignees complied with the order so made, and on July 20, 1897, their action in so doing was confirmed by the court. * * *

On July 19, 1898, the administrators filed their first and final account. On September 13th following, it was confirmed, the estate settled, and they and their bondsmen discharged. After the conveyance was made to Firestone by the assignee, he took possession of all the property and effects of the Columbus Buggy Company and Peters Dash Company and commenced to operate the business. He soon thereafter sold the Dash business. In the year 1900 the Columbus Buggy Company of New Jersey was duly organized and incorporated under the laws of that state. That corporation purchased from Firestone, and he conveyed to it by deed of general warranty, for the named consideration of \$377,475, all of the real estate owned by him which was used and had been used by him and the partnership in the manufacturing business, subject, however, to a mortgage indebtedness of \$126,000, with accrued interest and the unpaid taxes and assessments, all of which liens the corporation assumed and agreed to pay. The deed recites that Peters conveyed all of his interest in the partnership property to Firestone by deed dated December 16, 1896. Firestone also executed and delivered to the corporation a bill of sale for all of the property other than the real estate which was used in connection with and arose out of the business which he was then and had been conducting. The consideration paid for all of the property transferred by him to the corporation was \$1, 1,000 shares of 7 per cent. preferred stock, and 6,990 shares of common stock, all of the face value of \$100 per share.

Ten additional shares were outstanding, 8 of which were held by Charles E. Firestone. King and Parker each held one share, Parker's subsequently being transferred to Firestone. On October 18, 1902, the corporation conveyed a part of the North High real estate for the sum of \$125,000, subject to a \$40,000 mortgage, taxes, and assessments, to the Mercantile Building Company.

In January, 1904, the Columbus Buggy Company of Ohio was duly organized and incorporated, and purchased all of the property of the New Jersey corporation of whatever kind, including the Dublin avenue real estate, on which the factory buildings are located, and which was purchased in 1898 or 1899. The property was taken subject to the outstanding mortgages and other liens; the purchaser also assuming and agreeing to pay all of the indebtedness of the New Jersey corporation. The consideration named in the deed for the real estate was \$338,000. The total consideration for all of the property transferred was \$700,000, which was paid by the delivery to such persons as the New Jersey corporation should designate of 6,000 shares of common stock and 1,000 shares of preferred stock, all of the face value of \$100 per share. Of the several holders of common stock are Firestone, over 5,200 shares, Joseph F. Firestone, about 500 shares, and Oliver H. Perry, 51 shares. Preferred stock to the amount of about \$132,000 was sold to various purchasers for cash at \$100 per share and is still outstanding. Substantially all of these sales were made in 1904. On February 27th of that year, the Buggy Company sold * * * the residue of the property which had been owned by the partnership, lying north of Chestnut street, for the sum of \$130,000. * * * In November, 1902, the Mercantile Building Company filed a suit in the court of common pleas of Franklin county, Ohio, against Caroline L. Peters, to quiet title to the premises which it had purchased as above mentioned, alleging that she asserted an interest in a portion of such real estate adverse to it, as it was informed, in the nature of a dower interest. She answered, claiming a dower interest, and asked that it be assigned to her, and for other equitable relief. On or about November 30, 1906, she commenced an action in the Franklin county court against Firestone. * * * He answered, and on the evidence and agreed statement of facts Judge Bigger held on December 1, 1906, that the deed in question was a deed of trust, and that Firestone should account, and ordered the evidence to be taken and reported to the court. An appeal was prosecuted to the state circuit court and dismissed, for the reason that the order of the common pleas court was not final. The case stands on a reference. After the receiver was appointed in this court for the Columbus Buggy Company, the bulk of its property was sold on May 14, 1913, to a creditors' committee for \$310,000. It is thought that perhaps \$40,000 additional will be realized. The debts aggregated about \$660,000. * * * On May 31, 1913, Mrs. Peters, as administratrix de bonis non with the will annexed, intervened, asking that no distribution of the assets of the defendant company be made until her rights are determined, asserting that the property to the extent of her interest in the George M. Peters estate was held in trust, and praying that a trust be declared and an accounting be ordered. To this the receiver answered. * * * Mrs. Peters did not keep track of the business of the Columbus Buggy Company, but knew that it was operating, and that its stock was listed on the market and offered for sale to raise money. * * * She gave the matter no consideration, because she was not interested in it. After Firestone solicited a quitclaim deed from her for the Mercantile Building Company, which desired to borrow money on its property, she "decided to make some investigation," and * * * has since continually been represented by counsel, who knew of the corporate character of the Buggy Company. * * * The New Jersey and Ohio corporations above mentioned caused their respective deeds to be recorded with becoming promptness in Franklin county, Ohio, and made the annual reports required by law to the proper state officers. Purchasers for the preferred stock of the Ohio corporation were solicited by publication in the local press and by a widely distributed circular to all parties with whom the company was dealing, some of whom are now its creditors. That such stock was on the market was communicated to * * * commercial agencies and was the subject of comment in trade journals. The sales made were actual. * * *

[1] The primary question for decision is: Did the deed from Peters to Fire-

stone create a trust? It is not charged that there was fraud in securing it or the order of the probate court. * * * If there be a trust, either express or implied, the burden is on the intervener to prove its existence by clear and satisfactory evidence. *Shepard v. Pratt*, 32 Iowa, 296; 13 Ency. Ev. 115; *McKeown v. McKeown*, 33 N. J. Eq. 384; *Parker v. Snyder*, 31 N. J. Eq. 164; *Stall v. Cincinnati*, 16 Ohio St. 170; *Ryan v. O'Connor*, 41 Ohio St. 368, 372; *Russell v. Bruer*, 64 Ohio St. 1, 5, 59 N. E. 740. If the case be a doubtful one, the deed will be construed in favor of the grantee (*Bender v. Fromberger*, 4 Dall. [Pa.] 436, 440, 1 L. Ed. 898), and most strongly against the grantor (*Potter v. Burton*, 15 Ohio, 196, 199; 4 Ency. Dig. Ohio Rep. 798).

[2] A valid argument cannot be based on the fact that the deed does not recite a grant, bargain, and sale, but merely remises, releases, relinquishes, and forever quitclaims the property therein described. A deed in the form of the one under consideration is as effectual to divest and transfer a complete title as any other form of conveyance. In *Moelle v. Sherwood*, 148 U. S. 21, 29, 13 Sup. Ct. 426, 429 (37 L. Ed. 350), Mr. Justice Field said: "There is in this country no difference in their efficiency and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain, and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either." See, also, *U. S. v. California, etc., Land Co.*, 148 U. S. 31, 46, 13 Sup. Ct. 458, 37 L. Ed. 354; *McDonald v. Belding*, 145 U. S. 492, 12 Sup. Ct. 892, 36 L. Ed. 788; *Van Rensselaer v. Kearney*, 11 How. 297, 322, 13 L. Ed. 703; *Hall's Lessee v. Ashby*, 9 Ohio, 96, 34 Am. Dec. 424; *Garlick v. Railway Co.*, 67 Ohio St. 223, 65 N. E. 896; *Devlin on Deeds* (3d Ed.) § 27; 7 Words and Phrases Judic. Def. 6076; 13 Cyc. 524, 525, 652; *Boynton v. Haggart*, 120 Fed. 819, 823, 57 C. C. A. 301.

[3, 4] The deed has a preamble or introductory portion. 22 Am. & Eng. Ency. Law, 1161. Mrs. Peters seeks the intention of the parties to the deed mainly in its preamble; the receiver looks mainly to the body of the deed, and sees no inconsistency therewith in the preamble. The same rule must obtain in the treatment of the preamble to a deed, which is but a contract (*Wierengo v. Insurance Co.*, 98 Mich. 621, 627, 57 N. W. 833), as to the preamble of a statute. The preamble is explanatory of the reasons for the making of the deed, but not necessarily of all of them. It is declaratory of the intention of the parties, but not necessarily of all of their intentions. If the dispositive or operative portions of the deed are ambiguous and difficult of interpretation, resort may be had to the preamble to show the intention of the grantor, but not to create a doubt or uncertainty which otherwise does not exist, for if the deed, exclusive of the preamble, be clear and unambiguous, the preamble does not control. *Walsh v. Trevanion*, 15 Q. B. 733, 751; *Bailey v. Lloyd*, 5 Russ. 330, 344; *Townsend v. State*, 147 Ind. 624, 636, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477, 485; *Coverdale v. Edwards*, 155 Ind. 374, 382, 58 N. E. 495; *Lloyd v. Urison*, 2 N. J. Law, 212, 224, 225; *James v. Dubois*, 16 N. J. Law, 285, 294; *Jones, Real Property*, §§ 246, 249, 250; *Abbott's Law Dict.*; *Bouvier's Law Dict.* If there were reasons and considerations for the execution of the deed other than those expressed in the preamble, the party whose interest requires proof of the same may, under proper circumstances, show what they were. *Lloyd v. Urison*, 2 N. J. Law, 226; *Bouvier's Law Dict.*; *Steele v. Worthington*, 2 Ohio, 182.

[5, 6] A court of equity looks at the real object of a deed and the intention of the parties and will compel the fulfillment of both. *Hughes v. Edwards*, 9 Wheat. 489, 494, 6 L. Ed. 142. If possible, their intention will be gathered from the whole instrument. *Martin v. Jones*, 62 Ohio St. 519, 525, 57 N. E. 238; *Williams v. Paine*, 169 U. S. 55, 76, 18 Sup. Ct. 279, 42 L. Ed. 658. If their intention is plain, parol evidence is not admissible to prove an intention different from the terms of the deed. *Lessee of Barton v. Heirs of Morris*, 15 Ohio, 408, 424; *Hubbird v. Goin*, 137 Fed. 822, 70 C. C. A. 320 (C. C. A.

8). But when a deed possesses an element of uncertainty, parol evidence, the admissions of the parties, and other extraneous circumstances, may be proved to ascertain its true meaning. *McAfferty v. Conover*, 7 Ohio St. 99, 104, 70 Am. Dec. 57; *Reed v. Proprietors, etc.*, 8 How. 274, 288, 289, 12 L. Ed. 1077; *Gill v. Fletcher*, 74 Ohio St. 295, 304, 78 N. E. 433, 113 Am. St. Rep. 962. * * *

[7] The issues tendered as to the intentions of the parties, the considerations for the deed and estoppel, make the case a proper one for the admission of parol evidence to show the intent and all of the intent of the parties, and the part played, the conduct, and the acts performed by Mrs. Peters, both before and after the execution of the deed. The whole and actual consideration for the conveyance may also be shown, so long as it does not contradict, or change the effect or legal operation of, the deed. The court may therefore plant itself in the place of the grantor for the purpose of discovering his intention, and then, in view of all the facts and circumstances surrounding him at the time of the execution of the instrument, consider how the terms of the deed may affect the subject-matter. When the intention is manifest, it will control in the construction of the deed without regard to technical rules of construction. *Prentice v. Duluth Storage & Forwarding Co.*, 58 Fed. 437, 443, 7 C. C. A. 293 (C. C. A. 8); *Atkinson v. Baden*, 1 Ohio Cir. Ct. R. 537, 540; *Kirby v. Brownlee*, 13 Ohio Cir. Ct. R. 86, 89 (affirmed *Kirby v. Bowdle*, 55 Ohio St. 676, 48 N. E. 1114, without report); *Gunn v. Black*, 60 Fed. 151, 153, 8 C. C. A. 534 (C. C. A. 8); *Brown v. Cranberry Iron & Coal Co.*, 59 Fed. (C. C.) 434, 438. * * *

[8] In the light of the surrounding circumstances, the conclusion to be reached is plain. Peters shared with the creditors and others concerned the belief that the assigned property, if sold, would pay but a small percentage of the partnership debts. His individual estate would then be called upon to respond. Under the Ohio statute, the creditors might reach, in part at least, his life insurance, even if made payable to some member or members of his family. If it was made payable to his estate, they could reach substantially the whole of it. He had forced the execution and delivery of a preferential mortgage of doubtful validity in favor of his wife. He desired protection in these three respects. He was in ill health—near, as it proved, to death. He was physically unable to protect the interests of himself and wife, a fact recognized by himself and all others concerned. He was compelled to communicate with his counsel through intermediaries—his wife and son. There was but one way in which the protection he desired could be obtained, and that was by a composition. There was confessedly but one man that could effect a composition and continue the business, and that was Firestone. The latter desired to remain in business. Peters was not thinking of such. He, as well as the creditors, turned to Firestone for relief. The latter was willing to undertake the task of working out a composition which would shield Peters, but he was to be made the sole owner of the partnership assets. It was not unnatural that he should not wish an invalid, or, in case of Peters' death, an estate, as a partner. The inference must be that, if he made a composition, he would not be in a financial position to buy the Peters' interest under the terms of the partnership agreement, if it remained in the business, nor, in all probabilities, could Firestone effect an agreement with the creditors, unless the absolute control and ownership of the property were vested in him immediately, or at such reasonable future time as would enable him to put such arrangement into effect. The condition of Peters' health was such that creditors might well hesitate to settle with a firm, one of whose members was an invalid, or to deal with an estate in case of Peters' demise. In consideration of the protection which Peters would get in the three respects named, if Firestone should be able to work out a composition, Peters agreed to convey and did convey his interest in the partnership property and business, without reservation of any right or interest whatsoever. Such was the fully understood intention of the parties in the execution and delivery of the deed, and when the composition was effected the title vested absolutely and beyond recall in Firestone alone.

It is urged with much earnestness that, if Peters intended finally to part with his interest in the property, the contracting parties would not have stip-

lated that he should remain liable for his proportionate share of the debts and of attorney's fees and court costs incurred in defending any suit that might be brought on any existing partnership debt or obligation, but would have provided that Firestone should hold him harmless therefrom; that it is unreasonable that Peters should wholly release beyond his control his entire interest in the property, and still consent so to remain liable; and that his agreement to do so is inconsistent with any purpose on his part, other than a temporary conveyance to enable Firestone to work out a compromise. A consideration of this question involves an interpretation of the deed. The argument made is not convincing. This is so, whether we interpret the deed, standing alone and from its four corners, or in the light of the facts and circumstances brought upon the record by the witnesses. It is also true whether the creditors knew or did not know of Peters' possession of life insurance and an individual estate.

The preamble recites that Peters is ready and willing to relinquish every vestige of estate, right, title, and interest in the firm's assets and in all reservations in his favor in the deed of assignment, and also the good will of the business which represented his life's work, for the purpose of enabling, not Peters and Firestone acting through the latter, but Firestone possessed of the full title on the fulfillment of the conditions, to offer a composition to the firm's creditors. The granting clause is broader than the preamble, in that it recites, not merely a relinquishment, but a remising, releasing, relinquishing, and forever quitclaiming of all of such property to Firestone, his heirs and assigns forever—the language employed passing an estate in fee to the real estate and the entire title as to the personal property. The condition following the habendum is that Firestone shall use his best endeavors to obtain assent to and acceptance of the offer made “by him”—not by Peters and Firestone, or for them. If Firestone should not secure acceptance to the extent of 87 per cent., it was then for Peters to elect whether the conveyance should be void or not, Firestone was to be the actor. The thought was present that Peters might suffer the conveyance to stand, if less than 87 per cent. of the creditors came into the adjustment—a thought which must have been born of the belief of both in the hopeless insolvency of the firm, and on the part of Peters that a composition of less than 87 per cent. would to that extent relieve both him and his estate. The paragraph following the recited condition and providing for Peters' continued liability shows that the contracting parties intended a severance of their interests and a termination of their partnership relation. The first sentence in that paragraph affords protection to Firestone. No occasion existed for its insertion, if the partnership relation was to continue, for in that event the continuance of Peters' liability would in any event result by operation of law; nor if the sentence relates to partnership debts only, because the defense of suits affecting it would belong primarily to the assignees. The last sentence of the paragraph imposes a restriction, narrows the powers of the partners, suggests a termination of their prior close relation, a severance of interests, and a fear that one of the parties might act prejudicially, not only to the partnership estate, which was beyond their immediate control and insufficient to satisfy the creditors' claims, but to the individual estate of the other as well. This provision, more important to a sick than an able-bodied man, and such as a person having a private estate would exact, originated with Peters, and is a departure from the broad powers enjoyed by each partner under the articles of copartnership. The last paragraph preceding the witnessing clause broadly recognizes an intended and complete separation of the partners' interests and a termination of the partnership relation on the fulfillment of the prior specified condition. It contemplates the possession of the books and papers of the firm by a “new firm or company,” with which Peters would not be identified, but with which Firestone might or might not be connected. Firestone stipulated for himself and for the officers and employes of any such new firm or company so possessing such books and papers, in so far as his control and influence could compel, that Peters should have his and their earnest co-operation and assistance in any litigation against Peters or his estate arising out of the partnership, including in such co-operation and assistance reasonable time, help, and assistance which Peters or his attorney, executor, or administrator might desire or

need for the production, inspection, or explanation of such books and papers. This paragraph cannot be tortured into an expression of intent to continue the old firm or Peters' connection with such firm or company. It harmonizes with the granting clause, and does not consist with any theory other than a dissolution of the firm and an absolute conveyance of Peters' entire interest. A new firm would be other than the old one. Both could not subsist and own the same property. If the word "company" means a "partnership," it was nevertheless a new partnership that was contemplated. The use of the term "officers" in connection with the word "company" necessarily implies, however, a corporation, for a partnership has no officers. The taking over of the property by a corporation would necessitate the retirement of the partnership. The litigation in which Firestone obligated, in so far as he could, himself and the officers and employes of the new enterprise to assist, was not that against the partnership estate, but against Peters and Peters' individual estate. The words "arising out of said partnership" do not limit the immediately preceding words of "his estate," but the preceding word "litigation." The litigation against the partnership estate would not be under the control of Peters and Firestone, or either of them, but of the assignees acting under the direction of the probate court, who had possession of the firm's books and papers. The litigation in which Peters would be concerned and which he could control, and in which he sought and was to have assistance, was such as might be instituted against him and his private estate, concerning which he was solicitous and for whose protection he bartered away his entire interest in and claim to the firm's assets. This paragraph is wholly unnecessary, if Peters and Firestone intended to continue their business relations and the former to retain an interest in the business should a composition be effected; for as a partner Peters would have had unrestricted access to the firm's books and papers, with power to compel the assistance of employes. If such an intention existed, the formation of a new firm would not have been suggested. It is not contended and there is nothing in the deed or in the evidence, if it be considered, to suggest that Peters ever contemplated the location of his interest in a corporation or a new partnership, should either be formed by Firestone. The theory of the intervenor's case is that the old partnership was to be continued, or at least that there was to be no severance except in accordance with the articles of copartnership. If Peters intended that any interest he might have, real or possible, in the partnership property, should pass into a new corporation, then as a stockholder he would have access to its books and papers without stipulating therefor. Section 3254, R. S. Ohio; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 43 L. R. A. 732, 78 Am. St. Rep. 707. He did not expect any estate to arise to him from the partnership assets, for the reason that (1) he was providing in the same deed for a composition which, in the light of the views expressed at the meeting of the creditors' committee, unless we assume that he and Firestone were acting dishonestly with their creditors, was a reaffirmation that the firm, as matters stood, was insolvent; (2) he was selling outright his entire interest therein present and contingent; and (3) he was providing for protection, as far as attainable, for his individual estate only. If, however, Peters was selling outright his entire interest in the property, and putting it into Firestone's power to exercise sole control over it, or to pass it into the hands of a new firm or corporation, then the insertion of the paragraph became important, because it embodies provisions such as a prudent man and discerning counsel would exact. He had concurred in the view expressed at the creditors' meeting that the partnership assets were inadequate to pay the partnership debts. He knew there was nothing to come from that source, and consequently no litigation would or could arise concerning it. If the partnership assets were more than sufficient to pay its debts, and if Peters and Firestone were nevertheless seeking a compromise, they were purposing a fraud upon their creditors; but this is not claimed. Firestone could not make a disposition of the firm's assets, books and papers, unless he owned the title outright. Full ownership was therefore vested in him, on the fulfillment of the prior named condition; but he was obligated, if he sold, so to sell that neither Peters nor his individual assets should suffer in litigation brought against him or any disadvantage that Firestone could prevent.

The creditors had trusted Peters and Firestone in their days of prosperity. Common honesty exacted that such creditors should be treated fairly by the latter in their hour of adversity. That Peters should remain liable for his proportionate share of the debts was an evidence of the financially distressed partners' good faith, and would necessarily operate as an influential factor in obtaining consents to the proposed adjustment. To have stipulated for Peters' release would have militated against a composition—the only means whereby Peters and his private estate might escape total or partial depletion. Considering the magnitude of the partnership liabilities, it is quite likely that diligent creditors had acquainted themselves with, at least had acquired some knowledge of, Peters' individual resources. The creditors' committee must have known the precise situation. Their lawyer had assisted in preparing the deed. * * * It is neither charged nor intimated that any of these men acted in bad faith. The existence of Peters' private estate is written upon the face of the deed. It is not a violent presumption that the creditors demanded of Firestone, their committee, the assignees, and their lawyers knowledge of all the property which was liable, primarily and secondarily, to the satisfaction of their claims, and a statement of how and by whom the future business was to be conducted from which Firestone hoped to derive the funds which were to meet the notes to be given in composition. It is unreasonable to suppose that creditors who were shaving their claims to 25 per cent. or 35 per cent. of their face value would assent to a release of Peters. They naturally and rightfully would try to get as much as under the circumstances they could. If they did that, Peters' individual estate and life insurance were factors, and the settlement was made with reference to them. If so, then to the extent that the amount paid in composition was increased by a consideration of such factors, Firestone by his agreement indirectly obligated himself to relieve, and by his subsequent payment of the partnership debts from the business as conducted by him did individually relieve, Peters and his estate. If Firestone effected the composition and continued the business as sole owner, he would become, and in fact did become, in a very practical and substantial way solely bound for the payment of the debts. If he did not pay them his property would be seized. It would be the most available asset for their satisfaction. If he satisfied them, Peters would be absolved. * * * Had Firestone and Peters stipulated that the former should pay all the debts and relieve the latter therefrom, it would, unless assented to by the creditors, have been unavailing beyond the extent of Firestone's individual estate, if he had one, and it is not shown that he had such. If the composition was made with but 87 per cent. of the creditors, Peters would have been able to satisfy his proportionate share of the unpaid residue. The reasonable inference is that, if the firm's assets should be sold and the proceeds applied on its debts, the partners could not have satisfied in full the unpaid residue, else the creditors would not have accepted in settlement so small a percentage. It was politic and wise that Peters should remain liable for his share of the debts. He could well afford to carry that risk for the moral effect it would produce. Proof of its wisdom is found in the fact that his estate was never called upon to pay even so much as a penny. He was physically unable to attempt the rescue of the firm's property, which had passed beyond his control. In so far as he was concerned, it was wholly lost, and his private estate in danger of loss, perhaps of obliteration. To have secured protection for it and at the same time to have exacted from Firestone the assumption of all the debts, would have been unfair to the latter, a situation which it is not reasonable to assume that Firestone would accept, for if the composition, when made, was not performed, each would in law still remain liable for all of the firm's debts. Peters had nothing to give for such assumption, if the firm's estate was sold and applied on its debts, or unless such a composition were so made as left some remaining equity. The extent of that equity, if wrought out, was uncertain. He might well surrender his chance on that for the chance of saving his life insurance and his private estate, both of which were realities. It is true that Firestone was liable for all the debts and that it was his duty to satisfy them. His reward for working out the composition was to be the sole ownership of the property. It was competent for Peters to say that he should have it. * * * I have found

no authority, and diligent counsel have cited none, which made it his duty as a partner to compromise without compensation the firm's debts in such a way as would indirectly and yet substantially relieve his business associate's private estate from liability by pledging all that he himself had, if he had anything, and that he might thereafter acquire, to satisfy them.

It is the aim of the courts to preserve, not to destroy. They should be astute to find means to make acts effectual, according to the honest intent of the parties. *Kelly v. Calhoun*, 95 U. S. 710, 713, 24 L. Ed. 544. That construction will always be adopted which will accomplish the object for which the instrument was executed. *Hubbird v. Goin*, 137 Fed. 822, 830, 70 C. C. A. 320 (C. C. A. 8).

[9] It thus appears that the whole of the intention of the parties was not expressed in either the preamble or the operative parts of the deed, and that the dispositive portion of the deed is the more comprehensive in these respects. It is also as much broader as a conveyance in fee is broader than a relinquishment, and the operative portion of the deed must therefore control, and not the preamble, to which, in the light of the authorities heretofore mentioned and *Warvelle on Vendors*, §§ 129, 357, *Walker v. Tucker*, 70 Ill. 527, 536, 537, *Clark v. Post*, 113 N. Y. 17, 25, 20 N. E. 573, and *Norton on Deeds*, chapter 11, an undue and mistaken importance is attached. It was permissible to the creditors to rebut the averment of want of consideration by proof of the real one. *Jenkins v. Pye*, 12 Pet. 241, 253, 9 L. Ed. 1070. In view of Mr. Justice Miller's language in *Hitz v. Nat. Met. Bank*, 111 U. S. 722, 727, 4 Sup. Ct. 613, 28 L. Ed. 577, we need not deeply concern ourselves whether the \$1 named in the deed was paid or not. A different consideration from that expressed may be shown, if, as in this case, it is not inconsistent with or repugnant to that named in the deed. *Groves v. Groves*, 65 Ohio St. 442, 449, 62 N. E. 1044; *Vail v. McMillan*, 17 Ohio St. 617, 623; *Richardson v. Traver*, 112 U. S. 423, 431, 5 Sup. Ct. 201, 28 L. Ed. 804. * * *

The common pleas court held that a trust existed in favor of the Peters estate, and referred the case to a master commissioner to take, state, and report to the court an account between Firestone and Mrs. Peters for the court's further action. Firestone appealed to the circuit court. His appeal was dismissed, in harmony with the prior ruling of that court in another case hereafter to be noticed, on the ground that the trial court's order was interlocutory and not final. This accords with the ruling of the Supreme Court in the unreported case of *McManigal v. Columbus & Hocking Coal & Iron Co.*, 79 Ohio St. 432, 87 N. E. 1138, No. 10997, which reached that court from the above-mentioned circuit court. From a personal examination of the file papers it appears that the trial court held McManigal to be a trustee who had violated his trust, and that he had diverted profits and appropriated them to his own use. As in this case, an accounting was ordered. The circuit court dismissed the appeal taken to the trial court's order as interlocutory. That precise ruling was assigned as error, and the decision of the Supreme Court affirming the dismissal by the circuit court was based on the error so assigned, as will appear from the entry on its journal No. 22, page 442. * * *

The order made by the common pleas court is therefore not final, nor is it binding on this court. The issue of estoppel was not before that court, nor was the evidence otherwise so ample. But, were these matters absent, my views as to the degree of importance to be attached to the preamble and as to the interpretation of the residue of the deed are so different from those expressed by that court that, notwithstanding my great deference for its judgment and my desire to avoid a conflict of decision, I should be not able to concur in its conclusions.

If what Peters conveyed was the thing of value now asserted, and if there was present a purpose to preserve it for the benefit of himself or his estate, or both, there would have been, in view of the mature deliberation attendant on the preparation and execution of the deed, some apt expression indicative of that intent, nor would there subsequently have been a long-continued and unequivocal line of conduct inconsistent with any theory other than the clothing of Firestone with the exclusive ownership of such property. The deed did not create a trust. It made Firestone the sole and absolute owner of all the property described in it. The intervener, by her acts and conduct prior

and subsequent to the execution and delivery of the deed, so understood it, and recognized Firestone as the exclusive owner of the firm assets. She is not entitled to an accounting, or to share in the distribution of the defendant's assets.

Her intervening petition is dismissed, at her costs.

BRANDT v. MAYHEW et ux.†

In re MAYHEW.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2421.

1. BANKRUPTCY (§ 399*)—EXEMPTIONS—HOMESTEAD—STATE LAW—FAILURE TO DESIGNATE.

A bankrupt is not precluded from claiming a homestead as exempt from the operation of the bankruptcy law merely because, prior to the adjudication, he had failed to designate a homestead as required by the laws of the state, provided he proceed under the state law to perfect his right within a reasonable time after claiming it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

2. BANKRUPTCY (§ 400*)—HOMESTEAD—CLAIM—TIME—FILING SCHEDULES.

Where an adjudication of bankruptcy was entered October 8, 1912, but the schedules were not filed until February 17, 1913, the right of the bankrupt to file the schedules at that time not having been questioned, his claim of a homestead exemption in his schedules, as he was permitted by law to do, was in time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

3. BANKRUPTCY (§ 400*)—EXEMPTIONS—HOMESTEAD—DECLARATION—FILING BY WIFE.

Where, after a bankrupt and his wife had made a general assignment for the benefit of creditors, including real property on which they were living, a petition in involuntary bankruptcy was filed and the husband adjudged a bankrupt, whereupon the wife recorded a declaration of homestead on the real property, as she was authorized to do by the state law, she was entitled to claim the property as exempt in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

4. BANKRUPTCY (§ 395*)—BANKRUPTCY ACT—AMENDMENT—EFFECT—EXEMPTIONS.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 557, § 47a(2), as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. 1913, § 9631), providing that trustees in bankruptcy as to all property in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, did not affect section 6, providing for the allowance to bankrupts of the exemptions prescribed by state laws, nor change the bankrupt's right to exemptions, but was merely intended to render ineffective secret or unrecorded liens, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. § 395.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 17, 1914.

5. BANKRUPTCY (§ 399*)—EXEMPTIONS—HOMESTEAD—CONVEYANCE FOR BENEFIT OF CREDITORS.

Where a bankrupt and his wife made a general assignment of all of their property, including the real property on which they were living, for the benefit of all of their creditors, without preference, fraud, or concealment, and such act constituted an act of bankruptcy, for which the husband was subsequently adjudged a bankrupt, the conveyance did not preclude him from claiming a homestead exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

Ross, Circuit Judge, dissenting.

Petition for Revision of Order of the District Court of the United States for the First Division of the Northern District of California.

In Bankruptcy. In the matter of bankruptcy proceedings of F. S. Mayhew. On petition to review an order allowing homestead exemption to the bankrupt and his wife, to which Arthur H. Brandt, the bankrupt's trustee, filed objections. Affirmed.

On April 18, 1912, F. S. Mayhew and his wife made a general assignment to one Wayman, for the benefit of all of Mayhew's creditors. A part of the real property conveyed was that upon which the assignors had been living. On August 17, 1912, a petition in involuntary bankruptcy was filed against Mayhew; the act of bankruptcy charged being the conveyance to Wayman above mentioned. On October 8th Mayhew was duly adjudged a bankrupt. On November 4, 1912, the wife of the bankrupt recorded with the local county recorder a declaration of homestead upon a portion of the real property which she and her husband had conveyed to Wayman. On November 20, 1912, she filed with the referee a petition for an order setting apart as exempt the dwelling house and the land upon which her declaration of homestead had been filed. On December 20, 1912, Wayman transferred and surrendered to the trustee in bankruptcy the property so conveyed to him by the Mayhews. On January 10, 1913, the trustee filed with the referee an inventory of the property and assets of the estate of the bankrupt, including as an asset the real property above referred to. On February 17th the bankrupt filed his schedules of his creditors and his property, and therein he made claim to an exemption of \$5,000 in value of the real estate upon which his wife had filed the declaration of homestead. The trustee denied the right of the bankrupt to the homestead. On February 2, 1914, the referee allowed the claim to the exemption, and directed the trustee to set aside a homestead to the bankrupt to the value of \$5,000 and to pay and deliver said sum to the bankrupt out of the proceeds of the then pending sale of the real property when the sale should be made. The trustee filed his petition for a review of the referee's order, and on May 7, 1914, the District Court affirmed the order of the referee. To review that order, the present petition for revision was filed in this court.

R. H. Cross, of San Francisco, Cal., for petitioner.

Hartley F. Peart and Ernest K. Little, both of San Francisco, Cal., for respondents.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The petition presents these questions: (1) Is a bankrupt in the state of California entitled to claim a real estate homestead exemption, where neither he nor any one in his behalf has made and recorded a declara-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of homestead prior to his adjudication of bankruptcy? (2) Assuming that otherwise he would be entitled to claim the homestead, is he precluded by reason of his voluntary conveyance of the property for the benefit of creditors prior to the petition and adjudication in bankruptcy; the property being subsequently transferred to the trustee?

Sections 1240 and 1241 of the Civil Code of California provide that the homestead is exempt from execution or forced sale, except—

"in satisfaction of judgments obtained: (1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises. (2) On debts secured by mechanics', * * * materialmen's or vendors' liens upon the premises. (3) On debts secured by mortgages on the premises, executed and acknowledged by husband and wife. * * * (4) On debts secured by mortgages * * * executed and recorded before the declaration of homestead was filed for record."

Section 1262 provides:

"In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record."

Section 70a of the Bankruptcy Act provides that the trustee of the bankrupt's estate shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, "except in so far as it is to property which is exempt," and property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

Section 2, cl. 11, gives courts of bankruptcy authority to "determine all claims of bankrupts to their exemptions."

Section 7, cl. 8, requires the bankrupt to make and file a schedule of his property "and a claim for such exemptions as he may be entitled to."

Section 47a, cl. 11, directs trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

Section 6 provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

While exemptions allowed a bankrupt are fixed and defined by the law of the state of his domicile, the Bankruptcy Act is controlling as to the time and manner of claiming, selecting, and allowing exemptions, and the courts have given these provisions of the act a liberal and equitable construction. In *Smith v. Thompson*, 213 Fed. 335, 129 C. C. A. 637, Judge Hook said:

"In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice. It should be helpful to those whose condition requires them to invoke it."

The contention of the trustee is based upon the language of section 70a, which provides that the trustee shall be vested by operation of law with the title of the bankrupt's property, except as to property which is exempt, which provision, it is said, shows the intention of the law to be that property, in order to be excepted, must be recognizable as exempt at the date of the adjudication. But section 70a does not deal with the time or manner of claiming exemptions. Those matters are regulated by other provisions. Section 7, cl. 8, gives to the involuntary bankrupt the right to claim his exemptions within ten days after the adjudication, and the time within which he may do this may be further extended by amendment, as authorized by general order 11.

[1] A bankrupt is not precluded from claiming a homestead as exempt from the operation of the Bankruptcy Law merely because, prior to the adjudication, he had failed to designate a homestead under the laws of the state, provided that, after claiming it, he proceed under the state law to perfect his right within a reasonable time. In *re Fisher* (D. C.) 142 Fed. 205; In *re Culwell* (D. C.) 165 Fed. 828; *Goodman v. Curtis*, 174 Fed. 644, 98 C. C. A. 398.

[2] But it is urged that the bankrupt in this case did not claim his homestead until after his right to claim it as exempt under the bankruptcy law had expired, in that, although he was adjudged a bankrupt on October 8, 1912, he did not claim the exemption until February 17, 1913. But it appears from the record that the bankrupt did not file his schedules until the date last mentioned, and that in his schedules, as he was permitted by law to do, he made his claim of exemption of a homestead. The reason for the delay in filing the schedules is not explained in the record. No question is made, however, of the bankrupt's right to file them on the date mentioned. We may assume that the referee, upon good cause shown, permitted them to be filed of that date. In *Goodman v. Curtis*, the bankrupt filed his schedules without claiming his homestead exemption. Six weeks later, upon his application, he was allowed to amend his schedules and file a claim of exemptions. The court said:

"In this case the bankrupt did not waive his exemptions, and he had, notwithstanding his omission to set forth his claim in the schedules, a clear legal right to the exemptions allowed by the laws of the state of Alabama; and we think he had a legal right to prefer his claim in the bankruptcy proceedings at any seasonable time while the property remained in the hands of the trustee unaffected by adverse rights."

[3] Aside from the bankrupt's rights in the premises, we see no ground for denying the right of Mrs. Mayhew to claim, as she did, on November 20, 1912, the dwelling house and the land upon which her declaration of homestead had been filed. The statutes of the state of California recognized her right to do this, and she could not be deprived of that right by the adjudication of bankruptcy against her husband. In *re Maxson*, 170 Fed. 356, is a case in which the wife had been adjudged bankrupt, but in her schedules had failed to claim a homestead exemption. It was held that her waiver of right to the homestead would not prevent her husband from claiming it.

[4] The petitioner contends that the right which the bankrupt would have to a homestead exemption under the bankruptcy law before the amendment of June 25, 1910, is taken away by that amendment, which adds to section 47a(2) the following:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The argument is that the amendment puts the trustee, as to all property in the custody of the bankruptcy court, in the position of a creditor holding a lien by legal or equitable proceedings, and, as to all other property, in the position of a creditor holding an execution returned unsatisfied, and that it follows that the trustee in the case at bar is in the attitude of a lien creditor as to the real estate which is claimed as a homestead, and that his lien represents the entire indebtedness against the bankrupt, so as to exclude a claim of homestead exemption. We do not so construe the amendment. Section 6 of the act remains unamended and unrepealed. The amendment does not affect the provision of that section, in which the intention of Congress is plainly expressed, that the Bankruptcy Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by state laws. Section 6 still remains one of the fundamental provisions of the act, and it is the duty of the courts to construe the act with all its amendments as a whole, and to harmonize all its parts. The purpose of the amendment to 47a was to make effective the rights of creditors against those who claimed secret or unrecorded liens or adverse interests in the property of the bankrupt. Before the amendment, the trustee in bankruptcy was vested with no better title to the bankrupt's property than the bankrupt had at the time when the trustee's title accrued. He stood in the shoes of the bankrupt, and where, under the law of the state, a conditional sale, a vendor's lien, or an unrecorded mortgage was good between the parties, it was good as against the trustee. The amendment gives the trustee the right to attack all such unrecorded liens and secret equities, without requiring that he shall be in the position of representing creditors who have acquired liens by legal or equitable proceedings against the bankrupt. It is conceded that the purpose of the amendment was to remedy the situation disclosed in *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, in which it had been reaffirmed that the trustee in bankruptcy was vested with no better right or title to the property than the bankrupt had when the trustee's title accrued, and that where a contract of conditional sale of personal property was good as between the parties themselves, although not filed, the vendor of such property, where payment had not been made, might remove the same as against all creditors of the bankrupt who have not fastened upon it by some specific lien. The amendment should be construed in the light of the purpose which it was intended to serve, and this is shown by the report of the Senate judiciary committee when

the amendment was on its passage. In *re Williamsburg Knitting Mill* (D. C.) 190 Fed. 871; In *re Farmers' Supply Co.* (D. C.) 196 Fed. 990; In *re Dancy Hardware & Furniture Co.* (D. C.) 198 Fed. 336.

[5] It is contended that, the bankrupt and his wife having voluntarily conveyed the real property in question for the benefit of creditors prior to the petition in bankruptcy, they are by that act precluded from claiming the homestead exemption. In certain cases where the bankrupt prior to bankruptcy has conveyed his property for the purpose of giving a fraudulent preference, or to conceal the property in fraud of creditors, and thereafter the trustee in bankruptcy, for the benefit of the creditors has, by his own action, recovered the property, it has been held that there can be no claim of homestead exemption, since the trustee has restored to the estate property which, but for his efforts, would have passed both from the bankrupt and his creditors. In *re Coddington* (D. C.) 126 Fed. 891; In *re Evans* (D. C.) 116 Fed. 909; In *re White* (D. C.) 109 Fed. 635; In *re Tollett* (D. C.) 105 Fed. 425; In *re Long* (D. C.) 116 Fed. 113; In *re Wishnefsky* (D. C.) 181 Fed. 896. These decisions are based upon the ground that to permit the bankrupt thereafter to claim exemptions would be to allow him to take advantage of his own wrong, or on the ground that he can have no right to extend his claim over that to which he has no title, except through the intervention and instrumentality of the trustee. But in the present case no preference was made, and there was no fraudulent transfer. In good faith Mayhew and his wife had conveyed all their property to an assignee for the benefit of all creditors. Bankruptcy ensued before the assignee accepted the trust, and he at once released to the trustee in bankruptcy. Such a voluntary conveyance for creditors can have no effect upon the right of the bankrupts thereafter to claim the exemptions provided by law. The effect of the bankruptcy and the transfer of the property by the assignee to the trustee in bankruptcy was to leave the estate as it would have been if there had been no such voluntary conveyance. In *Bryan v. Bernheimer*, 181 U. S. 188-192, 21 Sup. Ct. 557, 559 (45 L. Ed. 814), the court said:

"The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent."

Cases in point are *In re Falconer*, 110 Fed. 111, 49 C. C. A. 50; *Bashinski v. Talbott*, 119 Fed. 337, 56 C. C. A. 241; In *re Thompson* (D. C.) 140 Fed. 257; In *re Soper* (D. C.) 173 Fed. 116; In *re Irwin* (D. C.) 177 Fed. 284.

The petition to revise is denied, and the order of the District Court is affirmed.

ROSS, Circuit Judge (dissenting). The conclusion reached by the majority of the court in this case finds support in some of the District Court cases, but is, I think, in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *In*

re *Youngstrom*, 153 Fed. 98, 82 C. C. A. 232, where that court said, among other things:

"At what point of time must the bankrupt be entitled to a particular exemption under the state laws to have it allowed and set apart under the saving and protecting provisions of the bankruptcy act? The answer must, of course, be found in that act. Naturally it would be expected that this point of time would not be later than the date as of which the general estate of the bankrupt is wrested from his dominion and vested in his trustee for the benefit of the creditors. And such, we think, is actually and plainly the effect of the provisions before set forth. Thus it is declared, in section 6, that the exemptions to be allowed are those prescribed by the state laws in force 'at the time of the filing of the petition,' and, in section 70a, that, upon his appointment and qualification, the trustee shall be vested, by operation of law, with the title of the bankrupt, 'as of the date he was adjudged a bankrupt,' to all property, not exempt, which, 'prior to the filing of the petition,' he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Other provisions strengthen this view, notably the requirement of section 7, cl. 8, that a voluntary bankrupt shall claim his exemptions at the time of filing his petition, and that an involuntary bankrupt shall claim them within 10 days after the adjudication, unless further time is granted. Indeed, we think the statute admits of doubt only in respect of whether the right to any claimed exemption is to be determined as of the time of the filing of the petition or as of the time when the debtor was adjudged a bankrupt. That it is to be determined as of the earlier date is suggested by those provisions of section 6, section 7, cl. 8, and section 70a, cl. 5, which make the time of the filing of the petition of special significance, and that it is to be determined as of the later date is suggested by the provision in section 70a that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. But, as the facts of the present case do not require that we determine this matter, we pass it, observing, first, that the present act differs from that of 1867 in that by section 14 of the latter the trustee became vested with the title of the bankrupt as of the date of the commencement of the proceedings; and, second, that the Circuit Court of Appeals of the Seventh Circuit seems to regard the date when the debtor was adjudged a bankrupt as controlling, as is shown in *Re Mayer*, 108 Fed. 599, 608, 47 C. C. A. 512, 521, where it was said by Judge Woods: 'The intention of this statute is, without doubt, that the creditors shall have all of the estate of a bankrupt which is not exempt, and that the bankrupt shall have the exemptions allowed by the law of his domicile determined by relation to the date of adjudication.' Although dissenting from the judgment in that case, Judge Jenkins also said (108 Fed. 615, 47 C. C. A. 528): 'The general purpose of the bankruptcy act is that the bankrupt, surrendering his estate not exempt, should be discharged from his debts then existing, and should retain the property exempted and allowed to him by the law of the state of his domicile. The creditors are to have all of the estate not exempt, and must surrender all claims against the bankrupt if he shall receive his discharge. The title to the property thus reserved for the benefit of the creditors is vested in the trustees as of the date he was adjudged a bankrupt. That date is the "dead line," separating the past and the future. All that the bankrupt had on that date, except property exempt, goes to his creditors.' We conclude that a claimed exemption otherwise recognized by the state laws, but to which the bankrupt had not become entitled at the time of the filing of the petition or at the time he was adjudged a bankrupt, is not within the saving and protecting clauses of the bankruptcy act, and cannot be allowed or set apart thereunder."

I think that reasoning entirely sound, and I therefore dissent from the judgment given here.

CLARK-HERRIN-CAMPBELL CO. v. H. B. CLAFLIN CO. et al.†

(Circuit Court of Appeals, Fifth Circuit. December 17, 1914.)

No. 2700.

BANKRUPTCY (§ 21*)—DISTRICT OF PROCEEDING—WAIVER OF OBJECTION.

In its answer to a petition in involuntary bankruptcy, the defendant objected to the jurisdiction of the court on the ground that it was domiciled in another division of the district; but it also answered to the merits and contested before a referee an application for a receiver, also in an agreement for settlement by which the petitioning creditors agreed to dismiss the proceeding it stipulated to submit the question of liability for costs and attorney's fees to the District Court and abide by its decision. *Held*, that by such acts it entered a general appearance and waived its objection to the jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 24; Dec. Dig. § 21.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

In the matter of the Clark-Herrin-Campbell Company, alleged bankrupt. On petition by said company against the H. B. Claflin Company and others, petitioning creditors, to superintend and revise an order of the District Court. Affirmed.

The petitioner, Clark-Herrin-Campbell Company, is a Mississippi corporation, located at Clarksdale, in said state. An involuntary petition in bankruptcy was filed against it October 31, 1912, at Oxford, in the Western division of the district. The proceedings in bankruptcy were instituted by creditors in statutory number and amount, alleging insolvency and sundry acts of bankruptcy. The Clark-Herrin-Campbell Company in due course answered the petition and interposed specially the defense that it was "domiciled" and engaged in business at Clarksdale, in the Delta division of said district, and prayed the judgment of the court as to jurisdiction of the defendant in the Western division of said district. Defendant did not, however, limit its defense to the privilege of being sued in the division of the district in which it was an inhabitant, namely, the Delta division, but proceeded with a general denial of all the matters charged, raising issues severally on all the grounds alleged for adjudication, and demanding a jury trial indiscriminately on all the issues raised.

Two days after the filing of the involuntary petition and before the answer of defendants the petitioning creditors made an application on the usual ground of necessity for the appointment of a receiver to take charge of the business and assets of the alleged bankrupt. Upon a certificate of the clerk of the court to the absence from the district or incapacity of the judge, a reference was made to the referee of the Western division, who thereupon appointed a deputy clerk of the United States court as receiver, but upon discovering the irregularity the order of appointment was revoked before there was any interference with the property of the alleged bankrupt. The application for a receiver was finally met by a demurrer or motion to dismiss on substantially the same grounds asserted in the answer to the involuntary petition. Thereupon a hearing proceeded before the referee at Clarksdale, apparently upon the merits of the application for a receiver, consuming 17 days and resulting in a voluminous record of typewritten evidence.

During the progress of the hearing, after the alleged bankrupt had made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 5, 1915.

several offers tending to obviate the necessity for a receiver, an agreement was entered into between the petitioning creditors and the alleged bankrupt for the dismissal of the proceedings against the Clark-Herrin-Campbell Company, upon the latter entering into satisfactory obligations securing the payment of the claims of creditors and stipulating that the liability for all court costs, including attorney's fees and stenographer's fees, should be ascertained and determined by the referee, subject to review; "it being expressly agreed that the question of liability for court costs and attorney's fees as between the parties should in no wise be affected by the withdrawal of the application, or prejudice the right of the creditors with reference to the liability of the Clark-Herrin-Campbell Company for costs and attorney's fees, nor the latter's right to contest the liability therefor." Then follows the pertinent paragraph of the agreement: "That should the petitioning creditors last aforesaid dismiss their petition for a receiver, as hereinbefore provided for, in advance of or before said Hon. J. D. Magruder, referee, etc., shall have fixed and determined the questions stated and reserved in clause 'd' hereof, such action on the part of said petitioning creditors last aforesaid is not intended to conclude any of the questions so reserved, nor to affect their right to insist upon the alleged legal liability of said Clark-Herrin-Campbell Company for said expenses, court costs, and attorney's fees, but that the said alleged liability of said Clark-Herrin-Campbell Company therefor shall be determined just as though said petition had not been dismissed, and the same with respect to the right of said Clark-Herrin-Campbell Company to contest and deny any such liability, by said J. D. Magruder, referee, etc., or by Hon. H. C. Niles, Judge, etc., in reaching his or their conclusions, or the conclusions of either of them, with reference to and concerning the said questions aforesaid; that the decision of said Hon. H. C. Niles, judge of the court, as to the liability of said Clark-Herrin-Campbell Company for said expenses, court costs, and attorney's fee, and the amount thereof, shall be conclusive on all parties to the agreement, if the amount of any allowance for attorney's fees (not including expenses and costs) shall not be in excess of \$1,000, otherwise the same shall be subject to review or appeal as heretofore stated."

Thereupon the referee made an allowance to the petitioning creditors of one attorney's fee of \$1,000, and taxed the costs at \$563.40, to be paid by the alleged bankrupt. The defendant carried the findings to the District Court for revision, challenging the jurisdiction of the court on substantially the same grounds advanced in the motion to dismiss and in the answer to the petition. The District Court affirmed the findings of the referee, except for a small portion of the costs, about \$41, overruling the objections to the jurisdiction because of the failure of the local authorities to furnish as provided by law suitable accommodations for the court at Clarksdale.

J. W. Cutrer, of Clarksdale, Miss., and William B. Grant, of New Orleans, La., for petitioner.

D. A. Scott, of Clarksdale, Miss., and William C. Dufour, of New Orleans, La., contra.

Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge (after stating the facts as above). The rulings of the District Court are brought here on a petition for revision, and the matter specifically complained of is the overruling of defendant's objection to the maintenance of the suit against it in the Western division of the district, since the defendant was an inhabitant of the Delta division and had seasonably asserted its right to the venue of its domicile as provided in section 53 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1913, § 1035]):

"When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides."

Whether the provisos contained in the act creating the Delta division had been so far complied with as to establish the court at Clarksdale for the issuance and return of process for that division, in the view we take of the record, it is unnecessary to determine. It appears that the defendant did not content itself with objecting to the jurisdiction of the court, or stand on its alleged right to be sued in the division of its residence, but pleaded generally to the merits of the petition. Besides denying that it was indebted to petitioners, it went on to traverse the allegations of insolvency and the acts of bankruptcy charged against it. Clearly, therefore, its pleading was not to raise the question of jurisdiction alone, but also that of the merits of the case.

The proposition is so well settled by both federal and state authority that it is hardly necessary to do more than refer to one of the more recent statements of the law by the Supreme Court in *Big Vein Coal Co. v. Read*, 229 U. S. 38, 33 Sup. Ct. 696, 57 L. Ed. 1053:

"It is the settled practice in the federal courts that an appearance may be made for the sole purpose of raising jurisdictional questions, without thereby submitting to the jurisdiction of the court over the action. *Goldey v. Morning News*, 156 U. S. 518 [15 Sup. Ct. 559, 39 L. Ed. 517]; *Shaw v. Quincy Mining Co.*, 145 U. S. 444 [12 Sup. Ct. 935, 36 L. Ed. 768]. It is true that where the defendant appears by motion and objects to the jurisdiction, and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis, etc., Ry. Co. v. McBride*, 141 U. S. 127 [11 Sup. Ct. 982, 35 L. Ed. 659], where a demurrer was interposed, raising two grounds of jurisdiction and the third going to the merits of the cause of action, it was held that there had been a submission to the jurisdiction of the court. See, also, *Western Loan Co. v. Butte & Boston Mining Co.*, 210 U. S. 368 [28 Sup. Ct. 720, 52 L. Ed. 1101]."

The record in this case discloses, moreover, that the defendant after pleading to the merits, went to trial on the issues made by the traverse to the petition for the appointment of a receiver, and it was held by this court in *Edgell et al. v. Felder*, 84 Fed. 69, 28 C. C. A. 382, that an appearance declared to be special may amount in law to a general appearance and where the party pursues a course inconsistent with a special appearance it is equivalent to a waiver of all privileges and benefits the party might have had through an objection to the venue. The right to insist upon suit only in the district is a personal privilege, which a defendant may waive, and he does waive it by pleading to the merits.

If the case is one of which the court could take jurisdiction, such a pleading, notwithstanding any reservation therein to the pleader, waives all special or personal privileges of the defendant in respect to the particular court in which the suit is brought. *St. Louis, etc., Ry. Co. v. McBride*, 141 U. S. 130, 11 Sup. Ct. 982, 35 L. Ed. 659. If the court had jurisdiction by reason of the waiver, as we have seen, it had authority, of course, to adjudicate the questions of al-

lowance of attorney's fees and costs. Apart from the question that the defendant has precluded itself by pleading to the merits, it appears by paragraph "g" of its voluntary stipulation to have agreed to abide the decision of the District Court as to the question of liability for costs and amount thereof. If there had been no waiver evidenced by the record of the objection to the jurisdiction, it would be difficult to construe the effect of this agreement other than unqualified submission to the jurisdiction.

Power to award costs to the prevailing party, if it were not given by the Bankruptcy Act, is inherent in courts of equity. It is true the defendant was not adjudicated a bankrupt; it may have been that it preferred the settlement agreed upon, than to take chances on the result of a trial.

We see no abuse of the discretion vested in the court as to the allowance of costs, in the circumstances of this case. The petition will therefore be dismissed, and the findings of the court below affirmed.

LEE SIM v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 54.

1. ALIENS (§ 32*)—DEPORTATION OF CHINESE—COMPETENCY OF EVIDENCE.

In a proceeding to deport a Chinese person, his testimony that he was born in New York City was not competent evidence of his United States citizenship, as he could not possibly know the fact.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PRESUMPTIONS AND BURDEN OF PROOF.

In a proceeding to deport a person of the Mongolian race, there is a natural presumption that he is an alien; and the evidence to overcome the presumption, and show that he is entitled to the privileges of citizenship, should be clear and convincing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—DEPORTATION OF CHINESE—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a proceeding to deport a Chinese person, his testimony that he was born in the United States, even if competent, was discredited by his inability to recall the name of a single street, or of any of the teachers who had taught him while he was in school, or anything about the city, except that it was by the water, though he claimed to have lived there 12 years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

What Chinese persons are excluded from the United States, see note to *Wong You v. United States*, 104 C. C. A. 538.]

4. ALIENS (§ 32*)—DEPORTATION OF CHINESE—EVIDENCE.

On a hearing before an immigration inspector in a proceeding to deport a Chinese person, he need not hear sworn testimony, but may decide the question on his own inspection and examination.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. ALIENS (§ 32*)—EXAMINATION OF WITNESS—INTERPRETER—SWEARING INTERPRETER.

On a hearing before an immigration inspector in a deportation proceeding, even though the testimony was given under oath, it was not necessary that the official interpreter, under oath to discharge his duties faithfully, should take a separate oath to do his duty faithfully in that particular case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

6. ALIENS (§ 32*)—DEPORTATION—WARRANT OF ARREST—SUFFICIENCY.

A warrant for the arrest of an alien for deportation, which stated that he was unlawfully within the United States, in that he entered without inspection, contrary to the acts of Congress, was not void, as failing to show what acts brought the alien within the excluded classes, and as failing to advise him why he was taken into custody.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

7. ALIENS (§ 32*)—DEPORTATION—COUNTRY TO WHICH ALIEN SHOULD BE DEPORTED.

Under Immigration Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (Comp. St. 1913, § 4284), providing that the deportation of aliens illegally within the United States shall be to the trans-Atlantic or trans-Pacific ports from which they embarked for the United States, or, if such embarkation was for foreign contiguous territory, to the foreign port at which the alien embarked for such territory, where a Chinese person came to Canada with the intention of being smuggled into the United States, and was so smuggled into this country, he was properly ordered deported to China, instead of Canada.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon appeal from an order of the District Court for the Western District of New York, denying the appellant's application for a writ of habeas corpus.

Dilworth M. Silver, of Buffalo, N. Y., for appellant.

John Lord O'Brien, U. S. Atty., and Donald Bain, Asst. U. S. Atty., both of Buffalo, N. Y.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The appellant Lee Sim, is a Chinaman who was arrested in a freight car in the city of Buffalo on March 13, 1914, and has been ordered deported on the ground that he has been found in the United States in violation of the act of Congress approved February 20, 1907 (34 Stat. 898, c. 1134), amended by the act approved March 26, 1910 (36 Stat. 263, c. 128). He is ordered deported for the following among other reasons:

"That the said alien is unlawfully within the United States in that he entered without inspection."

The day following his arrest he was granted a hearing by the immigration inspector at Buffalo to enable him to show cause why he should not be deported in conformity with the law.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Lee Sim, the appellant, is 18 years of age. He left Hong Kong on January 27, 1913, and landed in Vancouver a month later, where he paid the Canadian head tax of \$500; from Vancouver he proceeded to Toronto, where he remained two days, and then went on to Windsor, Canada, where he remained about a week. At Windsor he was put into a freight car on Monday going to Buffalo, where he was arrested on Thursday, March 13th, as already stated. He testified that he was born in New York and had recently come from Ha Hung village, Hoi Ping district, China, where his father was then living. He also testified that his father had lived in New York City, but returned to China in 1907, taking him with him at that time.

Lee Sim claimed that he himself had lived in New York 12 years, being 12 years old when he went back to China, and that he had lived in New York City continually from his birth until his return to China. The following statement is taken from the record, giving some of the questions asked of him and his answers thereto:

"Q. Where did you live during the 12 years that you spent in New York City? A. I do not remember.

"Q. Do you remember the names of any street in New York City? A. I do not remember.

"Q. Can you give the names of the streets that comprise Chinatown in New York City? A. I do not remember.

"Q. Can you give the name and address of any Chinese firm in New York City? A. No.

"Q. Can you give the name of any Chinese person who you knew during your residence there? A. I cannot remember any one.

"Q. Can you tell us anything about New York that you remember? A. There is a large body of water near there. * * *

"Q. What did your father do when he was in New York? A. He kept a grocery store.

"Q. What was the name of the firm and where was it located? A. I do not know.

"Q. Was he engaged in that business up to the time that you all left for China? A. Up to a short time before that, he failed in business.

"Q. Did you go to school in New York? A. I was studying Chinese there for two years.

"Q. Where did you attend school? A. I do not remember.

"Q. What was the name of your teacher? A. I do not remember.

"Q. Have you any papers showing your right to be and remain in the United States? A. No, sir.

"Q. Did you ever have any papers to prove your right to be in the United States? A. No.

"Q. Do you know of any one who could recall your birth in the United States and whom you can recall at the present time? A. No. * * *

"Q. When you left China, was it your intention to come to the United States? A. Yes.

"Q. Why did you not take passage for some port in the United States, instead of going to Canada, if you are a native of the United States as you claim? A. I have no papers to show nativity or citizenship, and therefore did not apply at an American port.

"Q. Then it was your intention at the time you left China to be smuggled into the United States? A. Yes.

"Q. And for that purpose you paid the Canadian government a head tax of \$500, so that you might have the privilege of landing in Canada? A. Yes.

"Q. When you crossed from Canada into the United States, were you inspected by an immigration inspector? A. No.

"Q. Was your entry surreptitious? A. Yes, sir."

Upon the evidence the Secretary of Labor issued his warrant of deportation and directed that Lee Sim be deported to China. Application having been made for the writ of habeas corpus on the ground that Lee Sim was unlawfully detained, the court below denied the application, and in doing so gave its opinion as follows:

"The petitioner is an alien who entered the United States from Canada on or about March 14, 1913, surreptitiously, contrary to law, and without inspection, and that he was given a fair hearing by the immigrant inspector touching his right to be and remain in the United States, and the immigrant inspector, acting under authority of law and the regulations of the Department of Labor, having reported the proceedings had upon such hearing to the Secretary of Labor, and the Secretary of Labor having thereupon ordered the said petitioner deported, which said decision and order of the Secretary of Labor is made final by law."

[1] The appeal to this court is based among other grounds upon the theory that Lee Sim is a citizen of the United States and that the immigration laws do not apply to him. There is no evidence that he was born in this country beyond his own testimony that he was born in New York and that cannot be accepted as he cannot by any possibility know where he was born. *Ark Foo v. United States*, 128 Fed. 697, 699, 63 C. C. A. 249 (1904); *People v. Etz*, 5 Cow. (N. Y.) 315, 320 (1826); *Braintree v. Hingham*, 1 Pick. (Mass.) 245, 257 (1822).

[2, 3] In these deportation proceedings there is a natural presumption that a person of the Mongolian race is an alien, and it is essential that the evidence to overcome it and to show that the man is entitled to the privileges of citizenship in the United States should be clear and convincing. In the case at bar there is no evidence that Lee Sim is a citizen of the United States, except his unsupported statement that he was born in New York City, and his evidence as to where he was born, as we have seen, is incompetent to prove the fact. But, if his statement were competent, it would be discredited by his inability to remember anything about the city, except that it was by the water. Although he stated that he had lived there for 12 years, he could not recall the name of a single street, or of any teachers who had taught him while he was in school. Upon the record before us there can be no doubt that he was unlawfully within the country, and the finding to that effect must be sustained.

The Supreme Court, in *United States v. Wong You*, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354 (1912), decided that Alien Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 898, 908, applies to Chinese laborers illegally coming to this country, notwithstanding the special acts relating to the exclusion of Chinese.

His counsel complain in this court that at the hearing before the immigration inspector at Buffalo the law entitled Lee Sim to counsel, and that he was not represented by counsel, nor afforded an opportunity to consult an attorney or his friends. But the record shows that he was informed that he had the right to be represented by counsel, and was asked whether he wished to be represented, and that he answered in the negative. He was then asked whether he waived all rights of counsel and was ready then to proceed with the hearing, and he replied that he was. He was fully informed of the purpose of the hearing and

the nature of the charge was explained. He was asked whether he wished an adjournment, so that he could communicate with his friends, to which he replied:

"No; but I want the privilege of writing to friends of mine, and in the event of my finding any testimony for you to give me the opportunity to present it and have the case reopened."

He was asked whether he understood all the questions he had been asked by the interpreter, and he answered, "Yes." He also testified he had been treated kindly throughout the hearing, and that his statements were made without influence or duress.

[4, 5] It is objected that at the hearing the government's interpreter was not sworn to interpret correctly Lee Sim's testimony which was given in the Chinese language. It is said that the interpreter is a witness as well as the person testifying and that the former's evidence which he is giving can be impeached; that the witness was put under oath, but the interpreter was not. We are not aware that it is incumbent at such hearings to put the witnesses under oath. The act does not require the inspectors to take sworn testimony. Although they are empowered to administer oaths, they are not required to do so, but may decide the question of the right of an alien to enter the country upon their own inspection and examination. See *Nishimura Ekiu v. United States*, 142 U. S. 651, 663, 12 Sup. Ct. 336, 35 L. Ed. 1146 (1892); *In re Jem Yuen* (D. C.) 188 Fed. 350, 353 (1910). But if at such hearings the testimony had to be given under oath it could hardly be regarded as necessary that an official interpreter under oath to discharge his duties faithfully should be required in each case to take a separate oath that he would do his duty faithfully in that particular case. A judge might with as much propriety be required to take an oath at the beginning of each case he is called upon to try.

[6] It is said that the warrant of arrest is void on the ground that it does not show what act or acts bring Lee Sim within the excluded classes, and that it gave him no knowledge as to the reasons why he was taken into custody. There is nothing to the objection thus raised, for the warrant specifically states "that the said alien is unlawfully within the United States, in that he entered without inspection," contrary to the provisions of the acts of Congress. As the warrant specifically charges him with the fact that he is unlawfully in this country because he entered it without inspection, it is sufficient, if upon a fair hearing the charge is sustained by the facts disclosed, to justify his deportation.

[7] It is contended that this man should not be deported to China, from which he originally came, but should be sent to Canada; that being "the country from whence he came" directly into the United States. It is provided in section 35 of the Immigration Act:

"That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

The question as to whether he is to be returned to China is answered for us by the Supreme Court in the recent case of *Lewis v. Frick*, 233

U. S. 291, 302, 34 Sup. Ct. 488, 58 L. Ed. 967 (1914). In that case the question was whether the alien should have been deported to Canada, whence he came upon the occasion of his unlawful entry into this country, rather than to Russia, the land of his birth from which he came six years earlier, and it was held that the act admitted of the return of the alien to Russia. The court in the course of its opinion said:

"Respecting this matter, the sections are somewhat lacking in clearness. But at least section 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country."

We entertain no doubt but that under the act Lee Sim should be deported to China, from which place he embarked for the United States, or for the foreign contiguous territory of Canada with the intention of being smuggled into the United States.

Order affirmed.

AMERICAN CAR & FOUNDRY CO. v. DUKE.

(Circuit Court of Appeals, Third Circuit. November 12, 1914.)

No. 1848.

1. MASTER AND SERVANT (§ 233*)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—CHOICE OF WAYS.

Plaintiff had worked in defendant's foundry for 11 years, when he was injured by falling into a pit, which was of the usual kind used in foundries, circular in shape, with an earth core in the center, on which was mounted a revolving crane. Plaintiff was familiar with the pit and the surrounding floor, which was of earth and uneven. There were two ways of passing to the core of the pit; one called the front way, and the other the back way. Plaintiff was directed by the foreman to wheel sand onto the core "by the back way, the same" as another employé did on the day before. To do this it was necessary to pass around one side of the pit. There was a tramway, with the rail within from six inches to two feet of the edge of the pit, and plaintiff wheeled his first load in that space, as he had seen the man do the day before, but in returning he went on the other side of the rail, where there was ample space. It was while he was wheeling his second load along the edge of the pit that he fell in, owing to the unevenness of the ground. There was nothing to prevent him from using the space on the other side of the rail, which was perfectly safe, except the slight inconvenience of crossing the rail with his barrow. *Held*, that the direction of the foreman could not be construed to require him to take the narrow and dangerous way, and that in doing so, when there was a safe way equally open and well known to him, he was chargeable with negligence as matter of law, which precluded his recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.*]

2. NEGLIGENCE (§ 136*)—ACTIONS FOR NEGLIGENCE—WHEN QUESTION OF LAW.

Where the facts are such that from them all reasonable men would draw the same conclusion, and that upon the testimony no recovery can be had upon any view which can properly be taken of it, the question of negligence ceases to be one of fact for the jury, and becomes one of law for the court to determine.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by William T. Duke against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed.

Fred Ikeler, of Bloomsburg, Pa., for plaintiff in error.

Paul J. Sherwood, of Wilkes-Barre, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This action arose out of the relation which the parties bore to one another of master and servant, wherein the plaintiff below, hereinafter called the plaintiff, sought to recover from the defendant below, hereinafter called the defendant, damages for personal injuries caused by the negligence of the defendant. The particular negligence imputed to the defendant, and which is alleged to have occasioned the injuries of which the plaintiff complains, is: First, the failure of the master to supply its servant with a reasonably safe place in which to work; and, second, its failure to supply him with reasonably safe conditions under which to work.

[1] The facts relied upon for the deduction of the defendant's negligence, as first stated, are in the main undisputed, and with respect to them the question before this court on review is whether they constitute acts from which all reasonable men might draw the same conclusion, and therefore, whether the court below erred in declining to treat the question of negligence as a question of law and in refusing to withdraw the case from the jury.

William T. Duke, the plaintiff below, was employed by the American Car & Foundry Company, the defendant below and the plaintiff in error, as a general laborer in its pipe foundry in the borough of Berwick, Pa. Duke was a man 34 years of age, and, excepting for a short interval of a few months, had been engaged for about 11 years prior to the date of his injury in working in and about a pit in the defendant's foundry, into which he fell and was injured. By his own testimony he showed that he had had a large experience in and possessed a general knowledge of the various kinds of work performed in the foundry, as well as entire familiarity with the apparatus in connection with which his accident occurred.

The pipe foundry of the defendant company was equipped with a pit of a type and pattern usual in such foundries, the center or core of which was solid ground, surrounded by a ring or open pit circular in form. This open circle or pit proper was three or four feet wide and about twelve feet deep, the inner portion or core of which was of earth, and bore a relation to the circular pit somewhat similar to that of a hub of a wheel to its tire. Upon this solid center or core was constructed a revolving crane that handled everything connected with work in the pit, lowering and placing the flasks, molds, pipes, and all materials in connection with the work. The walls of the pit were of concrete, the upper portions of which consisted of or came in contact with the ordinary earth floor of the foundry, the surface of which

was irregular, after the fashion of earth floors in foundries. Excepting along a passageway distant from the point of accident, the pit was without guard rails or protection, and no contention is here made that the trial court was in error in ruling that the case is not within the protection of the Factory Act of Pennsylvania. Act May 2, 1905 (P. L. 352).

The work in the pit was very largely, if not entirely, done from the center or core by the use of the revolving crane, and it became necessary to wheel the supplies over the pit into and upon the solid center in one of two ways, known as the "front way" and the "back way." The way usually pursued was the "front way"; but, when that way became congested with materials, the foreman would direct laborers to wheel sand and other material by the "back way." In order to reach the "back way," or "back end" of the pit, the sand could be wheeled by the side of the pit in one of several ways. Along the side of the pit and not more than two feet from it ran a tramway. Between the unguarded edge of the pit and the first rail or extended ties of the tramway there was a narrow irregular space of from six inches to two feet in width, and between this rail of the tramway and the side of the building there was room sufficient to wheel several barrows abreast, away from any peril or danger of the pit.

The testimony showed that Duke for years had worked in various capacities in and about this pit, working in it at times and passing over it at times and around it nearly all the time, and that he had intimate knowledge of its unguarded condition. On the day before the injury, the foreman had instructed a laborer by the name of Sitler to wheel a barrow of sand to the crane by the "back way." Without further direction it appears that Sitler took his own route and wheeled a barrow of sand along the edge of the pit in the narrow way of from six inches to two feet wide between the edge of the pit and the first rail or ties of the tramway, and that Duke saw him. Upon the day of the injury it appears that Duke was directed by the foreman to wheel sand over the pit to the crane, and that he told Duke to "go and wheel the sand in and take it in around the back way, the way Sitler took it yesterday." What Duke did in response to this command appears by his own testimony, as follows:

"Mr. Bower told me to wheel this sand in there, and I came in by the back way of Mr. Sitler that I had saw him come in the day before, and I wheeled the sand down along this track and the edge of this wall—about two feet of space and across the plank—there was a plank across this pit, I had three plank laid across this pit, in this hole, to the inside of this core, to dump the same [sand] into a box. I only took one load and dumped it and went on out. I went across the planks and up the middle of the tracks with the wheelbarrow and then I came with the second load of sand, and when I was going along by No. 2 pit I stepped into a hole, I should judge about six or eight inches deep, between the edge of the pit and the track, and I stumbled and fell headlong into the pit."

An analysis of Duke's conduct discloses that of several ways to wheel his barrow to the "back end" Duke selected the narrow and dangerous way and avoided a broad and safe way; the two ways, the dangerous and the safe ways being separated one from the other in distance only by the breadth of a rail and the extended ties. That he saw the pit,

and therefore must have known that he was passing within a very few inches of its unguarded brink, is evidenced both by his admission and by the fact that he placed planks across it, over which he wheeled the barrow, and that he succeeded in making one trip in safety along this dangerous way. In returning he selected the safe way and passed between the tracks of the tram and away from the point of danger, but on his second attempt to wheel the barrow along the edge of the pit he stepped into a hole in the irregular surface of the ground upon or near the edge of the pit and fell or was thrown into it.

It was not denied by the defendant that the way traversed by Duke was permitted by it to become rough and to contain holes, in fact it was asserted by the defendant that the very nature of the work in the pit caused an uneven and broken surface about its rim; nor is there any dispute in the testimony that immediately adjoining this way, and separated from it only by the width of a rail, and possibly by the extended ties, there was an absolutely safe way for Duke to have traveled, the difference between safety and danger here being merely a matter of inches. In pursuing the safe way, however, and turning to cross to the pit and go upon the core, Duke would have been required to lift the wheel of his barrow over the rail of the tram. The inconvenience of this act he avoided by taking the dangerous way.

The direction of the foreman to Duke to wheel the sand by the "back way," or in the "back end," may be susceptible of two constructions and was given a greater importance by the trial court than is justified by either construction. It would seem by one construction that the direction of the foreman to Duke to wheel the sand in by the "back way," instead of by the "front way," which at the time was blocked, did not indicate the passageway along the brink of the pit, or the route which Duke should take to get there, but rather the way back of the pit, as distinguished from the way in front of it, as a place of entrance to the core of the pit, and in no sense restricted, but in every sense left to Duke's option and to Duke's senses, the route to the "back end" that seemed safe and free from danger. It would seem by the other construction, as disclosed by the court's instruction to the jury, that it was thought that the foreman's direction to Duke to wheel the sand in by the "back way, the way Sitler took it in yesterday," might be a direction which, if followed literally by Duke, relieved Duke of the assumption of risks of dangers that were obvious and discharged him from the responsibility of the consequences of his act of obedience. The court said:

"Was the place over which the plaintiff was *required* to move by wheelbarrow the sand in question reasonably safe? If it was dangerous, did the defendant have knowledge of its dangers and was the plaintiff ignorant of its dangerous condition? * * * The question for you is rather one as to whether the route taken by him was the one over which he was *expected or required* to take the sand. If it is true, as testified by the plaintiff, that he was instructed and directed by the defendant's foreman, Clark Bower, to use the route taken by him, the defendant is convicted of negligence in not having first made the same reasonably safe. If, however, on the contrary, you are satisfied that such were not his instructions, and there was another course open to him which was reasonably safe, the defendant should not be convicted of negligence."

From the terms of this instruction, the test of the defendant's liability and of the plaintiff's contributory negligence appears to be the construction which the jury is asked to place upon the foreman's order and the manner of the plaintiff's compliance with it, while under the evidence as we view it we think the test is the conduct of Duke, taken in connection with his admitted knowledge of the dangers of his undertaking, without regard to the foreman's order or the construction to be placed upon it.

If the injury to Duke had occurred upon his first trip along the dangerous way, we think this instruction of the court below would have been more in point, for then there would have been the question for the jury, "Was the plaintiff ignorant of its dangerous condition?" But having made the trip once, and having adjusted the boards across the pit and wheeled his barrow over them, having observed and testified to the narrowness of the way, his proximity to the edge of the pit, and having knowledge, either by sight or by the sensation of wheeling the barrow, of the roughness of the ground along the edge of the pit, and having sought and pursued a safe way upon his return, there could be left for the jury no question of the plaintiff's knowledge of the danger and condition of the unsafe way or of the existence of a nearby way that was perfectly safe. With this knowledge of the dangers and perils upon the brink of the pit, if not gathered by years of observation, certainly disclosed to him by his first trip, and with a safe way open and known to him and distant but a few inches from the unsafe way, Duke is not discharged from negligence consequent upon electing to take the dangerous way, even in compliance with what he thought was required of him by the foreman's order, when the way embraced within the instruction was obviously dangerous, and when the way adjacent to it was obviously safe.

In *Solt v. Williamsport Radiator Co.*, 231 Pa. 585, 80 Atl. 1119, the Supreme Court of the state of Pennsylvania said:

"To do an obviously dangerous thing, which one is required to do in order to perform the duties of one's employment, is an assumption of a risk, but not necessarily contributory negligence."

We find nothing in this case, in the light of the foreman's instruction to Duke, when conjoined with Duke's knowledge of the situation, that *required* Duke to wheel the barrow of sand along the narrow and dangerous way, or that brings this case within the principle of law adverted to. Continuing the court said:

"To do an act necessary to the performance of the duties of one's employment in a way which is obviously dangerous, when one can perform the act in another way known to him which is obviously safe, is contributory negligence, which will bar a recovery, even though the employer may have been negligent in not complying with the requirements of the statute. * * * Where two ways of discharging the service are apparent to an employé, one dangerous and the other safe or reasonably so, the employé must select the latter, whether or not it is the less convenient to him; and if he chooses the former, and the danger is such that a reasonably prudent man would not incur the risk under the same circumstances, he is guilty of such negligence as will bar a recovery, although the master may also have been negligent." *Baldwin v. Urner*, 206 Pa. 459, 56 Atl. 38; *Chisney v. Pipe Co.*, 199 Pa. 520, 49 Atl. 309; *McIntire v. Steel Co.*, 208 Pa. 36, 57 Atl. 61; *Musser v. Brown*, 126 Fed. 141, 61 C. C. A. 207.

The negligence imputed to the defendant, that it failed to afford the plaintiff reasonably safe conditions under which to work, is based upon the contention that the foundry was not sufficiently lighted for Duke to become aware of his peril. Upon this point there was a conflict of testimony, which ceases to be important, in view of Duke's admissions and the necessary deductions from his conduct that he saw and knew the dangers incident to the way he selected and pursued.

[2] In reaching a conclusion in this case we recognize the correctness and propriety of the rule of law that a case should not be withdrawn from a jury where upon a given state of facts reasonable men might differ as to whether there was negligence or not. In such a case, negligence is a question of fact and being such is to be determined by the jury and not by the court; but where the facts are such that from them all reasonable men would draw the same conclusion, and that upon the testimony no recovery can be had upon any view which can be properly taken of it, then the question of negligence ceases to be one of fact for the jury, and becomes one of law for the court to determine. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Sealey v. Southern Ry. Co.*, 151 Fed. 739, 81 C. C. A. 282; *Bush v. Hunt*, 209 Fed. 164, 126 C. C. A. 112; *Myers v. P. C. Co.*, 233 U. S. 184, 193, 34 Sup. Ct. 559, 58 L. Ed. 906.

In our opinion the conduct of Duke, in view of what he did, saw, and admitted to have known, amounts to misconduct, about which reasonable men cannot draw different conclusions, and we are of opinion that the court below committed error in refusing to find, as a matter of law, that Duke was chargeable with the negligence that caused his injury, and in failing to bind the jury to return a verdict for the defendant.

The judgment below is reversed, and a new venire is awarded.

REYNOLDS et al. v. LOCKE et al.†

(Circuit Court of Appeals, Eighth Circuit. October 30, 1914.)

No. 4062.

1. PARTNERSHIP (§ 77*)—ASSETS—REAL PROPERTY—RIGHT TO SURPLUS.

Where a farm obtained by a partnership was taken in the name of P., one of the partners, then traded for other property under the purchaser's agreement to pay a balance of \$9,000 to the firm, and the purchaser's contract was afterwards accepted by P. in exchange for certain of his own land, he thereby became obligated to account to the firm for the \$9,000, and the whole surplus of \$3,800 arising on a sale of the land on foreclosure of a trust deed was payable to the firm's trustee for the settlement of its affairs.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 125, 145; Dec. Dig. § 77.*]

2. PARTNERSHIP (§ 336*)—DISSOLUTION AND ACCOUNTING.

Where a partner held title to certain real property in which the firm had an equity of \$9,000, and by an agreement to settle the partnership affairs such partner executed certain blank deeds to one of the partners,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 16, 1915.

acting as liquidated trustee, evidence *held* to require a finding that it was understood that one of the deeds should be used to convey the property to such trustee, and, this having been done, he was entitled to the surplus on foreclosure of a trust deed on the property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.*]

Smith, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by S. M. Locke against C. L. Reynolds and another, with cross-bill by defendants against Locke and others. Decree for complainant, and defendants appeal. Reversed, with directions.

Thomas T. Fauntleroy, Charles M. Hay, and Patrick H. Cullen, all of St. Louis, Mo., for appellants.

J. H. Rodes, of St. Louis, Mo., and F. R. Jesse, of Mexico. Mo., for appellees.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This case presents no controlling questions of law, but turns wholly upon questions of fact. It involves the right to a surplus fund arising on the foreclosure of two trust deeds against 400 acres of land in Audrain county, Mo., known as the "Waddingham farm." Locke brought the suit against C. L. and William N. Reynolds. They answered, denying the equities of the bill, and filed a cross-bill against Locke and the holders of the fund asserting title in themselves. The trial court entered a decree in favor of Locke. The defendants in the principal bill, the plaintiffs in the cross-bill, appeal.

The Mexico Land & Loan Company was organized in the spring of 1903, by William N. Reynolds, E. F. Pumphrey, and J. L. Gallo-way, for the purpose of buying and selling real property. The business, however, was not carried on through the agency of the corporation, but rather by these parties as equal partners under the corporate name. When a tract of land was acquired, it was taken in the name of the party who was chiefly concerned in its acquisition. To facilitate conveyances Reynolds and Pumphrey, who were the principal holders of titles, executed blank deeds and delivered them to the other parties, to be used in case a sale of the property was made. The business was actively prosecuted until March, 1904. It then ceased, but a settlement between the parties was not effected until the following September. In May, 1903, the company acquired title to 800 acres of land, which is referred to in the evidence as the "Waddingham farm," subject to two trust deeds. It was paid for by the company, and title taken in the name of Pumphrey. This property was later in the same year traded to a man by the name of Mathis for a farm and some city property in Illinois. There was a balance due to the company on the trade of about \$9,000. A contract for a deed was given to Mathis upon his paying this balance, which he agreed to do in the following March. Before this deed was due

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mathis' equity in the land was traded for 800 acres of land owned by Pumphrey in Kansas. Pumphrey acquired Mathis' equity and became obligated to perform his part of the contract by the payment of the \$9,000. Pumphrey never made this payment. As above stated Pumphrey held the legal title to the property. This he took originally for the company; but after the trade with Mathis for Pumphrey's land in Kansas, Pumphrey occupied a dual relation to the property. He held the legal title for the company; he held the equitable title in his own right under the Mathis contract, and would be entitled to treat the legal title as his own upon paying the company the \$9,000 due on that contract. Clearly he could not divest this interest of the company without the consent of his associates, and it is not contended that such consent was ever given. He afterwards sold 400 acres of the farm and applied the proceeds to his own use.

Pumphrey had drawn out and used the funds of the company, so that at the settlement he was indebted to it in the sum of \$32,000. Galloway had overdrawn his account in the sum of \$11,000. Reynolds had drawn out nothing, and had invested about \$35,000. Notes of the company were also out at banks amounting to \$31,000. The only assets of the company consisted of equities in several farms and town lots and some second and third mortgages, all of doubtful value. All the parties, from the time the active business closed until the settlement was made, had been anxious for a settlement. The correspondence which is put in evidence shows Pumphrey to have been especially anxious to turn over the property of the firm, if he could only escape its liabilities, most of which had either been incurred by him or were attributable to his excessive withdrawals of the company's funds. He had removed from Mexico, Mo., where the business of the company had been chiefly carried on, and become engaged in business at Omaha, Neb. In the correspondence he recognizes repeatedly that the company is largely indebted to Mr. Reynolds. He also had a vague notion of its indebtedness at the banks. Reynolds resided in Illinois. About the 10th of September, he and Galloway went to Mexico with counsel for the purpose of settling up the business of the company. They had written Pumphrey to meet them there for that purpose. He failed to come, but urged, as he had been urging for some weeks, that Galloway and Reynolds fix the matters up in some way; that he was ready to turn over all his interests, either to Mr. Locke, the cashier of the bank to which they were chiefly indebted, or to Mr. Reynolds, and simply retire, leaving the other parties to pay the debts. The correspondence leaves no doubt of his reluctance to come to Mexico and face the actual situation. He was written and telegraphed to, but was only prevailed upon to come by Mr. Galloway's going to Omaha after him in person. We call attention to the frame of mind in which Mr. Pumphrey came to this meeting, because we think it has a strong bearing upon the controverted question in the case. As late as August 31st, he wrote Galloway, urging him to arrange with Reynolds to take all the property as trustee and dispose of it and pay off the debts:

"If you cannot get him to do this, make the best proposition that he will accept, as I want to close this up worse than I can tell you. I must unload

my part in this deal, and this will unload the big end of it, and I shall feel like a young girl again."

On September 9th, in answer to the urgent appeal of Reynolds and Galloway to go to Mexico, he wrote them:

"If you can arrange with Locke to carry me a while longer, you can get an expert to go over the books and fix them up and sell the stuff and square our debts. I am so blue I cannot sleep nights, and feel as if I had had a sick spell."

This is the frame of mind in which he came to Mexico on September 11th. The evidence also clearly shows that the banks were threatening to bring suit on the company's notes, which were past due. The parties spent two days in going over the records. On September 13th they arrived at a full settlement. First it was agreed that the indebtedness at the banks should be divided, and paid by Reynolds and Pumphrey separately. One of the notes for \$10,000 had been signed in the name of the company by Pumphrey. He had, however, used the proceeds wholly for his own private purpose. This note he was to take care of himself. He was also to pay \$4,000 of the remaining \$21,000 owing at Mr. Locke's Bank. Reynolds was to pay the remaining \$17,000.

A written agreement was made, by which all of the property of the company was turned over to William N. Reynolds to be sold, and out of the proceeds the obligations of the company were to be paid. If there was a surplus, that was to be divided among the parties. If there was a deficit, the parties were to share it equally. It was further provided as follows:

"If it shall be found that either of said parties is indebted to said company, or has overdrawn more than his share of the profits of said company, the said party shall pay such amount to said company; or in case either party shall not have received his share of the property or profits of said company, such party shall be paid such amount."

This contract was signed by all three of the parties. A list of the company's property was made out in writing, and an estimate of its value placed thereon. While it was agreed that Reynolds was to manage and control the property, it was understood that either of the other parties might, if they had an opportunity, make sales, turning in to Reynolds the estimated value fixed in the list. A statement of the settlement and the list of the property was made in the form of a record of a meeting of the board of directors, and was signed by Galloway as secretary, and Reynolds as president. It was not signed by Pumphrey. The evidence is clear and convincing, however, that this record was made for the purpose of reducing the settlement to writing, and as a supplement to the written agreement that was signed by all the parties, and that this record, after it was written up, was read over and checked over by Pumphrey, as well as the other parties.

To go back to the Waddingham tract: Late in August, or early in September, Pumphrey had sent some 14 blank deeds to Galloway to be used by him in conveying the property of the company to Reynolds, if the arrangement which Pumphrey had proposed could be carried out, for Reynolds to take the property and sell it and liquidate

the company's obligations. There is a dispute in the evidence as to whether Pumphrey specified what property should go into the several deeds. He insists that he did, but the other parties who saw the letter (which had been lost) testified that no such specification was made. Reynolds and Galloway filled up one of these deeds with a description of the Waddingham tract. This deed was placed upon record on the 5th day of September. At the meeting Pumphrey knew of the deed. It was discussed while the settlement was pending. In the list of the company's property turned over to Reynolds, this tract was entered, and the value of its equity was fixed at \$6,000. There is no dispute in the evidence that Pumphrey knew that this tract was entered in the list of the property. He says, however, that it was placed there simply as property which might be sold by either of the parties. That seems so inconsistent with the whole object of the list that we feel compelled to reject Pumphrey's testimony and accept that of the other parties, including Judge Whiting, the attorney who acted for Reynolds in making the settlement. The list was prepared as a list of property which Reynolds was primarily to control and dispose of for the purpose of meeting the obligations of the company, and not simply as a list of property that either of the parties might sell.

After the record was written up and the contract signed, the parties went, on the evening of September 13th, to the bank, for the purpose of adjusting their liabilities there. At this meeting the settlement was made upon the terms above set forth. The entire liability was taken over by Mr. Pumphrey and Mr. Reynolds, and ceased to be a company obligation. The old notes were surrendered. Reynolds paid \$10,000 cash, and gave his note for \$7,000. Pumphrey gave notes for the balance. After this meeting Pumphrey insisted that he must have the Waddingham farm to put up as security for his indebtedness, and demanded that it be reconveyed to him by Mr. Reynolds, but Reynolds refused to make the conveyance.

This presents the controversy about which the testimony is marshaled. Pumphrey insists that he never consented to the use of the deed by Reynolds for a conveyance of the Waddingham tract, and that he did not consent to the turning over of that tract to Reynolds at the time of the settlement. On the other hand, it is insisted that the letters which Pumphrey wrote authorized such a use of the deed, and that at the settlement he fully ratified the conveyance, and that he only attempted to recant from it after he had been to the bank and found that the indebtedness was larger than he expected, and that he was to be charged individually with the \$10,000 note, and possibly after he had been urged by Mr. Locke to furnish him more adequate security. Locke claims under a subsequent conveyance from Pumphrey, and has no better right than Pumphrey.

[1, 2] We think that Reynolds is entitled to the fund for two reasons: (1) Under the Mathis contract the company had an interest in the land to the extent of \$9,000. That exceeds the value of the equity as fixed in the list that was made at the time of the settlement, and also as appears from the actual sale of the property on the foreclosure. The fund here in controversy is about \$3,800. So, quite in-

dependent of the conveyance and settlement, Reynolds, as trustee to close up the business of the company, has an interest in the property that is prior and superior to any interest of Pumphrey. (2) We think that the clear weight of evidence shows that the blank deed was properly filled up with a conveyance of this property to Reynolds; that this was done pursuant to the plan proposed by Pumphrey himself, that all the property of the company should be turned over to Reynolds as trustee, out of which he should pay, not only the debts of the company, but the debt which was conceded by all to be owing to him personally. The evidence also clearly shows that the conveyance was ratified and approved by Pumphrey at the settlement, and the Wad-dingham land listed as part of the land which was turned over to Reynolds. We recognize that there is some evidence to support the decree, but after a careful study of the record we are convinced that the evidence against the decree is so overwhelming that it ought not to stand.

There was some evidence to support a contention that Reynolds was estopped to claim the property by an alleged conversation between Pumphrey and Locke on the evening of September 13th, which occurred in Reynolds' presence. This evidence, however, is far too indefinite and vagrant to create an estoppel.

The decree will therefore be reversed, with directions to enter a decree in conformity with this opinion, establishing the right of the complainants in the cross-bill to the fund, and directing its payment to them, and dismissing the original bill on the merits. The allowance of \$150 to the holders of the fund for their expenses in the trial court may stand.

SMITH, Circuit Judge, dissents.

LOCKER et al. v. AMERICAN TOBACCO CO. et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 29.

1. MONOPOLIES (§ 28*)—SHERMAN ANTI-TRUST ACT—DAMAGES.

Proof that defendants have violated the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, §§ 8820-8830), will not establish a cause of action for damages to plaintiffs' business, recoverable under section 7 (8829), unless it is proved that the defendants' acts have injured plaintiffs and caused them damages recoverable at law.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

2. MONOPOLIES (§ 17*)—SHERMAN ANTI-TRUST LAW—INJURIES—SCHEME OF BUSINESS—REFUSAL TO SELL JOBBERS.

Where certain tobacco manufacturers had formed a combination in restraint of trade in violation of the Sherman Anti-Trust Act, and had appointed the M. Company their sole jobbing agent in Greater New York, on condition that it should not sell at more than list prices, receiving a discount on the goods sold, a determination on its part that it would not sell to other jobbers in its territory, but only to retailers, because its former practice of selling to jobbers resulted in insufficient service by its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

salesmen to retailers, such determination was not illegal, and did not constitute a violation of the act, for which a jobber, whose orders were declined, could recover treble damages under section 7.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.*]

In Error to the District Court of the United States for the Southern District of New York.

On writ of error to the District Court for the Southern District of New York to review a judgment in favor of the defendants. The complaint was dismissed, as to the defendants Blackwell's Durham Tobacco Company and the American Snuff Company and a verdict was directed in favor of the American Tobacco Company and the Metropolitan Tobacco Company. An action similar to this was brought in the state courts and the complaint was dismissed. The dismissal was sustained by the New York Court of Appeals. 195 N. Y. 565, 88 N. E. 289.

See, also, 200 Fed. 973.

Charles Dushkind, of New York City, Charles C. Daniels, and John S. Wise, of New York City, for plaintiffs in error.

Delancey Nicoll, Junius Parker, and Thomas S. Fuller, all of New York City, for defendants in error The American Tobacco Co., American Snuff Co., and Blackwell's Durham Tobacco Co.

William N. Cohen, Arthur J. Cohen, and William S. Weiss, all of New York City, for defendant in error Metropolitan Tobacco Co.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The suit is brought under section 7 of the Anti-Trust Act, which is as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fees."

[1] It matters not that certain of the defendants have violated the provisions of the Sherman Act unless it be proved that such acts have injured the plaintiffs and caused them damages which can be recovered in an action at law.

[2] The plaintiffs were doing business in Brooklyn as jobbers in tobacco and its products and were not engaged in manufacturing. The American Tobacco Company is a manufacturer of cigarettes, plug and smoking tobacco. The defendant American Snuff Company is a manufacturer of snuff. The Blackwell's Durham Company is a manufacturer of smoking tobacco. The Metropolitan Tobacco Company was engaged in substantially the same business as the plaintiffs, viz., not as a manufacturer, but as a jobber of tobacco and its products, which it purchased from the manufacturer and sold to retailers in New York and Brooklyn.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is not now contended by the defendants that the American Tobacco Company, American Snuff Company and Blackwell's Durham Tobacco Company were not a combination forbidden by the Sherman Law during the time covered by this action. The agreement between the American Tobacco Company and the Metropolitan Company was, it seems to us, a legitimate one, viz., to make the Metropolitan Company its sole agent in Greater New York, on condition that it should not sell the American Company's products at more than the list prices. The Metropolitan Company was to receive a discount of five per cent. on goods so sold. The agreement was not reduced to writing. The plaintiffs entered business in 1903 after the foregoing arrangement had been in existence for about five years. In June, 1904, the Metropolitan Company concluded that it would not sell to local jobbers but would sell direct to the retail trade in Brooklyn. The reasons for this change in policy are fully set out in the testimony and seem to be fair and reasonable. If the manufacturing defendants had concluded to sell their products solely through instrumentalities of their own and had organized in their factories a selling department through which they supplied their products to all who desired to purchase them, it will hardly be contended that such action was even within the mischief of the Sherman Law. How, then, does an act which the defendants might lawfully do themselves become unlawful when done by another to whom they sell or consign their goods? There can be no pretense that the Metropolitan Company has received any unlawful preference or clandestine favors from the manufacturers. The prices at which they sell to the Metropolitan Company are their own list prices and there is nothing to show that the manufacturers received an exorbitant profit by this arrangement. The Metropolitan Company may sell for less than the list price but it cannot sell for a higher price. It is not prohibited from buying or selling the products of other manufacturers at any price which it may induce the manufacturer to take or the purchaser to give. We are unable to discover anything illegal or unfair in the Metropolitan Company's method of conducting business. It is not the sole agent of the other defendants but deals with the produce of many manufacturers, in no way connected with the manufacturing defendants, who are apparently entirely satisfied with the Metropolitan's methods and treatment. The reasons for the adoption of these methods are well stated by Mr. Bendheim, the president of the Metropolitan Company, as follows:

"Q. Mr. Bendheim, will you now state to the court and jury the condition that existed in Brooklyn that led you to refuse to sell the jobbers in that territory during that period; that is, in May, 1904? A. We were losing our hold on the retail trade, which we considered against our interest in a great many ways. Our salesmen preferred to sell jobbers, because it is easier to sell a bill of \$100 than 40 or 50 cents of assorted goods. They drifted gradually into the habit of selling the wholesalers more than retailers. We had promised and agreed to call on retailers once a week, and they were not being called on. Systematically it weakened our power to introduce the goods. Our goods were used to help along other goods, outside goods, and those were the main conditions."

Under the method complained of, the sequence, is Producer, Jobber, Retailer, Consumer. This seems the usual, natural and fair way of

getting the goods from the manufacturer to the consumer. We can think of no reason based on the common law or the Sherman Law which required the introduction of a second jobber or wholesaler between the producer and the consumer. In short, we are convinced that what was done by these defendants was not prohibited by law, but was a reasonable commonsense trade arrangement dictated by the exigencies of the situation. We see nothing forbidden by the Sherman Act in a manufacturer consigning or selling his product to a jobber for a particular territory and placing certain restrictions upon the prices at which the goods are to be sold. Many of the large mills have a factor in New York to whom their products are thus consigned. He can sell to A. or B. or both as he sees fit and the consignor is not concerned with the transaction so long as he gets his price and the terms of the consignment are not violated. The same is true of the jobber; he is at liberty to sell to one retailer or twenty retailers as he sees fit.

We are unable to discover anything illegal in a manufacturer of tobacco disposing of his goods to a jobber to sell to retailers, or, if he deems it advisable, to change his policy, and sell direct to the retailer himself. Why may he not do so? One who desires to become a jobber has no right to complain because the manufacturer chooses another to do this work, unless the manufacturer owes some duty to consign his product, or a part of thereof to him. The laws of trade are not wholly altruistic, they may often be hard and selfish, but it is no part of the duty of courts to attempt to enforce the precepts of the decalogue. In the struggles engendered by fierce competition, losses must occur and injustice may be done, but this is frequently inevitable and cannot be prevented so long as the parties keep within the law.

As we have thus disposed of the case upon the principal question, it is unnecessary to discuss the subsidiary questions involved. We think it proper to say, however, that we find no satisfactory proof of damages; the matter seems to be left to speculation and conjecture.

The judgment is affirmed with costs.

RUPPERT v. BENNETT.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 81.

1. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—CARE REQUIRED.

Where defendant's driver was using a heavy wagon on a street incumbered by an elevated railroad, and the clearance between the wagon and the pillars was barely sufficient to enable other wagons to pass, it was the driver's duty, when about to start, to observe conditions both front and rear, and in no event to start if danger was to be apprehended.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

2. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—USE—CARE REQUIRED.

It is the duty of the driver of a team along a city street, where the space is narrow and danger from collision imminent, to have his team well in hand before starting.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—COLLISION—NEGLIGENCE—QUESTION FOR JURY.

Evidence of negligence of driver of defendant's team, causing injury to plaintiff through collision in the street, *held* for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by Robert J. Bennett against Jacob Ruppert. Judgment for plaintiff, and defendant brings error. Affirmed.

Grant C. Fox, of New York City, for plaintiff in error.

Edward J. Byrne, of Brooklyn, N. Y., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The jury rendered a verdict of \$8,000 in favor of the plaintiff, who was injured by being run over by a brewery wagon owned by the defendant. The question was of fact and peculiarly within the province of the jury. It was fairly presented by the court in a charge to which no exception was taken. The court could not have disposed of the controversy as matter of law. There was testimony from which the jury might have drawn the conclusion that the brewery wagon, through the negligence of its driver, collided with the plaintiff's wagon and threw him into the street where he was run over by one of the wheels of the heavy brewery wagon. In these circumstances to have directed a verdict for the defendant would have been clearly error. The evidence was circumstantial in character, no one saw what occurred at the precise moment when the two wagons collided.

[1-3] The jury were, however, justified in finding that the driver of the brewery wagon was careless in leaving his horses unattended in so dangerous an environment. The clearance between his wagon and the pillars of the elevated railroad was barely sufficient to enable other large wagons to pass. When, therefore, the driver was about to start, it was his duty to observe the conditions in front of and behind his wagon and in no event to start when danger was to be apprehended. So, too, it was his duty to have his team well in hand before starting. It appears from the driver's own testimony that the team was left without hitching and that when he was ready to start he took no precautions to guard against accident. He says:

"I go in the saloon, put the key in the saloon, come out, jump on the pole and take off the blankets * * * so I just take them and throw them over there on the left side. * * * When I got them like this on the seat, just so I have the blankets in my hand, my wagon was struck from behind, so I drop down again on the pole."

The plaintiff testified:

"I seen my way clear, and everything was all right, and I drove about five or six feet when I felt a jar and was thrown to the street, it was a very violent jar. * * * I felt this jar on the right-hand side behind me. As I was passing this brewery truck the horses were standing still; * * * as my seat passed the horses' heads they were still standing."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Without reciting the testimony further, the jury were justified, if they believed the plaintiff's version of the accident, in finding that the plaintiff was driving along Third avenue in a careful manner when he was thrown from his seat by a collision with the brewery truck from behind which was due to the negligence of its driver in not having his team in hand and under his control when the circumstances were such that a high degree of care should be taken. We think that the trial court was justified in leaving the question of negligence to the jury and that their verdict should not be disturbed.

The judgment is affirmed with costs.

In re ROBSON et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 34.

PARTNERSHIP (§ 136*)—NOTE IN FIRM NAME—LIABILITY.

Where members of a firm executed a note, each signing his individual name, with nothing on the face of the note to indicate that it was a firm obligation, they bound themselves individually, and not the firm; and this though the lender of the money knew that it was going into the business of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 203, 204, 240; Dec. Dig. § 136.*]

Petition to Revise Order of the District Court of the United States for the Western District of New York.

On petition to revise an order of the District Court for the Western District of New York affirming an order made by Mark T. Powell, referee in bankruptcy, allowing the claims of creditors Mary M. Gage and Albert F. Robson against the individual estates of Charles W. Robson and John Monroe, who were members of the firm of Robson & Monroe.

W. Smith O'Brien, of Geneva, N. Y., for trustee.

C. W. Rice, of Geneva, N. Y., for claimant creditors.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The question here is whether the members of the firm of Robson & Monroe are individually liable upon certain promissory notes signed by them. There are a number of these notes in evidence, but, as they are substantially alike, it will only be necessary to refer to one of them. In March 1907, Mrs. Gage received a note of which the following is a copy:

"\$2500

Geneva, N. Y., March 27, 1907.

"One year after date we promise to pay to the order of Mary M. Gage twenty-five hundred dollars. Payable at the Geneva National Bank value received. With interest at five per cent.

[Signed] Charles W. Robson.

"John Monroe."

It will be observed that there is nothing on the face of the note to indicate that it was a firm obligation. In fact, there is nothing to indi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cate that a partnership existed between the signers. A stranger taking such a note would never think of ascertaining whether a firm existed and, if so, whether it was financially responsible, after he had satisfied himself that the individual signers were amply responsible. After being convinced in this respect he would not busy himself in finding out whether they were partners and, if so, whether their firm was successful, except perhaps as such an inquiry might bear on their individual responsibility. Neither is it at all important to ascertain how the firm of Robson & Monroe regarded the transaction or what they did with the money. On the face of the note it was the joint obligation of the signers. The lender had a right to rely upon their individual responsibility and upon their estates, respectively, if they died. The burden is strongly upon him who seeks to transform an individual liability, clearly appearing upon the face of the paper, into a firm liability. If the sole reliance were on the partnership why was it necessary or proper to have the individuals sign at all? We think the law is clearly to the effect that where the members of a firm sign in their individual capacity the creditor has a right to rely upon the individual credit. The burden is strongly upon him who asserts to the contrary and he must establish his contention by a clear preponderance of proof. Surely there is nothing here which clearly establishes the proposition that these notes were copartnership obligations and that it was the firm which was the principal debtor.

We are unable to find as to the notes in controversy any testimony which overcomes the presumption that they were what they purported to be on their face—the joint obligation of the two signers. It may even be assumed as to some of these transactions that the lender knew that the money was going into the business of the firm but this knowledge would not change the character of the written promise of the individual signers to pay the amount when it fell due. The testimony of the bankrupts as to what became of the borrowed money, as to the payment of interest out of money belonging to the firm, etc., is, in our opinion, wholly immaterial. The lenders had a right to rely on their security which was the individual responsibility of each of the signers. There is no testimony that they ever relinquished this security or released the signers of the notes from their individual liability.

The order is affirmed with costs.

In re K. MARKS & CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 7.

1. SALES (§ 44*)—FRAUD—REMEDY OF SELLER—RECOVERY OF PROPERTY.

When a buyer, being insolvent, induces a seller to sell him goods on credit, which he does not intend to pay for, the seller may rescind and recover the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 93; Dec. Dig. § 44.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 140*)—SALE TO BANKRUPT—FRAUD—DISAFFIRMANCE—RECOVERY OF GOODS.**

A seller of goods to bankrupts while insolvent, in order to disaffirm and recover the goods, must show that the bankrupts were insolvent at the time of purchase, that they concealed the fact, and intended then not to pay for the goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. **SALES (§ 52*)—FRAUD OF BUYER—RECOVERY OF GOODS—EVIDENCE.**

Where the bankrupts, a year prior to failure, had had good credit, and were reported in Dun's as "first class" on the strength of statements previously made and not corrected, and on applying to petitioner to purchase a quantity of flour, knowing themselves to be hopelessly insolvent, replied to a question as to their financial ability by saying, "Look us up in the commercial agencies, and you will find that we have good credit and are amply responsible for all our obligations," and petitioner, relying on the truth of such statement, sold the goods on credit, such facts were sufficient to show a fraudulent sale, entitling petitioner to recover the goods from the bankrupts' trustee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a final order and decree of the District Court for the Southern District of New York entered May 15, 1913, confirming the report of the special master in reclamation proceedings instituted by the Hecker-Jones-Jewell Milling Company to reclaim property alleged to be owned by the said petitioner which was in the possession of the receiver of the bankrupts. The property consisted of 725 sacks of flour. The receiver, having been appointed trustee, appeals to this court.

Emanuel Eschwege, of New York City, for appellant.

Sullivan & Cromwell and Ralph L. Collett, all of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] The law is well settled that when a party, being insolvent, induces another to sell him goods on credit which he does not intend to pay for, the court may order the contract disaffirmed and restore the property.

[2] The special master points out the three propositions which the claimant must establish before he can rescind the contract and recover the goods: First. The insolvency of the bankrupts at the time the purchase was made. Second. The concealment from the claimant of the fact of insolvency. Third. Intention on the part of the bankrupts, at the time of the sale, not to pay for the goods.

[3] As to the first proposition there can be no dispute. The bankrupts were hopelessly insolvent and they knew it. The second proposition is established with almost equal certainty. The bankrupts did not, in so many words, say that they were solvent and intended to pay for the flour. Their conduct was such, however, as to induce the milling company to believe that it could rely implicitly upon the high financial standing and good faith of the bankrupts.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

In reply to questions as to their ability to pay, a member of the firm, over the telephone, said, "Well, look us up," knowing that Dun's Agency had reported them "first class" on the strength of statements made a year previous which they had not corrected, although they had made large losses in the meantime. It was tantamount to saying, "Look us up in the commercial agencies and you will find that we have good credit and are amply responsible for all our obligations." This is what the bankrupts did say in substance and it was the reliance upon the truth of this statement that induced petitioner to sell its goods.

The special master had the advantage of seeing and hearing the witnesses and his finding upon the facts should not be disturbed. The evidence brings the case within the doctrine of the following authorities: *Donaldson, Assignee, v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *In re Sol Aarons & Co.*, 193 Fed. 646, 113 C. C. A. 514.

The order is affirmed with costs.

NEW YORK, N. H. & H. R. CO. v. HALSTEAD.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 80.

1. JUDGMENT (§ 237*)—DISMISSAL AS TO ONE PARTY—EFFECT AS TO OTHER PARTY.

Where defendant railroad company, in performance of a contract to transport a regiment, furnished a car with a defective door, and plaintiff, while lawfully riding in the car, was injured by his foot becoming caught by the door while the car was being transported by a terminal company, which had nothing to do with the inspection or maintenance of the car, a dismissal as to the terminal company did not also require a dismissal as to the railroad company.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 415, 418-421, 429; Dec. Dig. § 237.*]

2. CARRIERS (§ 318*)—INJURY TO PASSENGER—DEFECTIVE CAR—EVIDENCE.

Evidence held to sustain a verdict in favor of a passenger, riding in a freight car, for alleged injuries suffered by reason of a defect therein.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

3. CARRIERS (§ 242*)—TRANSPORTATION OF FREIGHT—CARETAKERS.

Where defendant contracted to transport a regiment, with its horses, equipment, baggage, etc., it would be assumed, in the absence of anything to the contrary, that the commanding officer was authorized to say what men should go in the car with the horses, and hence a civilian driver attached to the regiment, while riding in the car under orders, was not a trespasser.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 980; Dec. Dig. § 242.*]

Relation of carrier to persons carried under contract with their employers, see note to *Chicago & N. W. Ry. Co. v. O'Brien*, 67 C. C. A. 427.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review a judgment of the District Court, Southern District of New York, entered on the ver-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dict of a jury in favor of defendant in error who was plaintiff below. The action was for personal injuries; plaintiff was a civilian driver attached to the Forty-Seventh Regiment, N. Y. N. G., which was being transported from Connecticut to Brooklyn. He traveled in a car operated by the railroad to its rail heads near Oak Point, where the car was placed on a float of the Brooklyn Eastern District Terminal Company, which controlled and operated both float and car until its disembarkation in Brooklyn. The action was brought against the railroad and the terminal company. Complaint was dismissed as to the terminal company and sent to the jury only as to the railroad company's negligence.

J. W. Carpenter, of Brooklyn, N. Y., for plaintiff in error.

J. T. Walker, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The first assignments of error deal with the denial of motion to dismiss as to the railroad company. This is really the only point in the case. The action was brought against both companies. The car, although owned by the New York Central Railroad, was furnished by defendant under its contract to transport the regiment. It was manifestly responsible for any unsafe condition of the car. The complaint charged that the door was in a defective and dangerous condition, liable to cause injury; that, while on the float, it was negligently operated, so that some object struck the door, which was forced in and caught and injured plaintiff's leg and foot. The theory of the complaint was that two things co-operated to cause the accident a defective door and a blow which was due to negligence. On the trial there was not sufficient evidence to show negligence in the operation of the car while on the float, and the complaint was dismissed as to the terminal company. Since it appeared conclusively that the railroad company did not operate the car when on the float, such dismissal practically disposed of any charge of negligence having caused the blow on the door. But that by no means disposed of the other charge of negligence, viz., that the railroad furnished a car having its door in such a defective condition that it became a potent cause of injury when the door was struck, although, if sound, the blow would have caused no trouble. We find no force in the contention that a dismissal as to the one defendant, which had nothing to do with inspection or maintenance of the car, required a dismissal also of the charge against the railroad which furnished the defective car.

[2] It is very difficult to understand from the proof just how the catastrophe happened, or what particular movement of the door it was which brought part of it inside the car. But there was very positive evidence that while plaintiff was seated on the floor of the car, with his feet towards the door, but not touching it, one of his legs was caught under the bottom edge of the door and pinned there until his companions disengaged it. There was also evidence that before the car started its door was in a condition of disrepair which made it swing and sway. Such condition it was sought to remedy by driving

in some nails, an expedient which evidently did not remedy the difficulty. There was sufficient evidence to sustain the jury's verdict. The case was sent to them under a full and careful charge, to which there was substantially no exception.

[3] We find no force in the suggestion that plaintiff was a trespasser. The contract under which the regiment, with its horses, equipment, baggage, etc., was being transported, is not in evidence. In the absence of anything in it to the contrary, it may fairly be assumed that it was for the commanding officer to say what men should go in the car with the horses.

Judgment affirmed.

MAXWELL v. ABRAST REALTY CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 50.

1. APPEAL AND ERROR (§ 273*)—EXCEPTION—STIPULATION.

A verdict having been directed for plaintiff, without exception, defendant moved for a new trial, and the parties stipulated that, whatever the disposition of the motion, all questions presented by the evidence should be preserved for argument on appeal. *Held*, that such stipulation did not constitute an exception to the direction of a verdict, so as to justify a review thereof on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.*]

2. INTERNAL REVENUE (§ 9*)—CORPORATION TAXES—"DOING BUSINESS."

Where a corporation, with general business powers, amended its articles so as to limit its activities to the mere ownership and rental of certain property occupied and used by its stockholders as a department store, and applied the entire rent, first to the payment of interest on mortgage liens, and then to the payment of dividends to stockholders, it was not "doing business," under Corporation Tax Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300-6307).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

In Error to the District Court of the United States for the Eastern District of New York.

Action by the Abrast Realty Company against William J. Maxwell. Judgment for plaintiff (206 Fed. 333), and defendant brings error. Dismissed.

L. R. Bick, Asst. U. S. Atty., of Brooklyn, N. Y., for plaintiff in error.

E. M. Grout, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This action was brought to recover the amount of corporation tax under section 38 of the act of August 5, 1909, for the year 1911, paid by the plaintiff to the defendant as Col-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lector of Internal Revenue for the Eastern district of New York under protest. January 19, 1911, the company was incorporated for the purpose of renting on a long lease to the firm of Abraham & Straus premises owned by certain of the partners. January 20th the premises were deeded to the company. January 31st and December 7th it leased the same to Abraham & Straus. December 18th its charter was amended, so as to substitute for broader powers the real and restricted purpose of the corporation as above stated.

It seems to be agreed that the company leased all its property to Abraham & Straus, and applied the entire rent, first to payment of interest on mortgage liens, and then the balance in payment of dividends to the stockholders, and did nothing else. Judge Chatfield directed a verdict for the plaintiff, on the ground that the company was not doing business during the year 1911, within the meaning of the act as construed in *Zonne v. Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, and *McCoach v. Minehill R. R. Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. No exception was taken by the defendant.

[1] There is a preliminary consideration whether the record brings up anything for review. After the verdict was rendered, the defendant moved for a new trial on the ground, among others, that the corporation was taxable, and that the verdict was contrary to law. The parties then stipulated that, whatever were the disposition made by the court of this motion "upon appeal, all questions presented by the evidence shall be preserved for argument on appeal." This did not constitute an exception to the direction of a verdict, nor is the record signed by the judge a bill of exceptions. Such stipulations, if enforceable, might wholly change the established system in the federal courts of review upon writs of error.

[2] As this objection was not raised by the parties, it may not be improper to add that the majority of the court agree with the conclusion of the trial court.

Writ of error dismissed.

DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. v. WILLIAM R. THROPP & SONS CO.

(District Court, D. New Jersey. November 2, 1914.)

1. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — TIRE-WRAPPING MACHINE.

The De Laski & Thropp patent, No. 1,011,450, for a machine for wrapping automobile tires, was not anticipated, discloses invention, and is valid; also *held* infringed.

2. PATENTS (§ 241*) — INFRINGEMENT — PART HAVING DOUBLE FUNCTION.

The fact that an element of a machine which performs the same function as one in a machine of a prior patent also performs an additional function does not avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 380; Dec. Dig. § 241.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 92*)—VALIDITY—PATENT TO JOINT INVENTORS.

A patent to two or more persons as joint inventors is invalid, where one is the sole inventor; but such defense is regarded as technical, and not favored by the courts, and clear and convincing proof is required to sustain it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

4. PATENTS (§ 92*)—VALIDITY—"JOINT INVENTOR."

To constitute two persons joint inventors in case of a combination patent, it is not necessary that they should jointly conceive each part, but it is sufficient if each is the inventor of a part which contributes to the operativeness of the completed device; but if one contributes an independent element, which does not aid in rendering the device operative, or is not included in the combination claims, or is the subject of a separate claim, he is not a joint inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

5. PATENTS (§ 95*)—VALIDITY—PATENT TO ASSIGNEE OF INVENTOR.

A patent granted to the assignee of two applicants therefor as joint inventors is valid, although one was the sole inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 127; Dec. Dig. § 95.*]

6. PATENTS (§ 92*)—VALIDITY—OATH TO APPLICATION.

The fact that two persons make oath to an application for a patent as joint inventors does not invalidate the patent, even though it should later develop that one was the sole inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

In Equity. Suit by the De Laski & Thropp Circular Woven Tire Company against the William R. Thropp & Sons Company. On final hearing. Decree for complainant.

Brown & Seward, of New York City (E. Clarkson Seward, of New York City, of counsel), for plaintiff.

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for defendant.

HAIGHT, District Judge. This suit is for an alleged infringement of letters patent No. 1,011,450, issued to the plaintiff, as assignee of Albert De Laski and Peter D. Thropp, December 12, 1911. The answer denies infringement, and alleges that the patent is invalid.

[1] In support of the latter defense, it is contended that, in view of the prior state of the art, the patent involved no invention, and that, if it did, it was not the joint invention of De Laski and Thropp, but the sole invention of Thropp. The subject-matter of the patent is a machine for wrapping fabric around automobile tires during the course of manufacture. Where the "open cure process" is used, it is necessary that, prior to vulcanization, the tire be tightly wrapped with muslin or other fabric. Before it is wrapped, metallic side molds or "pressure rings," which clamp the edges of the tire, the latter being then in a more or less elastic state, are placed in position and subjected to pressure, so as to form the clencher or bead portion of the tire. The whole is then wrapped and placed in the vulcanizer. After vulcaniza-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion, the wrapper and the "pressure rings" are removed. The structure of the plaintiff's patent comprises a flat table-like support for the tires to be wrapped, in which are mounted three or more horizontally disposed rollers. These rollers are positively driven, and serve to move the tire in an annular course, through a raceway. In the latter is located a shuttle, carrying a bobbin, on which the fabric to be wrapped is wound. The shuttle, with the bobbin attached, is rotated in the raceway, and thus winds the fabric about the tire. In the table is another set of rollers, vertically disposed, which guide the tire and prevent horizontal dislodgment. Mounted on the table is a frame supporting a common head, from which arms radiate and curve downwardly towards the table. Each of these arms carries at its lower extremity a roller, located respectively above the first-mentioned rollers. These rollers are not positively driven. The alleged infringing machine is constructed in accordance with the description contained in the letters patent No. 1,031,491, granted to Joseph W. Thropp, July 2, 1912. The only substantial difference between the two machines is that in the defendant's more than one strand of fabric is applied at the same time, and the upper set of rollers are positively driven. It is to the former feature that the claims of the patent granted to Joseph W. Thropp are directed and limited. All of the claims in suit embrace a combination of elements, which, admittedly, are all present in the defendant's machine, except the upper set of rollers.

It is the defendant's contention that the upper rollers and their connecting mechanism of its machine do not perform the same function as that prescribed by the claims in question for the corresponding rollers and mechanism of the plaintiff's machine. It is upon this difference in function, and the consequent mode of operation of the respective machines, that the defendant bases its contention of noninfringement. The plaintiff contends that the upper rollers and connecting mechanism of its machine perform the double function of preventing vertical dislodgment of the tire during the winding, and, by exerting pressure on the tire and pressure rings, hold the latter in proper position, and thus prevent expansion. The defendant contends that the sole purpose and function of the corresponding rollers of its machine is to assist the lower rollers in feeding the tire. This function, it is claimed, is necessary because of the resistance of the feed, due to the double winding feature of the defendant's machine. It is further claimed that the double winding feature prevents vertical dislodgment of the tire, and consequently obviates the necessity, if there be any, of independent means for preventing vertical dislodgment. The defendant also contends that the upper rollers of the plaintiff's machine really do not perform any useful function, because the weight of the tire would, in itself, prevent vertical dislodgment, and the enormous pressure to which the tire and the containing molds have been subjected immediately prior to being inserted in the wrapping machine makes it impossible for any dislocation or expansion to take place, which these rollers could prevent. This is an important consideration, because, if defendant's contention is correct, it would tend to substantiate its claim—that the function of its upper set of rollers is not the same as that of the plaintiff's—as it would be presumed that the defendant would not annex a useless ap-

pendage to its machine and thereby incur risk of infringement, when by leaving it out infringement would be avoided. On the other hand, if the function performed is as the plaintiff claims, the fact that defendant has incorporated a mechanism so similar in its machine would persuade one to believe that it does perform the same function, although it may perform an additional one. The question of similarity of mode of operation depends upon the functions of the upper rollers and connecting mechanism of the respective machines. It is important, therefore, primarily to determine the function of these rollers on the plaintiff's machine.

Some of the claims of the plaintiff's patent (2, 3, 4, and 13) state their function to be that of preventing vertical dislodgment. The others refer to them as "pressure rollers" or "means for exerting vertical pressure" on the body during its movement. References in the specifications speak of this mechanism as designed for exerting pressure upon the tire and the ring, to hold the parts in position during wrapping. The evidence demonstrates that, after the tires are taken from the cold press, the pressure rings separate, to some extent, due to the expansion of the tire. When the tire is placed in the vulcanizer, it is subjected to substantially the same pressure as when in the cold press. The result is that the pressure rings are then forced back into practically the same position as when they first come from the cold press. If the tires are wrapped after expansion, or while expansion is taking place, and then are contracted when placed in the vulcanizer, there will be a slack in the wrapping, which, as the evidence shows, will seriously affect the tire. Persons who had used the plaintiff's machines were called to testify as to the utility and necessity of the upper rollers. Several testified that the pressure feature was very essential and necessary. Two testified that they were useless. Each was expressing his individual judgment, based on experience. This difference of opinion can be reconciled by considering the length of time which they, respectively, were accustomed to leave the tires in the cold press before wrapping. Those who testified that the pressure feature was necessary left the tires in the press a much shorter time than those who claimed that the pressure feature was not essential. This saving of time apparently is of great importance to some manufacturers, while not to others. Likewise there may be some tires whose weight is sufficient to prevent vertical dislodgment, while there are others which require independent means.

[2] I am constrained to find, upon all the evidence, that the upper set of rollers and connecting mechanism of the plaintiff's machine perform the twofold function claimed by the plaintiff. If the defendant's upper set of rollers perform the same function, it is clear that they perform it in substantially the same way. The fact that they may perform the additional function of assisting the lower set of rollers in feeding the tire does not negative infringement. *Powell v. Leicester Mills Co.*, 108 Fed. 386, 47 C. C. A. 416 (3d Cir.). In the specifications of the Joseph W. Thropp patent there are several references to the pressure feature. It appears, also, that one of the claims presented by this patentee, and which was rejected, included an element of a

"superposed pressure frame." The evidence demonstrates that the actual pressure exerted on the upper set of rollers of such of the defendant's machines in actual use as were discussed in the evidence is greater than that exerted on the plaintiff's machines in actual use, and much more than necessary to insure a proper feed. From this it appears that the upper set of rollers of the defendant's machine are capable of performing the same functions as those of the plaintiff's. If the only function of the upper set of rollers of the defendant's machine is to assist in the feeding of the tire, it is difficult to see why it has been found necessary, by those actually using the machine, to employ so great a pressure. During the progress of the trial, I examined, in company with counsel of the respective parties and some of the witnesses, certain of the plaintiff's and defendant's machines which were in actual use. One of the latter was being, and had been for some time, used without the upper set of rollers being positively driven, because the mechanism for driving them had become broken. When the tire was placed in this machine for wrapping, the upper set of rollers were pressed down upon it and practically the same pressure used as on the machine with the driven rollers. The only evidence as to whether this machine worked properly is to the effect that it did.

In view of these considerations, and the fact that the upper set of rollers on the plaintiff's machine perform a necessary function, I am clearly of the opinion that the upper set of rollers and connecting mechanism of the defendant's structure perform the same functions as those of the plaintiff's, and that therefore there is an infringement.

It is urged that the patent in suit is invalid, because, in view of the prior state of the art, it did not involve invention, but mere mechanical skill. This makes necessary an examination of the prior art. The Miller patent (No. 840,642) of 1907 exhibits a tire-wrapping machine. Its construction and mode of operation, as well as the principle on which it operates, is entirely different from the plaintiff's machine. The only similarity is the bobbin feature, and the fact that it will wind a fabric about a tire. To make it correspond with plaintiff's machine, it would be necessary to completely remodel and reconstruct it, adding the table feature, the mechanism necessary to operate the lower horizontal rollers, the upper pressure rollers, the vertically disposed rollers, and practically everything, with the exception of the actual winding apparatus. Defendant also offered drawings of a tire-wrapping machine designed and constructed by one State in 1905, and used by the Goodyear Rubber Company. This machine is similar to that of the patent, except that there are no upper rollers or means for performing their function. The Dixon patent (No. 351,584) of 1886 and the Whittlesey patent (No. 801,287) of 1905 exhibit machines for wrapping coils of wire. Each of them may be said to embody all of the essential features of the claims of the patent in suit, except the upper set of rollers and connecting mechanism. These, as well as the Miller patent, were considered by the Patent Office when the application for the patent in suit was pending, and certain claims were rejected on them.

The Bean patent (No. 337,230) of 1886 and the Bagaley and Hainesworth patent (No. 379,754) of 1888 exhibit machines for rolling car wheels. The Heer patent (No. 344,273) of 1886 exhibits a machine for wrapping small curtain rings with silk, or other fibrous strands. It is very small, and designed to operate on correspondingly small articles. There is one lower roller positively driven, which moves the ring to be wrapped; above that is located another stationary roller, attached to a lever; this is held against the body to be wrapped by means of a spring; the operation of the lever raises or lowers the roller as desired. The patent is silent as to the purpose of the upper roller, but the inventor testified that it was to produce proper frictional engagement with the body to be wrapped, so as to make it revolve. In order that this machine might perform the function of the machine of the patent, it is clear that a complete reconstruction would be necessary.

This comprises the state of the prior art so far as the evidence shows. While it thus appears that the problem of winding an annulus in substantially the same way as that embodied in the plaintiff's patent was old when the latter was granted, and possibly that the method adopted in the patent of exerting pressure on an annulus was known before, it fails to show that the winding feature or element, combined with the pressure feature or element, had ever been conceived before. The result of such combination was new and beneficial. The invention is the combination of these elements producing a new and useful result as a product of the combination. *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 371, 3 C. C. A. 559 (3d Cir.). In my opinion, it required more than mechanical skill for one having the prior art before him to have constructed a machine such as that of the plaintiff's. If I were in doubt regarding this the fact that the plaintiff's machine has gone into very general and extensive use, and has displaced other devices employed for a similar purpose, would be sufficient to turn the scale in favor of invention. *Potts v. Creager*, 155 U. S. 609, 15 Sup. Ct. 194, 39 L. Ed. 275.

[3] It is further urged that the patent is invalid, because it was granted for an invention purporting to be joint, which, it is claimed, was in fact the sole invention of Peter D. Thropp. It is well settled that a patent issued to two or more persons as joint inventors is invalid, where one of them is the sole inventor. This defense has, however, always been regarded as technical, and looked upon with disfavor by the courts, and clear and convincing proof has uniformly been required to sustain it. *Worden v. Fisher* (C. C.) 11 Fed. 505; *Butler v. Bainbridge* (C. C.) 29 Fed. 142; *Consolidated, etc., Apparatus Co. v. Woerle* (C. C.) 29 Fed. 449; *Belle, etc., Co. v. Lucas* (C. C.) 28 Fed. 371; *Schlicht, etc., Co. v. Chicago Sewing Machine Co.* (C. C.) 36 Fed. 585; *Priestley v. Montague* (C. C.) 47 Fed. 650; *Page Woven Wire Fence Co. v. Land* (C. C.) 49 Fed. 936; *De Laval Separator Co. v. Vermont Farm Mach. Co.*, 135 Fed. 772, 68 C. C. A. 474 (2d Cir.); *Quincey Mining Co. v. Krause*, 151 Fed. 1012, 81 C. C. A. 290; *Sieber & Trussel Mfg. Co. v. Chicago Binder & File Co.* (C. C.) 177 Fed. 437. There is some confusion in the cases as to what constitutes joint invention; but,

at least as respects a combination patent in which a number of elements are present, I think these principles may be considered as settled and sound:

[4] 1. In order to constitute two persons joint inventors, it is not necessary that exactly the same idea should have occurred to each at the same time, and that they should work out together the embodiment of that idea in a perfected machine. The conception of the entire device may be due to one, but if the other makes suggestions of practical value, which assisted in working out the main idea and making it operative, or contributes an independent part of the entire invention, which is united with the parts produced by the other and creates the whole, he is a joint inventor, even though his contribution be of comparatively minor importance and merely the application of an old idea. *Worden v. Fisher*, supra; *Consolidated, etc., Apparatus Co. v. Woerle*, supra; *Schlicht, etc., Co. v. Chicago Sewing Machine Co.*, supra; *Quincey v. Krause*, supra; *Vrooman v. Penhollow*, 179 Fed. 297, 102 C. C. A. 484 (6th Cir.); *American Patent Diamond Dop Co. v. Wood* (C. C.) 189 Fed. 391; *Carter v. Perry*, 8 O. G. 518; *Chase v. Chase*, 4 O. G. 4.

2. If the conception or contribution of one covers a distinct and independent part of the patented device, and is not an element which contributes to the operativeness of the completed device, or is not included in the claims covering a combination of elements, or is the subject of a separate claim in the same patent, such person is not a joint inventor. *Worden v. Fisher*, supra; *Stewart v. Tenk* (C. C.) 32 Fed. 665; *Heulings v. Reid* (C. C.) 58 Fed. 868; *Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co.* (C. C.) 100 Fed. 648 (affirmed C. C. A., 7th Cir., 104 Fed. 83, 43 C. C. A. 418; contra, *Welsbach Light Co. v. American Incandescent Lamp Co.*, 98 Fed. 613, 39 C. C. A. 185 [2d Cir.]); *De Laval Separator Co. v. Vermont Farm Mach. Co.*, supra.

It appears that Mr. Peter Thropp and his brother had been engaged in the machinery business for a number of years before this invention was made. Mr. De Laski, the other joint inventor, was in their employ as a draughtsman. Mr. Thropp conceived most of the machine, and Mr. De Laski some parts, namely, the tension on the bobbin, the throwing of the shafts, which transmit the power to operate the lower set of rollers, on an angle, and the shape of the device which supports the upper set of rollers. Although Mr. Thropp, the only witness who testified on this point, in referring to De Laski's part in the making of the invention, used the word "designed," I think it clear that his meaning was "conceived." He spoke of having "designed" most of the machine himself, and Mr. De Laski having "designed some"; also, in speaking of the means for supporting the upper set of rollers, he used the expression that it "was one of Mr. De Laski's suggestions." He referred to the machine as being "all my idea, with the exception of what I told you." Considering that De Laski was only an employé of Thropp, the natural presumption would be that the latter would desire to retain for himself all of the benefits accruing from the patent, if De Laski had added nothing in the way of inventive assistance. Therefore the fact that De Laski was joined as an inventor is most cogent

evidence that De Laski did contribute ideas and assistance which were of value in producing the whole operative invention.

For all that appears, any one or all of the things which De Laski did contribute may have been the very thing or things necessary to complete the invention and make the machine operative. All of the claims sued upon have elements, in combination, embracing one or more of De Laski's contributions. The means for moving the body to be wrapped in an annular course embrace the shafts, the means for exerting pressure embrace the means for supporting the pressure rollers, and "the tension on the bobbin" is embraced within the "means for applying a wrapper to the body as it moves along in its annular course." None of these elements is the subject of an independent claim, nor are they independent or distinct from the invention as a whole. If De Laski did invent these particular devices, it follows, under the principles above stated, that he was a joint inventor. At any rate, the evidence is not sufficiently clear and convincing that he was not a joint inventor to warrant me in invalidating a patent for an otherwise meritorious invention.

[5] If this conclusion is erroneous, still I think that the patent may be sustained on another ground. The reason for the rule which invalidates a joint patent for a sole invention is that the patent is granted to at least one person who is not an inventor, or an assignee of an inventor, and who, therefore, is not, by law, entitled to receive it, as the Patent Act gives no right to a patent, except to an inventor. *Barrett v. Hall*, 1 Mason, 447, Fed. Cas. No. 1047 (Story, J.); *Robinson on Patents*, vol. 1, § 402. The patent in suit was not granted to the original applicants, but to their assignee. The law permits the granting of a patent to the assignee of "an inventor or discoverer." If one of the original applicants for the patent was the sole inventor, and joined in the assignment, the person to whom the assignment was made was an assignee of the inventor, and the mere joining of the other assignor cannot, on any principle, invalidate the assignment. The patent having been granted to the assignee, the reason for the rule does not exist, and the rule is inapplicable, because the patent has been granted to one who is, by law, entitled to receive it.

[6] Neither do I think that the fact that in the oath, required to be made by the applicants as a prerequisite to granting the patent, two persons have stated that they "verily believe" themselves to be the original and first inventors, invalidates the patent, if it later develops that they were not such, because the statute merely requires that they take oath as to their "belief." The fact that they have applied for a joint patent is at least presumptive evidence that their affidavit respecting their belief was true at the time it was made. A rule so technical and liable to lead to unjust results as that under consideration should not be extended to any greater limits than a strict construction of the statute requires.

The plaintiff is entitled to a decree, with costs.

SCHMIDT v. CENTRAL FOUNDRY CO. et al.

(District Court, D. New Jersey. November 21, 1914.)

1. PATENTS (§ 210*)—INFRINGEMENT—IMPLIED LICENSE.

Complainant, when he made an invention of a pipe coupling, and at the time he applied for and obtained a patent therefor, was an officer and the active manager of defendant corporation. The greater part of the work of perfecting the device was done by employes of defendant and at its expense. Complainant also caused changes to be made in its machinery to adapt it for making the new device, and executed a contract on behalf of defendant for the manufacture of a large quantity of pipe having the patented feature, making no claim at the time for its use. *Held*, that there was an implied license to defendant to use the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 301, 302; Dec. Dig. § 210.*]

2. PATENTS (§ 210*)—LICENSE TO CORPORATION—EFFECT OF APPOINTMENT OF RECEIVER.

Where a corporation had an implied license to use a patented device, such license inures to the benefit of its receiver, and protects him from the charge of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 301, 302; Dec. Dig. § 210.*]

In Equity. Suit by Charles R. Schmidt against the Central Foundry Company and Waddill Catchings, its receiver. On final hearing. Decree for defendants.

Connolly Bros., of Washington, D. C. (Thomas A. Connolly, of Washington, D. C., of counsel), for plaintiff.

Charles Neave and Clarence D. Kerr, both of New York City, for defendants.

HAIGHT, District Judge. This suit is for an alleged infringement of letters patent No. 924,840, granted to Charles R. Schmidt June 15, 1909, on application filed October 5, 1907. The defenses are non-infringement, invalidity of the patent, and an implied license.

[1] The plaintiff was vice president and operating head of the defendant company from some time prior to the year 1907 until the fall of 1909. In 1903 the company began the manufacture and sale of what is generally known as "universal pipe," under patents issued to one Dean. In the fall of 1907 and during the year 1908, several changes were made in the manner of construction, among which, and seemingly of the least practical importance, was the embodiment of the form of coupling described in the plaintiff's patent. This form, generally speaking, differed from that previously used only in the making of a recess or groove on the inside of the faucet end of the pipe, at the rear of and adjacent to the tapered portion thereof. Considerable money was expended by the company in changing and making the tools and equipment necessary to manufacture the new form. The plaintiff not only assented to the use of this form, but was very active and chiefly, if not entirely, instrumental in inducing the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant company to adopt it. In March of 1909 he executed, on behalf of the company, a contract for furnishing a large amount of pipe, with the recess form of coupling, to be used for water mains in the city of Philadelphia. Under this contract the deliveries were to begin on May 1, 1909, and to continue from time to time thereafter. They were not actually completed until 1911. The recess did not prove to be a success, and was retained, experimentally, on some sizes, for only a few weeks, while on others it was given up at various times. In the late fall of 1910 it was wholly abandoned, and a modified form, without the recess, was thereafter manufactured. On October 5, 1907, the plaintiff applied for the patent in suit, but he did not acquaint the other officers or directors of the company of his action until after the patent was issued to him, in June, 1909. In the latter part of August, 1909, his resignation was requested, because of demands which he made on the company on account of the patent, and shortly thereafter his connection with the company was severed.

In addition, it is a reasonable conclusion from the evidence that the experiments and whatever else was necessary to perfect the features covered by the patent was done at the expense of the company, and by its employes, and that whatever the plaintiff did was done in the course of his employment, while he was the operating head of the company, and in receipt of a salary from it. All of these facts are undisputed, the plaintiff not having attempted to deny them or explain the natural inferences to be drawn from them. Although he knew that the company was, by reason of his own actions, expending money to make the changes necessary to adopt the features of his patent, and was obligating itself by contract to furnish pipe embodying these features, he did not claim to have any inventive or other rights in the recess form of coupling, nor did he make any claim on the company for its use, until he had secured his patent and until he had executed the contract on behalf of the company. These facts, I think, bring the case within the principle which was the basis of the decisions of the Supreme Court in *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102, *Solomons v. United States*, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667, *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049, *McAleer v. United States*, 150 U. S. 424, 14 Sup. Ct. 160, 37 L. Ed. 1130, *Keyes v. Eureka Mining Co.*, 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929, and *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480.

This principle was thus stated by Mr. Justice Brewer in *Solomons v. United States*, supra, 137 U. S. at page 346, 11 Sup. Ct. at page 89, 34 L. Ed. 667:

"So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employes to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the coemployes, of his employer, as to have given to such employer an irrevocable license to use such invention."

This was held in *Lane & Bodley Co. v. Locke*, supra, to be applicable to a case where an employé (who had not been employed for that express purpose) had invented improvements on a machine which his employer was engaged in manufacturing for sale. To the same effect is *Withington-Cooley Mfg. Co. v. Kinney*, 68 Fed. 500, 15 C. C. A. 531 (C. C. A. 6th Cir.). And in *Gill v. United States*, supra, where all the previous cases are reviewed, the principle was thus broadly stated by Mr. Justice Brown (160 U. S. at page 436, 16 Sup. Ct. at page 326, 40 L. Ed. 480):

"So, if the inventions of a patentee be made in the course of his employment, and he knowingly assents to the use of such inventions by his employer, he cannot claim compensation therefor, *especially* if his experiments have been conducted or his machines have been made at the expense of such employer."

In the latter case it was said that the principle "is really an application or outgrowth of the law of estoppel in pais"; that the ultimate fact to be proved is the estoppel, arising from the consent given by the patentee to the use of his inventions by his employer, without demand for compensation; that this may be shown by conduct on the part of the patentee proving acquiescence on his part in the use of his invention; and that the fact that the patentee made use of the property and labor of the employer in putting his conceptions into practical shape is important only as furnishing an item of evidence tending to show that he consented to and encouraged the employer in making use of his device.

Counsel for the plaintiff contends, however, that there can be an implied license only when the consent can be presumed or found to have been given before the patent has been applied for. The theory of this contention is that the principle or doctrine in question is based solely upon, or is a construction of, the provisions of section 7 of the Patent Act of March 3, 1839 (5 Stat. at Large 353, c. 88), which was later embodied, with modifications, in section 4899 of the Revised Statutes (Comp. St. 1913, § 9445). These acts provide that whoever purchases of an inventor, or with his knowledge or consent constructs, any newly invented machine, etc., *prior to the application for a patent*, shall have the right to use, and vend to others to be used, the same without liability. This theory, I think, is clearly wrong. The fallacy lies in a misconception of the decision in *McClurg v. Kingsland*, supra, which was the first case to announce the doctrine in question. The reference in that case to the seventh section of the act of 1839 applies to an exception which was taken to one part of the charge of the trial judge, which was entirely distinct from the part which enunciated the doctrine in question, and which was approved by the Supreme Court. This is quite evident when the whole opinion of Mr. Justice Baldwin is considered. On page 205 of 1 How. (11 L. Ed. 102) he said:

"The court left it to the jury to decide what the facts of the case were, but, if they were as testified, charged that they would fully justify the presumption of a license, a special privilege, or grant to the defendants to use the invention; that the facts amounted to 'a consent and allowance of such use,' and show such a consideration as would support an express license or grant.

or call for the presumption of one to meet the justice of the case, by exempting them from liability; having equal effect with a license, and giving the defendants a right to the continued use of the invention. The court *also* charged the jury that the facts of the case, which were not controverted, brought it within the provisions of the seventh section of the act of 1839, by the unmolested, notorious use of the invention, before the application for a patent by Harley, and that nothing had been shown by the plaintiffs to counteract the effect of this prior use."

Mr. Justice Baldwin then proceeds to examine the first part of the charge, which had to do with the presumption of a license, and held that there was no error therein. He then considered, separately, that part which dealt with the act of 1839. The only question on the latter phase of the case was as to the meaning of the words "the specific machine, manufacture, or composition of matter," contained in the act, whether they limited the provisions of the act to the "specific machine" purchased or built, or to the "invention." It is the general principle which was enunciated in the first part of the charge, and to which the first exception was taken, that has been reiterated and applied by the Supreme Court in the cases above cited. In none of them is the statute mentioned. In fact, were the doctrine based on the statute, and its application limited to cases which are within the provisions of the act, the plaintiffs, in all of those cases which came before the Supreme Court after the enactment of section 4899 of the Revised Statutes, must have recovered something. It will be noted that this section uses the words "specific thing," whereas section 7 of the act of 1839 uses the words "the specific machine, manufacture, or composition of matter." These words in the earlier statute were held, in *McClurg v. Kingsland*, to mean the "invention," as distinguished from the "specific" machine, etc., constructed or purchased. The section of the Revised Statutes was considered, in *Wade v. Metcalf*, 129 U. S. 202, 9 Sup. Ct. 271, 32 L. Ed. 661, to mean the "specific" or "actual" machine constructed or purchased, as distinguished from the "invention." In *Lane & Bodley Co. v. Locke*, *supra*, many of the machines, embracing the patented feature, were manufactured and sold after the application for letters patent had been made, yet it was held that plaintiff was not entitled to recover anything. The same applies to *Solomons v. United States* and *Gill v. United States*. In the latter case at least one machine was made after the patent was issued.

Counsel for plaintiff also refers to that part of Mr. Justice Brown's opinion, in the *Gill Case*, where, he, speaking of the application of the doctrine of estoppel in pais to inventors, said:

"In such case he is held to abandon his inchoate right to the exclusive use of his invention, to which a patent would have entitled him, *had it been applied for before such use.*"

He attempts to draw, from the underscored words, the conclusion that the implied license is limited to cases where it has arisen before the application for the patent. I think, however, he has placed a misconstruction upon this sentence, because it is apparent that Mr. Justice Brown was then speaking of an abandonment of a *right* to a patent, rather than *license* to use a patented article. Under the section of the statute upon which plaintiff relies, one might be entitled to a

patent, but be precluded from realizing the benefits of it as against the class of persons mentioned in that section. Having made an invention, one has an inchoate right to a patent; but he may abandon this inchoate right, and thus preclude himself from thereafter securing a patent.

It appears that certain of the pipe used in fulfilling the Philadelphia contract was manufactured for the defendant company by other concerns, and it is contended that the implied license does not, at any rate, extend to these. I cannot see any merit in this contention. This particular pipe was manufactured for the defendant company to enable it to perform and to fulfill a contract which the plaintiff himself had executed for it. Under the circumstances, there is no difference, so far as the application of the principle in question is concerned, between goods manufactured by the defendant company itself, or goods manufactured by another concern for it.

[2] On February 11, 1910, a petition in bankruptcy was filed against the defendant company, and Mr. Catchings, the other defendant in this suit, was named as receiver. It is urged on behalf of the plaintiff that, even though there is an implied license in favor of the defendant company, it did not inure to the benefit of the receiver, and exempt him from liability for infringement. In support of this contention plaintiff relies upon *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369. There is, however, an important and decisive distinction between the facts in that case and this. In that case the license was sought to be asserted by a corporation which claimed to have acquired it, by assignment, from the receiver of the corporation which had first secured it. The court held that it was personal and not transferable, and was extinguished with the dissolution of the first corporation. Here there was no transfer of title or interest from the corporation to the receiver. The latter was a mere custodian, carrying on the business of the corporation, pursuant to an order of the court, temporarily, in order to preserve the assets. His acts in making use of the device covered by the patent were the acts of the corporation, and he had the same right to do so that the corporation had.

In view of these conclusions, it has not been necessary for me to study with care the question of the validity of the patent; but the slight examination that I have made indicates that its validity is very doubtful.

The bill will be dismissed, with costs.

CITY OF MONTGOMERY, ALA., v. POSTAL TELEGRAPH-CABLE CO.
POSTAL TELEGRAPH-CABLE CO. v. CITY OF MONTGOMERY, ALA.

(District Court, M. D. Alabama, N. D. November 23, 1914.)

No. 200.

1. REMOVAL OF CAUSES (§ 89*)—PROCEEDINGS—ORDER OF REMOVAL—NECESSITY.

Where a suit of a civil nature involves the prerequisites necessary to a removal from the state to the federal court, and the application and bond for removal are regularly made, the case is removed by force of the statute (Judicial Code [Act March 3, 1911, c. 231] 36 Stat. 1095 [Comp. St. 1913, § 1011]) § 29, without the necessity of an order of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. § 89.*]

2. REMOVAL OF CAUSES (§ 89*)—CAUSE NOT REMOVABLE—ATTEMPT TO REMOVE—FILING PETITION AND BOND.

Where an attempt is made to remove a cause not in fact removable, the filing of the petition and bond in the state court, even though accepted and the state court proceeds no further in the suit, does not operate to oust it of jurisdiction, nor confer jurisdiction on the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. § 89.*]

3. REMOVAL OF CAUSES (§ 4*)—CAUSES REMOVABLE—"SUIT OF A CIVIL NATURE"—CORPORATION—SUIT TO RESTRAIN BUSINESS WITHOUT LICENSE—CITY ORDINANCE.

Montgomery city ordinances provide that every person or corporation operating a telegraph office in the city shall pay an annual license tax of \$125 on the business done at such office, exclusive of interstate and United States government business, and in addition 1¼ per cent. on the gross receipts of all intrastate business the previous year, except that done for the United States, and except in excess of \$3,000, and that any person doing such business without having first obtained such license shall, on conviction, be fined not less than \$10 nor more than \$100 for each day such business is transacted. *Held*, that such ordinance should be treated as a criminal state statute, and hence a suit by the city to restrain a telegraph company from doing business therein in violation of the ordinance was not a suit of a civil nature, and was therefore not removable to the federal court; the phrase "suit of a civil nature" being construed to mean a suit for the remedy of a private wrong, the test being whether the law is penal in the strict and primary sense, and whether the wrong is to the public or to the individual (citing Words and Phrases, Suit of Civil Nature).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11-20; Dec. Dig. § 4.*]

Suit by the City of Montgomery, Ala., against the Postal Telegraph-Cable Company, and ancillary bill by the Postal Telegraph-Cable Company against the City. On motion to remand to the state court. Motion granted, and defendant's application for an injunction in its ancillary bill denied.

Edward S. Watts, City Atty., of Montgomery, Ala., for City of Montgomery, Ala.

Martin & Martin and Rushton, Williams & Crenshaw, all of Montgomery, Ala., for Postal Telegraph-Cable Co.

CLAYTON, District Judge. This cause is submitted upon the motion of the city of Montgomery to remand the case to the city court, and also upon the motion of the Postal Telegraph-Cable Company, the respondent in the original case and complainant in the ancillary bill filed here for an injunction against the city seeking to restrain the further prosecution of the suit in the city court.

The 17 grounds assigned for the remandment of the case may be reduced to 3: First, that there is no diversity of citizenship; second, that the matter in controversy does not exceed the sum or value of \$3,000, exclusive of interest and costs; and, third, that the suit is not one of a "civil nature," for the reason, as asserted, it grows out of the infraction of a penal ordinance, and involves a remedy for the enforcement of the ordinance and for punishment for the infraction—in other words, that this legally ordained city law is a criminal or quasi criminal statute of the state, and that, therefore, this case, arising under such ordinance, is not triable in the federal court.

The court is of opinion that the third ground of the motion for remandment is well taken and is decisive of this case. This being so, it is unnecessary to consider whether diversity of citizenship is shown, or whether the matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$3,000.

The state statute requires the defendant in such case "to appear and demur, plead to or answer the bill within thirty days after service." Code Ala. § 3097. On October 24, 1914, the defendant Telegraph Company filed in the city court a petition and bond for the removal of the cause to this court. This was done "before the defendant is [was] required by the laws of the state * * * to answer or plead to the declaration or complaint of the plaintiff." Judicial Code, § 29.

The petition alleged that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of \$3,000, and that the suit was between citizens of different states. It thus appears that the petition and bond for removal were filed in seasonable time (*Wabash West. R. Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431), and that, so far as the citizenship of the parties and the sum or value of the matter in controversy are concerned, presented a removable case if the cause is of a "civil nature."

Upon the filing of the petition and bond, the judge of the state court refused to sign an order removing the case to this court. Thereupon, on November 4, 1914, the Telegraph Company filed, in this court, a certified transcript of the proceedings in the state court, including its petition and bond for removal. Afterwards, on November 7, 1914, the Telegraph Company filed its ancillary bill in this court, praying for an injunction restraining the city of Montgomery from further prosecuting the original case in the state court.

The original bill filed by the city of Montgomery in the case sought to be removed here sets out the ordinance in the following language:

"Each person, firm or corporation, or officer or manager thereof, having, maintaining, or operating a telegraph office in the city of Montgomery, shall pay an annual license tax of \$125 upon the business done at such office of sending and receiving telegraph messages to and from points in the state of

Alabama, but such license shall not be upon business done for the United States government nor upon interstate business. They shall pay, in addition, one and one-fourth of one per cent. on the gross receipts on all intrastate business during the previous year, except that done for the United States government, and except in excess of three thousand (\$3,000.00) dollars, certified statement thereof to be furnished the city clerk when application is made for the license."

"Any person, firm or corporation who shall engage in any business, trade or profession or keep any establishment or do any business or any act for which a license is required by this Code or any ordinance or by-law of the city for which a license is or may be required by any other law or ordinance of the city, without having first obtained such license, shall, upon conviction, for each day such business, trade or profession or such establishment is kept or carried on and for each act so done, without such license, be fined not less than ten nor more than one hundred dollars, unless a different manner is prescribed by this Code or some other ordinance or by-law of the city council."

It is alleged in the bill that the Telegraph Company is doing an intrastate business in the city; that it has not paid, and still refuses to pay, the license tax, and therefore, it is averred, the company is doing its intrastate business in violation of the above ordinance making it an offense or misdemeanor to carry on such telegraph business without having paid the required license tax. The bill further avers that, notwithstanding numerous arrests and convictions of defendant's manager in the state court, for violations of the above ordinance, the Telegraph Company continues to do an intrastate business in the city of Montgomery.

An injunction is prayed against the defendant company, restraining it from continuing to do intrastate business in the city in violation of the ordinance, and for a suitable decree against the Telegraph Company for the amount of the license tax for 1914, \$125, together with a penalty of 10 per cent. (\$12.50), and a fee of 50 cents for the issuance of the license.

It will be observed that the ordinance is so framed as to exclude from its operation business done by the defendant company for the United States as well as its interstate business; and the original bill filed in the city court, as stated above, is likewise so framed as to exclude business done for the government and all interstate business. Therefore no question of interfering with an agency of the federal government, or with commerce between the states, is presented. See *Williams v. City of Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. Ed. 275.

[1] It is well settled that if the case is a "suit of a civil nature," and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and the parties are citizens of different states, and proper petition and bond are timely presented to the state court, no order of the state court is essential to the removal of the case to this court. In such case, the statute (Judicial Code, § 29) operates, *proprio vigore*, to remove the case from the state court and into the federal court. And, in such case, any subsequent proceeding in the state court is *coram non iudice*. *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Railroad v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Railroad Co. v. Koontz*, 104 U. S. 5, 15, 26 L. Ed. 643; *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900;

Donovan v. Wells Fargo & Co., 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Steamboat Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870.

[2] It is also well settled that if the case sought to be removed from the state court does not come within the provisions of the Constitution and statutes of the United States, relating to the removal of causes of a civil nature, the filing of the petition and bond in the state court, even where such petition and bond are accepted and the state court proceeds no further in the suit, does not operate to oust the state court of jurisdiction; and in such case the controversy is not rightfully subjected to the jurisdiction of the federal court. In other words, " * * * the filing of a petition for the removal of a suit which is not removable does not work a transfer." Crehore v. Ohio & M. Ry. Co., supra; Insurance Co. v. Pechner, 95 U. S. 183, 24 L. Ed. 427; Amory v. Amory, 95 U. S. 186, 24 L. Ed. 428; Traction Co. v. Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462.

[3] If this case is not a "suit of a civil nature," it is not removable, and therefore cannot be subjected to the jurisdiction of the federal court; and, in determining the nature of the suit, the court must look to the subject-matter of the litigation, and not to its form. In *Moloney v. American Tobacco Co.* (C. C.) 72 Fed. 801, it was said:

"A question here is whether or not the present proceeding is a suit of a civil nature. *This court does not adjudicate upon penal or criminal statutes of a state.* The purpose of this information is to enforce against the American Tobacco Company the prohibition from doing business in Illinois, and the cause of action alleged is conduct which, within the meaning of the statute, if it have any meaning, is an offense or misdemeanor. The information does not show, as the ground of the action, any contract right in the state, or any property right or easement vested in the state, as trustee, representing the public or otherwise. The action is based on a statute or rule of conduct which the state, as a governing agent, has prescribed, and the violation of which, on the theory of the information, is an offense or misdemeanor. This is not, in its nature, a suit to recover for, or stop the continuance of, an injury. It is the prosecution of an offender against a criminal statute. * * * So, here, the circumstance that an injunction is the instrument, and apparently the only instrument, of the state's displeasure, does not change the essential nature of the conduct complained of, or of the legal sanction to which said conduct must be referred."

In *Arkansas v. St. Louis & S. F. Ry. Co.* (C. C.) 173 Fed. 572, the state law provided that any operator of a railroad who committed any violation of the law, for which no other penalty was prescribed, should be fined not less than \$500 nor more than \$3,000, and that the penalty was recoverable in the name of the state. It was also provided that, where there was a failure on the part of the shipper to give routing instructions, it was the duty of the railroad receiving the shipment to forward it by such route as would make the lowest freight rate. The railroad company received a shipment of lime at one point in the state, consigned to another point in the state. No instruction as to routing was given. The railroad made the shipment over its own road to a point in Oklahoma, and then by another railroad to the point of consignment in Arkansas. Suit was filed in the

name of the state against the initial railroad, alleging that the route over which the shipment was made charged a freight rate of 23 cents per hundredweight, and that the shipment should have been made over the line of the initial carrier and a shorter connecting line to the point of consignment; the original and connecting lines being wholly in Arkansas. It was alleged that this latter route was a reasonable one, and that the cost of the shipment over it would have been only 12 cents per hundredweight. The penalty was claimed, etc. On the application of the railroad the case was removed to the federal court. The state moved to remand on the ground that the case was not a "suit of a civil nature," but was for the recovery of a penalty. The court, in granting the motion, said:

"The question presented and urged at the hearing was that the suit is not of a civil nature. The question therefore is: What is the nature of the action provided by section 6813, Kirby's Dig. Ark.? After a most careful and patient investigation of a wide range of authorities, I have reached the conclusion that the action, while civil in form, is in its nature criminal. This case, therefore, must be remanded to the state court, solely upon the principle decided in the case of *Iowa v. Chicago, B. & Q. R. Co.* [C. C.] 37 Fed. 497, 3 L. R. A. 554, and which case seems to have been acquiesced in and is in harmony with various cases, among others, *Moloney v. Am. Tob. Co.* [C. C.] 72 Fed. 801; *State of Indiana v. Alleghany Oil Co.* [C. C.] 85 Fed. 870; *Ferguson v. Ross* [C. C.] 38 Fed. 161, 3 L. R. A. 322; *State of Texas v. Day Land & C. Co.* [C. C.] 41 Fed. 228."

"Suit of a civil nature" means a suit for the remedy of a private wrong. Words and Phrases, vol. 7, p. 6779; *Koch v. Vanderhoof*, 49 N. J. Law, 619, 9 Atl. 771.

In *Ferguson v. Ross* (C. C.) 38 Fed. 161, 3 L. R. A. 322, the defendant sued in his official capacity to recover certain penalties, and the court held that the proceeding was of a "penal and not civil nature," within the meaning of the removal act.

In the case of *State of Texas v. Day Land & C. Co.* (C. C.) 41 Fed. 228, 230, it was said:

"The test whether a suit at law or in equity is a suit of a civil nature, or of a criminal nature, is the nature of the right asserted and at issue. *Ames v. Kansas*, 111 U. S. 460, 4 Sup. Ct. 437 [28 L. Ed. 482]. See, also, *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524 [29 L. Ed. 746]; *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. 437 [29 L. Ed. 684]. It is not the form, but the nature, of the action that determines the question of removal."

And in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, the court said:

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community.'"

A federal court will not treat as removable, and therefore will not take jurisdiction of, a suit brought in a state court to enforce a criminal or quasi criminal state statute, or of a suit brought to recover a penalty under such state statute.

In *Iowa v. Chicago, B. & Q. R. Co.* (C. C.) 37 Fed. 497, 503, 3 L. R. A. 554, the court said:

"* * * An action to enforce a penalty, whatever may be its form, is one of a criminal nature. As such, within the Removal Act, it is not a removable case."

And again in *Iowa v. Chicago, B. & Q. R. Co.*, supra, the court said:

"And now it becomes necessary to notice the last utterance of the Supreme Court, in the case of *Wisconsin v. Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. 1370 [32 L. Ed. 239]. That case was this: The state of Wisconsin brought an action in one of her own courts against the defendant to recover a penalty prescribed by the statutes for a transaction of insurance business in the state without a license. The action was a civil action in form, to wit, an action of debt. The statutes provided that one-half of the penalty should go to the state, and one-half to the insurance department, to cover expenses, etc. Judgment was recovered in that action for the amount of the penalty. The defendant was a citizen of the state of Louisiana. Thereupon the state of Wisconsin brought an original action in the Supreme Court of the United States against the defendant, a citizen of another state, on that judgment. It will be seen that that action is somewhat removed from this, in that, not being an original action to recover a penalty, it was to recover on a judgment in a civil action for a penalty. By the Constitution of the United States the Supreme Court has original jurisdiction of controversies between a state and a citizen of another state. Yet, notwithstanding this general jurisdiction of the Supreme Court, it held that it had no jurisdiction of this action. Several lines of argument were followed by the court in reaching its conclusion. It held that that grant of jurisdiction was of judicial power, and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such a nature that it could not, on the settled principle of public and international law, be entertained by the judiciary of another state at all; that the enforcement of the criminal laws of a state was by such principles limited exclusively to the courts of the state whose laws were charged to have been violated; and that the form of the action prescribed was immaterial—courts looking ever to the substance, nature, and purpose of the action; and that in the case at bar, although the form of the action was civil, being an action of debt * * * for a penalty, it was in substance of a criminal nature, and an effort upon the part of the state to enforce its criminal laws."

In *Barron v. City of Anniston*, 157 Ala. 399, 402, 48 South. 58, 59, it was held that a proceeding for the recovery of fines and penalties, *imposed by a city ordinance*, are quasi criminal and are governed by the same rules of procedure and evidence which control in criminal cases. And there the court said:

"* * * Proceedings for the recovery of fines and penalties are quasi criminal, and 'should be conducted with greater regard to strictness than attaches to pleadings in civil cases.' * * * Again, this court has said that proceedings for the violation of city ordinances are in no sense 'civil causes,' but are 'punitive regulations,' and the object of a proceeding for the violation of them is not the redress for a civil injury, but the punishment of an offender against the peace and good order of society. Hence they are termed 'quasi criminal proceedings.'"

In the present case the city ordinance is to be treated as a state statute, and the rule stated in *Iowa v. Chicago, B. & Q. R. Co.*, supra, is to govern in the consideration of the motion to remand. In *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47

L. Ed. 778, municipal ordinances were assailed on the ground that they were unconstitutional and the court held that:

"The state having delegated certain powers to the city, the ordinances of the municipal authorities in this particular are the acts of the state through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a state law within the meaning of section 5 of the Circuit Court of Appeals Act [Act March 3, 1891, c. 517, 26 Stat. 827 (Comp. St. 1913, § 1215)]. *City Railway v. Citizens' R. R. Co.*, 166 U. S. 557 [17 Sup. Ct. 653, 41 L. Ed. 1114]; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 694 [18 Sup. Ct. 223, 42 L. Ed. 626]; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148 [21 Sup. Ct. 575, 45 L. Ed. 788]."

Therefore the city ordinance must be treated as the criminal statute of the state. The doing of intrastate business by the defendant company, without having first taken out the license required by the ordinance, is an offense or misdemeanor, and the continued violation of the ordinance, according to the theory of the bill, is a public nuisance, which is sought to be abated by permanent injunction. The bill is a means adopted by the city for the enforcement of its penal ordinance. The state court is a court of competent jurisdiction, and doubtless will properly adjudicate this controversy. However that may be, a removable cause is not presented to this court.

It was suggested, during the argument, that the bill filed in the city court is without equity, because there is an adequate remedy at law—an action for the amount of the license tax—and, again, that the prayer of the bill to restrain the Telegraph Company from further carrying on its intrastate business is inconsistent with the prayer for the recovery of the amount of the license tax, the payment of which, it is insisted, would authorize the doing of intrastate business by the Telegraph Company. But these suggestions go to the equity of the bill, and, if sound, can be made available as defense in the city court. On motion to remand, the federal court will not inquire into the sufficiency of the plaintiff's pleadings. *Smith v. Camas Prairie Ry. Co.* (D. C.) 216 Fed. 799.

From what has been said, it follows that this case must be remanded to the city court of Montgomery, and, inasmuch as the original case has been remanded, the application for the injunction, prayed for in the ancillary bill, must be denied.

Order and decree will be entered accordingly.

NATIONAL MERCANTILE CO., Limited, v. KEATING, State Auditor of Montana, et al.

(District Court, D. Montana. December 8, 1914.)

No. 13.

CONSTITUTIONAL LAW (§ 42*)—POWER OF COURT TO DETERMINE—"BLUE SKY LAW."

A court of equity will not inquire into the constitutionality of a state "blue sky law" (Laws Mont. 1913, c. 85), at suit of a corporation whose plan of doing business indicates on its face that it is intended to defraud.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the National Mercantile Company, Limited, against William Keating, State Auditor of Montana and Investment Commissioner ex officio, and others. Suit dismissed.

Joseph H. Griffin, of Butte, Mont., for plaintiff.

D. M. Kelly, Atty. Gen., of Montana, J. H. Alvord, Asst. Atty. Gen., of Montana, and J. J. McCaffery, of Butte, Mont., for defendants.

BOURQUIN, District Judge. Plaintiff is a Canada corporation doing business in Montana. It seeks to enjoin enforcement of the state's "blue sky law." Final hearing has been had. The law (Laws 13th Sess. Montana, p. 367) is like unto those referred to in Alabama & N. O. Transp. Co. v. Doyle (D. C.) 210 Fed. 175, National Mercantile Co. v. Watson (D. C.) 215 Fed. 931, and William R. Compton Co. v. Allen (D. C.) 216 Fed. 548, save that, curiously enough, it declares investment companies shall include all corporations that sell securities issued by any *other* corporation, though it also declares unlawful any sale of *any* securities by any investment company unless a permit be first secured. There are exceptions not material here.

Plaintiff contends the law violates the federal Constitution in various particulars. It seems plaintiff's business is in the nature of a loan and mortgage business, and defendants contend that, even if this is sale of securities, it is not of securities issued by any *other* corporation; hence plaintiff is not within the class in respect to which, if any, the law is unconstitutional, and so is precluded from attacking it. The definition of investment companies in the law is to be construed as a precautionary extension, rather than as excluding subjects not named. Furthermore, defendants assume to apply the law to plaintiff, and, if thereby plaintiff's constitutional rights are infringed, it may contest the law's validity. Home Tel., etc., Co. v. Los Angeles, 227 U. S. 288, 33 Sup. Ct. 312, 57 L. Ed. 510.

At the hearing, plaintiff submitted in evidence documents fully and exhaustively setting out its methods and business. In addition, its general manager testified briefly in relation thereto, though this was limited by the court upon the theory that no issue was made upon plaintiff's reliability or responsibility. Upon reading the documents aforesaid, however, the court is satisfied that they embody a scheme tending to defraud; and if the restriction placed upon the manager's testimony was error, it is harmless, in that such testimony was but cumulative and could not relieve this sinister aspect.

Plaintiff solicits applications for and issues "loan and home purchasing contracts." Each contract is limited to an amount from \$300 to \$5,000 in any series; a series being composed of contracts aggregating not in excess of \$100,000. In their main features the contracts provide that the applicant shall pay the amount stipulated in an initial and 99 monthly equal payments. After 10 per cent. of the stipulated amount or "face value" has been paid, the applicant is "eligible to receive a loan in a sum equal to the face value of his contract in the order of his application * * * out of the loan and reserve fund of the particular series" of his contract, on adequate

security in substance and form to be approved by plaintiff's board of directors, provided the said fund contains sufficient moneys. This fund is made up of all payments made by applicants *not taken as needed by plaintiff* for legitimate expenses governed by its board of directors (the applicant agreeing to such taking), interest earned, forfeitures, etc. If the loan is made, it is repaid at the monthly rate of \$7 and accrued interest at *3 per cent. per annum*, per \$1,000 of loan, or interest may be in an "equated amount" of *\$1.20 per month* per \$1,000. The applicant may or may not surrender the contract in payment upon the loan to the extent of the contract payments made.

If he retains the contract, there are various surrender features, wherein the applicant will receive a certain amount of cash *if and "when accumulated for."* If he makes all payments, plaintiff agrees to pay at the end of 120 months the face of the contract, 15 per cent., and such equitable proportion of any surplus (*if created*) as *may be* apportioned to him by plaintiff's board of directors, but not to exceed $33\frac{1}{3}$ per cent. of the face of the contract, out of the loan and reserve fund *as soon as the amount on hand to the credit of his contract equals the amount so due him.* Or at his option the applicant (1) "may accept" in cash in full settlement the amount, *if any*, in said fund standing or placed to his credit and not less than \$866.30 per \$1,000 paid by him, *as soon as accumulated*, or (2) may so accept the full amount, *if any, standing to his credit* in said fund. It is to be observed plaintiff is not a mutual concern. Applicants have no part in management or control. Nothing indicates plaintiff is endowed or a philanthropic institution. There are no restrictions upon it, save in so far as the collective conscience of its owners may be inspired by high morality impregnable to the assaults of avarice incited by opportunity. Plaintiff binds itself to no unconditional loans to applicants, to no unconditional payments on account of contract payments by applicants made. It loans and pays only *if*, after it has "taken" for itself practically all it pleases (for "legitimate expenses * * * governed by the board of directors" is sufficiently elastic therefor), there is aught and sufficient accumulated therefor in a *possible* loan and reserve fund.

The alluring feature to the applicant is a loan to build a home at rates of interest that in view of circumstances antagonize sound economic principles. Under any circumstances, few could realize their hopes; and that fewer would, in view of conditions and contingencies, is obvious. That this corporation is designed to profit its owners at the expense of victims enticed by pseudo promises and deceptive prospects seems clear. Therein, a court of equity—of conscience—will give no aid. Those appealing to equity to restrain the trespasses of others must themselves be free from imputation. If the right they assert is to do iniquity, they cannot have equity. Equity interferes in behalf of righteous dealing only, and not to further schemes of questionable morality calculated to deceive the public. Otherwise it would do violence to its principles, work injustice, and forfeit respect. The strong arm of equity—injunction—is cautiously exercised, when plaintiff's right is not doubtful, but clear and certain, and when upon

broad consideration of all the circumstances good conscience requires it. All this is settled law since the classic case wherein one highwayman of two operating upon Blackheath near London came into chancery for an accounting of profits accruing from their villiany. In this view of the case, it is unnecessary to consider the attack upon the constitutionality of the state's "blue sky law," for in no event is plaintiff entitled to the relief sought.

The suit is ordered dismissed, with costs to defendants.

AMERICAN-LA FRANCE FIRE ENGINE CO., Inc., v. CITY OF ASTORIA.

(District Court, D. Oregon. December 7, 1914.)

No. 6406.

MUNICIPAL CORPORATIONS (§ 230*)—POWERS—CONTRACTS—AUTHORITY—FORM—ORDINANCE OR MOTION.

Astoria City Charter, § 38, conferred on the city council power to maintain a fire department and provide apparatus, and appropriate money to pay the expenditures from any fund applicable thereto, provided that no bill should be contracted by any officer of the city without first sending to the council a written requisition therefor, and if the council deemed the supplies necessary they should authorize the proper committee to purchase them, and further provided that the authority given to the council by such section could only be exercised by ordinance, unless otherwise provided. Section 124 declared that the city should not be bound by any contract unless authorized by ordinance and made in writing or by order of the council. A committee of the council in charge of the fire department recommended the purchase of apparatus, on which the council by motion authorized the committee to act, and later the committee recommended to the council that it be authorized to contract with plaintiff's agent for the apparatus, on which authority the contract for the apparatus was made. *Held*, that the contract was not void, because the authority was conferred pursuant to a motion, instead of by ordinance, in conformity with the requirements of section 124.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 654-656; Dec. Dig. § 230.*]

At Law. Action by American-La France Fire Engine Company, Incorporated, against the City of Astoria. On demurrer to complaint. Overruled.

Fulton & Bowerman, of Portland, Or., for plaintiff.

A. W. Norblad, of Astoria, Or., and A. R. Wollenberg, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is an action to recover against the city of Astoria, on a contract entered into by and between plaintiff and the fire and water committee for the city, the cost price of a six-cylinder combination pump hose and chemical car, to be used as fire apparatus in extinguishing conflagrations in the city. The liability of the city upon the contract is challenged by demurrer to the complaint. The question presented is whether the fire and water com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mittee had the requisite power and authority to enter into the contract on the part of the city and in its behalf.

There is a miscellaneous provision in the city charter declaring that:

The city "is not bound by any contract, or in any way liable thereon, unless the same is authorized by city ordinance, and made in writing, and by order of the council, signed by the auditor and police judge, or some other person duly authorized on behalf of the city." Section 124, Charter.

The city council is accorded power and authority under the charter to do numerous things (section 38), among which is "to establish and maintain a fire department," to appoint fire commissioners, to make and ordain rules for the government of the department, and to provide engines and other apparatus therefor (paragraph 42, § 38), and to appropriate money to pay the debts, liabilities, and expenditures of the city, or any part or item thereof, from any fund applicable thereto:

"Provided, that no bills shall be contracted by any person or officer of the city without first sending to the common council a written requisition therefor, stating the items needed with the cost thereof, and, if the council deem the supplies necessary, they shall authorize the proper committee to purchase the same." Paragraph 33, § 38.

It is further provided that the power and authority given to the council by section 38 "can only be exercised or enforced by ordinance, unless otherwise provided." In pursuance of its power and authority, the city council by ordinance created a fire department, declaring that the powers and duties thereof should be exercised by and through the committee on fire and water, the committee being composed of members of the common council, and it was provided, among other things, that the commissioners "shall purchase all supplies for the fire department, and order all necessary repairs, subject to the ordinances of the city."

Now, acting perhaps as the committee and the common council deemed they had a legal right and were empowered to do, the committee, on July 21, 1913, addressed to the mayor and common council a recommendation that said committee be authorized to obtain prices for another fire apparatus, and, acting upon the recommendation, the common council adopted a motion authorizing the committee to act. On August 4th the committee, by a report to the common council, recommended that it (the committee) be authorized to enter into a contract with A. G. Long, agent of the American-La France Fire Engine Company, for supplying the apparatus in question. The contract was subsequently made on the part of the committee in pursuance of this authority.

It is objected to the validity of the contract that its execution on the part of the city was not authorized in conformity with the requirements of section 124 of the charter. In an analogous case in the Supreme Court of the state of Oregon, wherein it was sought to have applied the identical provision in bar of a recovery on contract with the city, the court held that, as the charter had conferred special power upon the common council touching the subject-matter of the contract, the more general provision was without application. *Beers v. Dalles City*, 16 Or. 334, 18 Pac. 835. There it was said:

"The council, having full power over the subject, may exercise it in any manner that may be most convenient."

And it was further said, the court speaking through Mr. Justice Strahan:

"I think that section was designed to apply to those cases, and only to those, where an ordinance is required by the charter, and where the work is expressly required to be let to the lowest responsible bidder, after notice, as in section 86 of the charter."

The principle was applied in a recent case in the Circuit Court of Appeals for this circuit (*City of Forsyth v. Crellin*, 210 Fed. 835, 127 C. C. A. 385), wherein it is said:

"Thus is provided a specific method by which the city may not only secure the work to be done, but may obligate itself to compensate the contractors for doing the work."

In the present case the fire department was created by ordinance, and the common council was proceeding in pursuance of its special authority to create a fire department and to provide engines and other apparatus therefor, wherein it authorized the execution by the committee of the contract in question, and I am impressed, in the light of the case of *Beers v. Dalles City*, supra, that the contract is legal and binding upon the city, and so hold.

From the complaint it appears that, in reliance upon the contract, the plaintiff constructed the apparatus in New York and shipped it to Astoria, where it was duly tested by the committee and found to be up to the requirements of the contract, so that in justice and good conscience the city ought to pay the stipulated purchase price. The city did not in the end accept or appropriate the apparatus to its own use, so that there was not an executed contract, and the city is not bound on that principle, as urged by plaintiff.

The demurrer will be overruled; and it is so ordered.

BRACEY et al. v. DARST, State Auditor of West Virginia, et al.

(District Court, N. D. West Virginia. December 5, 1914.)

1. COMMERCE (§ 57*)—CONSTITUTIONAL LAW (§§ 240, 276*)—REGULATION OF BUSINESS—DUE PROCESS OF LAW—CONSTITUTIONALITY OF "BLUE SKY LAW"—"DOMESTIC INVESTMENT COMPANY"—"FOREIGN INVESTMENT COMPANY."

Act W. Va. Feb. 11, 1913 (Laws 1913, c. 15; Code 1913, c. 55B), known as the "Blue Sky Law," provides in section 1 that "every corporation, every copartnership, every company, every individual, and every association" with certain exceptions as to banks, insurance companies, etc., which sells or negotiates for the sale of "any stocks, bonds, debentures or other securities of any kind" other than bonds of the United States, or of other political or municipal corporations, or "notes secured by mortgages on real estate within the state," to any person in the state, shall be known as "domestic investment companies," or "foreign investment companies" if organized in another state or a foreign country. It then provides that it shall be unlawful for any such company to do any of the business specified in section 1, without first applying to the State Auditor,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

making a showing of financial condition and solvency and obtaining a license, for which a fee is charged. It is also required to make annual reports, and penalties are imposed to be enforced by criminal prosecution for violation of the act. *Held* that, in view of its explicit and unambiguous language, the act cannot be construed as applying to corporations alone, and that as applied to individuals, partnerships, or voluntary associations of individuals, it is in violation of the Constitution of the United States and invalid as abridging their right as citizens to contract, thus depriving them of their property without due process of law, denying them the equal protection of the laws, and imposing a restraint and burden on interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72-76, 88, 90, 92-102; Dec. Dig. § 57; * Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699, 845, 846; Dec. Dig. § 240, 276.]

2. COMMERCE (§ 15*)—SUBJECTS OF INTERSTATE COMMERCE—STOCKS, BONDS AND SECURITIES.

Stocks, bonds, debentures, and other securities are subject-matters of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 17, 34, 35; Dec. Dig. § 15.*]

3. CONSTITUTIONAL LAW (§ 207*)—PRIVILEGES—CITIZENS OF SEVERAL STATES—CORPORATIONS—"CITIZEN."

Corporations are not "citizens" within Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. § 207.*]

For other definitions, see Words and Phrases, First and Second Series, Citizen.]

Woods, Circuit Judge, dissenting.

In Equity. Suit by Smith H. Bracey, Howie Mining Company, W. R. Covert, C. E. Wyatt, Augustus Tyler, and Charles La Due against John S. Darst, Auditor of the State of West Virginia, A. A. Lilly, Attorney General of the State of West Virginia, and R. L. Addleman, Prosecuting Attorney for the County of Ohio, West Virginia. On motion for preliminary injunction. Motion granted.

John A. Howard and J. M. Ritz, both of Wheeling, W. Va. for plaintiffs.

A. A. Lilly, Atty. Gen., Frank Lively, Asst. Atty. Gen., and C. B. Johnson and C. M. Hanna, both of Charleston, W. Va., for defendants.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge. [1] This hearing is had under the provisions of section 266 of the Judicial Code of the United States (Comp. St. 1913, § 1243), upon application of the plaintiffs for a temporary injunction to restrain the state officers, named as defendants, from prosecuting criminal proceedings against the individual plaintiffs for alleged violations of an act of the Legislature approved February 11, 1913, commonly known as the "Blue Sky Law."

The act is charged to be unconstitutional, invalid, and void: (1) Be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

cause it deprives them of their rights to sell in the state of West Virginia valuable stocks, bonds, and securities, which is depriving them of their property without due process of law; (2) that it denies the plaintiffs and each of them of the equal protection of the laws as guaranteed to them under the fourteenth amendment to the federal Constitution; (3) that it imposes a burden and practically amounts to prohibition of interstate commerce, contrary to section 8 of article 1 of the Constitution of the United States; (4) because it attempts to vest in and delegates to the Auditor of the State legislative, executive, and judicial powers in violation of the Constitution of West Virginia, and especially section 1, art. 5, thereof.

The terms of the act so assailed are:

"Section 1. Every corporation, every copartnership, every company, every individual and every association, (other than state and national banks, surety or guaranty companies, trust companies, and duly authorized insurance companies, real estate mortgage companies, dealing exclusively in real estate mortgage notes, building and loan associations, and corporations not organized for profit), organized or which shall be organized in this state, whether incorporated or unincorporated, which sell or negotiate for the sale of any stocks, bonds, debentures, or other securities of any kind or character other than bonds of the United States, or of some county, district or municipality of the state of West Virginia, and notes secured by mortgages on real estate located in this state, to any person or persons in the state of West Virginia, shall be known for the purpose of this act as a domestic investment company. Every such investment company organized in any other state, territory or government shall be known for the purpose of this act, as a foreign investment company. In all respects, other than those covered by this act, such foreign investment companies shall be governed by the law of this state applicable to non-resident corporations.

"Sec. 2. Before offering or attempting to sell any stocks, bonds, debentures, or other securities of any kind or character, other than those specifically exempted in section one of this act, to any person or persons, or transacting any business whatever in this state, except that of preparing the documents hereinafter required, every such investment company, domestic or foreign, shall file in the office of the auditor of this state, together with a filing fee of two dollars and fifty cents, the following documents, viz.: A statement showing in full detail the plan upon which it proposes to transact business; a copy of all contracts, bonds, or other instruments which it proposes to make with, or sell to, its contributors; a statement which shall show the name and location of the investment company, and an itemized account of its actual financial condition, and the amount and location of its property and liabilities, and such other information touching its affairs as said auditor may require. If such investment company shall be a copartnership or an incorporated association, it shall also file with the auditor a copy of its articles of copartnership or association, and all other papers pertaining to its organization, and if it be a corporation organized under the laws of this state, it shall also file with the auditor a copy of its articles of incorporation, constitution and by-laws, of any and all resolutions under which any contracts are to be made with contributors, or securities issued for sale, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the said auditor a copy of the laws of said state, territory or government, under which it exists or is incorporated, and also a copy of its charter, articles of incorporation, constitution and by-laws and all amendments thereof which have been made, and all other papers pertaining to its organization. No investment company which is a non-resident corporation shall be entitled to receive the license to transact business in this state provided by law until it shall have complied in all respects with the provisions and requirements of this act.

"Sec. 3. All of the above described papers shall be verified by the oath of a member of the copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association. All such papers, however, as are recorded, or are on file, in any public office shall be further certified to by the officer of whose record or archives they form a part, as being correct copies of such record or archives.

"Sec. 4. Every foreign investment company shall also file with the auditor its written consent, irrevocable, that actions may be commenced against it in the proper court of any county in this state, in which a cause of action may arise, or in which the plaintiff in such suit may reside, by the service of process on the auditor of this state, and stipulating and agreeing that such service of process on such auditor shall be taken and held in all courts to be as valid and binding as if due service had been made upon the company itself, according to the laws of this or any other state, and further expressly authorizing such auditor to accept service of any process, order or notice against such company, issued from any court in this state and agreeing that such acceptance of service shall have like force and effect as is above provided for service thereof upon such auditor, and such instrument shall be authenticated by the seal of said foreign investment company and by the signature of a member of the copartnership or company, if it be a copartnership or company, or by the signatures of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation or association authorizing the said president and secretary to execute the same.

"Sec. 5. It shall be the duty of the auditor to examine the statement and documents so filed, and if said auditor shall deem it advisable he shall have made a detailed examination of such investment company's affairs, which examination shall be made under the supervision of said auditor, and such examination shall be at the expense of such investment company, as hereinafter provided. And if the said auditor, upon his investigation, finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract or securities contain and provide for a fair, just and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, debentures and other securities by it offered for sale, said auditor shall issue to such investment company a statement reciting that such company has complied with the provisions of this act; that detailed information in regard to the company and its securities is on file in the auditor's office for public inspection and information; that such investment company is permitted to do business in this state; and such statement shall also recite in bold type that such auditor in no wise recommends the securities to be offered for sale by such investment or security company. But if said auditor finds that such articles of incorporation, or association, charter, constitution and by-laws, plan of business, or proposed contract contain any provisions that are unfair, unjust, inequitable or oppressive to any class of contributors, or if he decides from his investigation of its affairs that such investment company is not solvent and does not intend to do a fair and honest business, and in his judgment does not promise a fair return on the stocks, bonds, debentures, or other securities by it offered for sale, then he shall notify such investment company in writing of his findings, and it shall be unlawful for such company to do any further business in this state until it shall so change its constitution and by-laws, articles of incorporation or association, its proposed plan of business and proposed contract, and its general financial condition, in such manner as to satisfy the auditor that it is solvent, and its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contract are bona fide, and provide for a fair, just and equitable plan for the transaction of business, and does in his judgment promise a fair return on the stocks, bonds and other securities by it offered for sale.

All expenses paid or incurred and all fees or charges received or acquired for the filing and examination of any report required hereunder, or for any examination authorized to be made hereunder, shall be reported in detail by the said auditor, and a full account rendered and made thereof.

"Sec. 6. It shall not be lawful for any investment company, either as principal or agent, to transact any business in form or character similar to that set forth in section one of this act, except as provided in section two, until it shall have filed the papers and documents, and received from the auditor the statement above provided for. No amendment of the charter, article of incorporation, or constitution and by-laws of any such investment company shall become operative until a copy of the same has been filed with the auditor of this state as provided in regard to the original filing of charters, articles of incorporation, constitution and by-laws, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed by section two of this act, or to make any contracts other than the one shown in the copy of the proposed contract required to be filed by section two of this act, until a written statement showing in full detail the proposed new plan of transacting business, and a copy of the proposed new contract shall have been filed with the auditor in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the auditor obtained to the proposed change in the plan or contract.

"Sec. 7. Any investment company may appoint one or more agents, but no such agent shall do any business for said investment company in this state until he shall first register with the auditor of this state as agent for such investment company, and for each of said registrations there shall be paid to the auditor the sum of one dollar. Such registration shall entitle such agent to represent said investment company as its agent until the first day of July following, unless such authority is sooner revoked by the auditor; and such authority shall be subject to revocation at any time by said auditor upon notice to the holder for cause appearing to him sufficient.

"Sec. 8. Every investment company, domestic or foreign, shall file at the close of business on June thirtieth and December thirty-first of each year, and at such other times as may be required by the auditor, a statement verified by the oath of at least two members of the copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association, setting forth in such form as may be prescribed by the said auditor, its financial condition and the amount and description of its assets and liabilities, and furnishing such other information concerning its affairs as said auditor may require. Each regular statement of June thirtieth and December thirty-first shall be accompanied by a filing fee of two dollars. Any investment company failing to file its report at the close of business on June thirtieth and December thirty-first of each year or within ten days of that date, or failing to file any other or special report herein provided for within thirty days after the issuance by the auditor of notice or request therefor, shall forfeit its right to do business in this state, and the auditor shall thereupon revoke the statement in favor of such company provided for in section five of this act.

"Sec. 9. The general accounts of every investment company, domestic or foreign, doing business in this state, shall be kept by double entry, and such company, its copartners or managing officers, shall at least once a month make a trial balance of such accounts, which shall be recorded in a book provided for that purpose; such trial balance and all other books and accounts of such company shall at all times during business hours, except on Sundays and legal holidays, be open to the inspection of stockholders and investors in said company, or investors in the stocks, bonds or other securities by it sold or offered for sale, and to the state auditor and his assistants.

"Sec. 10. The auditor of this state shall have general supervision and control, as provided by this act, over any and all investment companies, domestic or foreign, doing business in this state, and all such investment companies shall be subject to examination by the said auditor, or his duly authorized assistants, at any time the said auditor may deem it advisable.

The rights, powers and privileges of the state auditor in connection with such examinations shall be the same in all respects as is now provided with reference to the examination of insurance companies; and such investment company shall pay the expense of such examination, and the failure or refusal of any investment company to pay such expense, upon the demand of the auditor or his assistant, shall work a forfeiture of its right to do business in this state.

"Sec. 11. Whenever it shall appear to the said auditor that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, or is jeopardizing the interests of its stockholders, or investors in stocks, bonds, or other securities by it sold or offered for sale, or whenever any investment company shall fail or refuse to file any papers, statements or documents required by this act, without giving satisfactory reasons therefor, said auditor shall at once communicate such facts to the Attorney General who shall thereupon apply to the circuit court of the county in which such company is located or is doing business, or to the judge of such court in vacation, for the appointment of a receiver to take charge of and wind up the business of such investment company, and if such fact or facts be made to appear, it shall be sufficient evidence to authorize the appointment by the court of such receiver and the making of such orders and decrees in such case as equity and the proper protection of the interests of investors may require.

"Sec. 12. Any person who shall knowingly or wilfully subscribe to, or make, or cause to be made, any false statement or false entry in any book of such investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine into and pass upon the affairs of such investment company, or who shall make and publish any false statement of the financial condition of such investment company, or who shall make and publish any false statement in relation to the stocks, bonds or other securities by it offered for sale, shall be deemed guilty of a felony and upon conviction thereof shall be fined not less than two hundred dollars nor more than ten thousand dollars, and shall be imprisoned for not less than one year not more than five years in the state penitentiary. Provided, that nothing herein shall in any wise limit or interfere with the civil liability of any person or persons so convicted for any loss occasioned by such criminal act.

"Sec. 13. Any person or persons, agent or agents, who shall sell or attempt to sell, or who shall offer for sale in this state any of the stocks, bonds, debentures or any other securities of any investment company, domestic or foreign, which has not obtained the statement provided for in section five, or the stocks, bonds or other securities of other concerns by it offered for sale, who have not complied with the provisions of this act, or any investment company, domestic or foreign, which shall do any business, or offer or attempt to do any business except filing the statements and reports provided for in section two of this act, which shall not have complied with the provisions of this act, and received from the auditor the statement thereof provided for in section five of this act, or any agent or agents who shall do or attempt to do in this state any business for any investment company, domestic or foreign, which agent is not at the time duly registered and has not fully complied with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than one hundred dollars nor more than one thousand dollars; and shall, in the case of an individual, be imprisoned in the county jail for not less than thirty days nor more than ninety days. Every officer, agent, employé or stockholder of any such investment company who shall violate, or who procures, aids or in any manner abets any violation of this act shall be deemed guilty of either the felony or misdemeanor above provided, as the fact may be, and all shall be guilty as principals and upon conviction shall be punished as hereinbefore provided.

"Sec. 14. All expenses and fees herein provided for shall be collected by the said auditor (save where fees are directed to be paid to some other officer), and shall be accounted for and turned into the state treasury, and the amount of the expenses and fees so turned into the state treasury are

hereby reappropriated to the said auditor for the purpose, and in an amount sufficient to pay the cost and expense of carrying this act into effect; and the said auditor is hereby authorized to appoint an additional clerk, if the same shall be found by him to be actually and absolutely necessary, to carry this act into full force and effect. All money actually and necessarily paid out, or expenses incurred by the said auditor or any clerk under his direction, under this act, shall be paid by the state treasurer out of such sums for expenses and fees received under this act, upon the state auditor's warrants, to be issued upon vouchers containing an itemized account of the salaries or expenses for which the same are issued.

"Sec. 15. All acts and parts of acts in conflict with this act or any provision thereof are hereby repealed."

The Legislatures of at least six other states have enacted so-called "Blue Sky Laws." These states are Arkansas, Kansas, Iowa, Michigan, Oregon, and Florida. So far as we can learn, the Arkansas act has not been passed upon by either the court of last resort of the state or by the United States courts of the state, but a similar statute of the state of Iowa has been passed upon by one Circuit Judge and two District Judges of the Eighth circuit, which includes the state of Arkansas. The same statement is true of the Kansas act; Kansas being in the Eighth circuit. The Iowa act has been declared unconstitutional by the District Court of the United States for the Southern District of the state; Circuit Judge Smith and the two District Judges of the state, McPherson and Pollock, sitting and all three concurring. *William R. Compton Co. v. Allen* (D. C.) 216 Fed. 537.

The Michigan act has been declared unconstitutional by the United States District Court for the Eastern District of that state; Circuit Judge Denison, of the Sixth circuit, and the two District Judges of the state, Sessions and Tuttle, sitting and all concurring. *Alabama & N. O. Transp. Co. v. Doyle* (D. C.) 210 Fed. 173.

The constitutionality of the Oregon act, in a case styled *National Mercantile Co. v. R. A. Watson et al.*, 215 Fed. 929, was submitted to the United States District Court of Oregon, Gilbert, Circuit Judge, and Wolverton and Bean, District Judges, sitting, but was not passed upon, the court dismissing the proceeding upon a plea in abatement, denying plaintiff's right to sue, it not having conformed to the provisions of the Oregon law permitting corporations to do business in that state.

The Supreme Court of Florida, in *Ex parte C. H. Taylor*, 66 South. 292, at its June term, 1914 (not yet officially published), has sustained the so-called "Blue Sky Law" of that state. An analysis of that law shows that it provides by section 1 that every corporation (municipal and others specifically named, excepted) which shall offer for sale within the state of Florida, and outside of the county where it has its principal office or place of business, "through any agency whatsoever," any of its stocks, bonds, debentures, certificates, policies, or other securities of any kind or character, is defined to be a "domestic investment company." "Any corporation organized under the laws of any other state, territory or county shall be known for the purposes of the act as a 'foreign investment company.'"

Section 2 requires both domestic and foreign investment companies, before offering any stocks, bonds, etc., to file with the comptroller with

a \$5 filing fee (a) its proposed plan of business, (b) a copy of all contracts, etc., which it proposes to make with or sell to its contractors, (c) its name and location, (d) a financial statement of its affairs, (e) such other information of its affairs required by the comptroller, and (f) verified copies of its charter, constitution, by-laws and other papers pertaining to its organization.

Section 3. Foreign investment companies are also required to file written irrevocable consent that actions against them may be commenced in the proper court of any county in the state where either cause of action arose or plaintiff resides, by service of process upon the Comptroller.

Section 4 makes it the duty of comptroller and Attorney General to examine the statements filed or to make or have made a detailed statement of the corporation's affairs, and, if it is ascertained that it is solvent, that its plan of business is just and equitable, then the comptroller shall issue to it a statement to the effect that it has complied with the act. If the contrary is found, the corporation is to be notified, and it then becomes unlawful for it to sell its securities, etc., until it shall change its constitution, etc., its plan of business, etc., and its financial condition in such manner as to satisfy the comptroller and Attorney General that it is solvent and its plan of business is just and equitable.

Section 5 makes it unlawful for any domestic company or any agent of it to sell its securities in Florida, outside of the county where its principal office or place of business is, until it has complied with the act.

Section 6 provides that an investment corporation may appoint agents, but such agents may not sell the company's securities in Florida (outside the county wherein its principal office is) until such agent has registered with the comptroller and paid the sum of one dollar, and bond may, in the discretion of the comptroller and Attorney General, be required of such agent, etc.

Section 7 provides for statements by the company of its financial condition to be filed and filing fees therefor of five dollars to be paid.

Section 8 provides that when, at any time, it appears that the company's condition is unsound or unsafe or it refuses to file statements, etc., its license, etc., shall be revoked.

Section 9 makes it criminal to subscribe or make false statements or entry in the company's books with design to deceive.

Section 10 makes it criminal for any person or agent to sell the bonds, securities, etc., of any company that has not complied with the act. This section, however, has this significant proviso:

"Provided that nothing in this act shall extend to any seller of stock, bond or other security, who has purchased the same in good faith for value, and who is the bona fide owner of such stock, bond, or other security at time of such sale."

The difference between the scope and extent of this Florida act and that of West Virginia is very apparent in many particulars.

For example:

The Florida act is confined exclusively to corporations, while the West Virginia act includes individuals, copartnerships, and associa-

tions of individuals. The Florida act restricts the corporation from selling in that state (other than in the county wherein is its principal office or place of business) only *its own* stocks, bonds, debentures, certificates, policies, or other securities of any kind or character, while the West Virginia act prohibits sale or attempt to sell *any* stocks, bonds, debentures, or other securities of any kind or character (except those specially mentioned) by any individual, copartnership, corporation, or association.

The Florida act expressly excludes from the effect of its provisions the sale by any bona fide owner of stock, etc., purchased in good faith; the West Virginia act makes no such exception. The Florida act expressly permits its domestic company to sell its stock, etc., in the county in the state wherein it has its principal office or place of business; the West Virginia act permits no such exception. In short, while the provisions of both acts, to some extent, obscure and fail to define clearly their true intent and meaning as to what kind of business operations are sought to be regulated, one might well reach the conclusion that the Florida act had for its purpose the defining of terms and conditions under which corporations can do business in that state and sell its stock and bonds for the purpose of doing such business, a perfectly legitimate thing for the state to do, for its domestic corporations are simply the offsprings of its own creation, while it has long since been determined that as to foreign corporations a state exercising its sovereign power may exclude them from doing business within its territorial limits altogether. But, on the other hand, the West Virginia act must by its terms be construed to regulate individuals, copartnerships, corporations, or associations seeking to engage in the business of buying and selling stocks, bonds, and securities of "any kind or character" other than those expressly exempted. In other words, to prevent any such person, corporation, etc., from selling in the state any obligation of any corporation whether doing business in the state or not, which had not the auditor's permission to do business therein. The sweeping effect of such provision is at once apparent, as it would substantially limit the brokerage business in the state and the purchase by its citizens of standard foreign securities which would have to be sold by them outside the state.

The decision of the Supreme Court of Florida in *Ex parte Taylor*, supra, is expressly based upon the fact that the power is clear in the Legislature "to limit and regulate the powers and operations of corporations which it brings into existence." And because Taylor, as agent for a domestic corporation, was charged solely with offering to sell in Leon county, another county of the state than the one where the corporation had its principal office or place of business, shares of the capital stock of this domestic corporation within the statutory definition and regulation, the court held that no question of interstate commerce was presented. It further says:

"It is manifestly competent for the lawmaking power to authorize an administrative finding whether the 'proposed place of business and the contracts of a domestic corporation 'contain a fair, just and equitable plan for the transaction of business,' which finding will warrant administrative action duly taken under a statutory police regulation in the interest of the

public welfare, unless restrained or controlled by appropriate judicial action. * * * Such regulations as those prescribed are peculiarly appropriate to corporations as classified in the statute."

We have examined the acts of Arkansas, Kansas, Iowa, and Michigan, the last two of which have been subject to judicial consideration and held to be unconstitutional as hereinbefore set forth. Without entering into detailed analysis of each, it will be sufficient to say that those of Kansas and Arkansas contain substantially the provisions of the West Virginia act. Each seek to make an "investment company" out of any individual, copartnership, corporation, or association seeking to sell any bonds, stock or securities of any kind or character. The Iowa act is made expressly applicable to "investment companies" and also to stockbrokers, defining "investment companies" as including "every corporation or concern, however constituted, now or hereafter organized, which shall sell or cause to be sold or offer for sale, take subscriptions for, or negotiate for the sale of any stocks, bonds, or other securities of any kind or character to any person or persons in the state of Iowa." The Kansas act defines an "investment company" substantially to be as set forth in the West Virginia act, and in its section 10 provides:

"Any investment company or stockbroker failing to file its report as herein provided * * * shall forfeit its right to do business in this state by reason thereof."

The Michigan act is much clearer and more logical than any of the others in that it undertakes to accomplish two things substantially: First, to prevent "every corporation, every copartnership or company and every association" (other than those expressly excepted) from offering for sale the stocks, bonds, etc., of its own issue without permit of the securities commission; second, to prevent any dealer in stocks, etc., from doing so until he has registered and from selling the stocks, etc., of any investment company that has not complied with the act until such dealer shall file such statements and give such information.

It goes without saying, as hornbook law, that it is the duty of the courts to endeavor to carry out the intention and policy of the Legislature, and that therefore they will not declare a statute unconstitutional in whole or in part where it is reasonably susceptible of a construction giving it effect in all its parts. But it is as well settled that courts must confine themselves to the construction of the law as it is, and not attempt to supply defective legislation, or otherwise amend or change the law under the guise of construction. The wisdom or want of wisdom displayed in the act is not a question for the courts, nor are the motives of the Legislature in including or omitting certain provisions. The legislative intention, however, must be the intention, as expressed in the statute itself, and it only must be given effect by the courts, otherwise they would be assuming legislative authority. For courts to violate this rule and assume legislative functions justly merits the severest condemnation. In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a well-settled rule that, so

long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequence, or of public policy; and it is the plain duty of the court to give it force and effect. A statute cannot in plain, common, unambiguous words say one thing and be held to mean another thing. Authority for these principles will be found in the hundreds of cases cited in 36 Cyc. 1102 et seq. But, in this connection, while the courts should be, and are, quick and ready to uphold legislative enactments, and where the meanings are doubtful, to solve all such doubts in favor of their validity, they have to recognize a higher and more solemn obligation to uphold and maintain the Constitutions, federal and state, upon which our government rests. These Constitutions emanate from the people themselves and are existent by virtue of their solemn approval. Legislative acts entitled as they are to all presumptions in their favor, originate and become existent by the approval of changing bodies of men, comparatively small in number. Where therefore legislative acts plainly violate the true meaning and effective force of constitutional provisions, courts should be far more prompt and active to prevent pernicious results therefrom, by declaring them invalid, than by specious interpretation, strive to uphold them in spite of such constitutional inhibitions. In the argument of this case it was insisted by defendants' counsel that this act by interpretation should be limited in its application to corporations, and to individuals acting in concert by organization, and not to apply to a single individual conducting his own business.

How can we be expected to place this construction upon it when its first words are:

"Every corporation, every copartnership, every company, every individual and every association (other than state and national banks, surety or guaranty companies, trust companies, and duly authorized insurance companies, real estate mortgage companies, dealing exclusively in real estate mortgage notes, building and loan associations, and corporations not organized for profit), organized or which shall be organized in this state, whether incorporated or unincorporated, which sell or negotiate for the sale of any stocks, bonds, debentures or other securities of any kind or character other than bonds of the United States, or of some county, district or municipality of the state of West Virginia, and notes secured by mortgages on real estate located in the state, to any person or persons in the state of West Virginia, shall be known for the purpose of this act as a domestic investment company," and then, by subsequent sections, proceeds to require such investment company to comply with terms and conditions as set forth under pain of criminal penalties.

If it was intended to apply only to corporations, why did it not stop if its first two words, "every corporation," embraced the full scope of its legislative intent? Why did it add "every copartnership, every company, every individual and every association"? Are we to adopt the conclusion that these words were only used as ejusdem generis with those of "every corporation"? If so, why accentuate the alleged intent by qualifying all with the words "whether incorporated or unincorporated"? How can you have an "unincorporated" corporation? How can you have an "organized" individual? If you say the word "individual" should be judicially construed out of the act and it should

be held applicable only to corporations and to "individuals acting in concert by organization," the objections to it are just as valid as if the word "individual" be allowed to remain for the legal rights, under the federal and state Constitutions, by reason of personal citizenship, attach to every individual just as fully, if he conducts a legitimate and lawful business alone, or by association with other individuals. As we will point out later on, the power of the Legislature to "regulate" the business operations of corporations and those of individuals are vastly different, based upon the fact that individuals, under article 4, § 2, of the federal Constitution, are "citizens" of a state "entitled to all privileges and immunities of citizens in the several states," while corporations are not. So this contention must hark back, at last, to the one that the true intent of the Legislature was that this act should only be made applicable to corporations. It is now substantially admitted that if its intent is to prevent a "citizen" from selling his own notes or other obligations, or bonds, securities, etc., which he may have acquired in the course of business, without a certificate from the auditor of solvency and "sound business capacity," it is clearly subversive of the inalienable right he has to acquire and sell property, and its validity cannot be asserted. As regards this "interpretation" now sought to be obtained from this court in order to save this act from its inherent constitutional defects, two things can very pertinently be noted:

First. The interpretation sought is not the one drawn from it by these state officials themselves, as shown by the facts (without substantial denial) alleged in the bill. These facts, stated briefly, are that Bracey, owning a valuable property, sold it to the Howie corporation, taking its stock in payment. When he offered to sell this stock, his own individual property, to citizens of West Virginia, he and those to whom he has sold are, at the instance of these officials, confronted with criminal proceedings for violation of this act.

Second. It cannot be for a moment questioned that the words of the first section of this West Virginia act, defining those subject to its provisions, are equally if not more particularly minute and inclusive than similar defining words contained in the Iowa and Michigan acts, with which, and others in its provisions, this West Virginia act is largely identical. In the two cases declaring the Iowa and Michigan act to be unconstitutional, all six of the judges sitting have not hesitated to reject the interpretation now sought here and to hold the defining words to include individuals. Says the court in the Iowa case:

"Coming now to a consideration of the act for the purpose of determining whether it does in express terms and undoubted meaning and intent contravene any provision of the organic law of the nation or this state, it is seen to undoubtedly prohibit any person or citizen, natural or corporate, of any foreign state, from selling or offering for sale, in person or through another, in any manner or way whatever, any stocks, bonds, or other securities or obligations, of every kind and nature, to any person within this state, unless the provisions of the act are first complied with, under heavy penalties. That is to say, by its express terms the act prohibits a citizen of a sister state of this country, owning and having stocks, bonds, certificates, or securities, although the same are listed on the exchanges of the country and have a well-established actual and salable value, from either bringing or sending the same into this state for sale unless he first meets the exactions

of this law, or by so doing subjects himself to its penalties. * * * That the act in express terms and by inclusive definitions employed therein does so ordain cannot be gainsaid or denied. That such is the effect and purpose of the act in controversy was not disputed by the able Attorney General of the state on the argument of this cause."

In the Michigan case the court says:

"We take judicial notice of the common understanding that this 'Blue Sky Law' was intended, as is said by the Attorney General, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations.' If just this intent had been carried into effect by the act as passed, these cases would not be here; but scrutiny of the law discloses additional and very different effects. It is not confined to corporations, but covers partnerships issuing, and individuals dealing in, securities; it does not relate alone to stocks, but as well to bonds, mortgages, and promissory notes; it is not limited to investment companies, as that term would ordinarily be defined, but extends the definition so that it may include most of the private corporations and partnerships in the United States; it does not cover fraudulent securities merely, but reaches and prohibits the sale of securities that are honest, valid, and safe; it does not simply protect the unwary citizen against fraudulent misleading, but it prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to offset the risk of loss, or which, from motives of pride, sympathy, or charity, he is willing to aid, notwithstanding a probability that his investment will prove unprofitable. Of course, not all of these results follow; but some of them always may, and sometimes will."

And most striking concrete instances of such effects in practical administration are then set forth.

[3] Recurring to the Florida Case, a careful study of it clearly shows that there is no conflict in principle between its ruling and those of the Michigan and Iowa cases, but, on the contrary, by implication may be held to admit their soundness and integrity. As we have shown, the Florida statute is confined to corporations alone, selling through their agents, their own stocks, etc., in the state, excepting, however, the county thereof wherein is its principal office or place of business, and it expressly excepts from its operation "any seller of stock, bond or other security, who has purchased the same in good faith for value, and who is the bona fide owner of such stock, bond, or other security at the time of such sale." The exercise of this control over the operations of corporations by state Legislatures is perfectly legitimate from the legal point of view, for ever since the decision in *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274, it has been settled that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created; that such corporations are not "citizens" within the meaning of article 4, § 2, of the federal Constitution, entitling them "to all privileges and immunities," as such "in the several states"; and the power of the states to determine the terms and conditions under which they, whether domestic or foreign, may do business in the state, has been repeatedly upheld, by the Circuit Court of Appeals for this circuit in *Kirven v. Va. Car. Chem. Co.*, 145 Fed. 288, 76 C. C. A. 172, 7 Ann. Cas. 219; *Cumberland Gaslight Co. v. West Va. & Md. Gas Co.*, 188 Fed. 585, 110 C. C. A. 383.

A state Legislature may therefore prevent foreign corporations from

transacting business altogether within its territorial limits, and it may limit all corporations, foreign and domestic, as to what particular kind of business they may or may not do within the state. So far as they are concerned, it is not a question of police power nor of interstate commerce, but purely and simply the exercise of a well-recognized sovereign power over these artificial bodies. But no such power is vested in any Legislature over either the individual citizen or over the copartnerships or voluntary associations formed or organized by him to do business. He has the equal right with any other citizen to do business in any state, and the states cannot restrict or hamper his right to engage in interstate commerce or his inalienable right to contract, to buy and sell legitimate property.

As regards corporations even, it may truthfully be said that comity between the states, and common sense business considerations, have practically given them unlimited permission to do business throughout the country; but this freedom should certainly not be abused to the extent of allowing them to defraud and cheat, and it may well be the jealous care and concern of the state Legislatures that they do not do so. And in one sense we think this evil has been fully provided for. So far as we know, the states uniformly have criminal statutes against the procurement of money or things of value under misrepresentation, false pretenses, and fraud, and the civil right of the victim of such to recover back the money or property so secured is universally upheld and enforced. In another sense some of the states may have failed to meet their full moral obligation to the citizenship of the whole country, in that they have indiscriminately granted charters to corporations without safeguarding its citizenship and those of sister states from unsound, fraudulent, "wild-cat," and "fly-in-the-night" organizations, forgetting perhaps the homely maxim that an "ounce of prevention is better than a pound of cure." The wisdom of making these provisions in advance, and as part of the conditions upon which the franchise is granted, and by the state granting it, is apparent, for that it cannot be gainsaid that if all the 48 states of the Union attempt to enforce these after-incorporation provisions set forth in these "Blue Sky Laws," with all their fines, penalties, and fee exactions, against all legitimate and sound business corporations, because some states have recklessly chartered others that were unsound and conceived to cheat and defraud, business conditions throughout the country will be greatly affected and injured.

[2] We do not think it can be longer questioned that stocks, bonds, debentures, and other securities are subject-matters of interstate commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Telegraph Co. v. Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *West v. Kansas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193;

Cook on Corp. (7th Ed.) vol. 2, § 486, p. 1364; A. & N. O. Trans. Co. v. Doyle (D. C.) 210 Fed. 173; Compton v. Allen (D. C.) 216 Fed. 537.

It follows that we must reject the contention that this act can be interpreted to affect only corporations, and not individuals. On the contrary, we are driven to the conclusion that it distinctly seeks to abridge and deny the rights of citizens of the United States to buy and sell property in the state, thus depriving them of their property without due process of law; that it denies them the equal protection of the laws; and that it imposes a restraint and burden on interstate commerce contrary to the provisions of the Constitution of the United States. We do not deem it necessary to extend further discussion in support of this conclusion. The opinions in the Iowa and Michigan cases are so clear, sound, and convincing as to not only command our admiration, but lead us to the conclusion that nothing more complete and effective can be added to them.

The temporary injunction prayed for must be awarded.

WOODS, Circuit Judge (dissenting). The question to be decided under this application for a temporary injunction is whether the enforcement of the statute of West Virginia approved February 11, 1913, known as the "Blue Sky Law," will violate the rights of the plaintiffs under the Constitution of the United States. The plaintiff Howie Mining Company is an Arizona corporation with an authorized capital in preferred stock of 300,000 shares and common stock of 1,700,000 shares, all of the par value of one dollar each. Its property consists of mining property in North Carolina alleged to be of great value, conveyed to the company by Smith H. Bracey in consideration of the issue to him of all the stock both common and preferred, except four shares. The plaintiff Bracey sold some of his holdings to the other individual plaintiffs, with an undertaking on the part of Bracey and his wife to take the stock back at an advance of 10 per cent., if so requested at the end of a year. Bracey and these purchasers from him having offered stock of the company for sale in West Virginia, prosecutions were commenced and others threatened against them under the statute making a criminal offense the offering for sale of such stock without having filed a statement of its affairs with the State Auditor as required by the statute, and without having obtained from him the certificate provided for by section 5 of the act, to the effect that the company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contract or securities contain and provide for a fair, just, and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, debentures, and other securities by it offered for sale.

Thereupon this action was brought to enjoin the prosecution on the ground that the statute is unconstitutional for these reasons:

- (1) By its enforcement the plaintiffs and others in like situation will be deprived of liberty and property without due process of law.
- (2) The attempt is made to confer on the auditor legislative power.

(3) The attempt is made to confer on the auditor both legislative and judicial powers in violation of the Constitution of West Virginia.

(4) It denies to the plaintiffs and other citizens the equal protection of the laws.

(5) It materially and directly burdens interstate commerce.

The force of these objections depends chiefly on the construction of the statute. If it means that no corporation, copartnership, or individual, a citizen of West Virginia or other state, can give his or its note or other obligation or sell any security he or it may have acquired in the course of business, without a certificate of solvency, of fair transaction of business, and promise of a fair return on the paper, it would be so obviously subversive of the right to acquire and sell property that its validity would hardly be asserted in any court. Indeed, nothing but language which admitted of no other construction should induce a court to impute to the Legislature the intention to do a thing so arbitrary and unreasonable. When the language of this statute is considered in view of the evil which the Legislature intended to prevent, I think the objections to it will fail. The principle that courts must reject construction of a statute, which would make it inconsistent with the Constitution if consistency with the Constitution can be found in any other reasonable construction, applies with especial force in the consideration of statutes which are intended to protect the public from prevalent frauds or to remedy evil conditions affecting the public. Courts must also recognize in such an issue the civic aspiration of enlightened people of our land, as it is expressed in legislative action by providing laws which will protect the community by holding back the evil-minded from crime, rather than by mere provision for punishment after its commission. The laudable desire and effort to this end has resulted in the enactment of many laws which seem to be novel in their scope. But novelty does not argue unconstitutionality. The power of the courts to declare such statutes invalid should be exercised with great caution, and the presumption is always in favor of the validity of the regulations they prescribe. They should not be declared void unless they clearly go beyond the evil to be remedied and so constitute a clear invasion of the rights of the citizen. What business is effected with a public interest, and therefore the proper subject of police regulation, is primarily a matter for legislative determination. *Giozza v Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; *Rippey v Texas*, 193 U. S. 504, 24 Sup. Ct. 516, 48 L. Ed. 767.

The statute here involved was intended to prevent, or at least check, one of the most generally recognized and harmful evils of economic life. With increasing facilities of communication all sorts of fraudulent and visionary schemes are imposed on the public by selling stocks, bonds, and other papers, in form of securities, calling for returns on the investment. Nothing seems plainer than the right of the Legislature under the police power to provide by statute a reasonable method of having these schemes examined into by some public authority and requiring those who would sell to the public securities based on them to make a showing of good faith, solvency, and a reasonable chance

of return on the investment. This I think is all that the Legislature of West Virginia has undertaken to do. The validity of similar legislation has been so often sustained that citation of authority seems hardly necessary. On the same principle rests the regulation of railroads by commissions, the inspection of meat, the condemnation of impure food, examination and inspection of cattle and fertilizers, examination and regulation of insurance companies and their contracts, the inspection and regulation of markets and mines, and the regulation of the business of labor agents, and of certain classes of banks. The police power of a state extends to all regulations of its internal commerce designed to promote the public convenience or to prevent imposition or fraud, as well as those designed to promote public health, public morals, or public safety; and this, too, though the regulations described may incidentally affect interstate commerce provided Congress has not acted in the particular matter. *Savage v. Jones*, State Chemist of State of Indiana, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; *Lemieux v. Young, Trustee*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295; *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; *Chicago, etc., Ry. Co. v. Drainage Commissioners*, 200 U. S. 562, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; *Broadnax v. State of Missouri*, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219; *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123; *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; *Simpson v. Kennedy*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151. In *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191, the court says:

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene."

The statute is to be analyzed and tested by these principles.

The first section provides:

"Every corporation, every copartnership, every company, every individual and every association * * * organized in this state, whether incorporated or unincorporated, which sell or negotiate for the sale of any stocks, bonds, debentures or other securities of any kind or character other than the bonds of the United States, or of some county, district or municipality of the state of West Virginia, and notes secured by mortgage on real estate located in this state. * * * shall be known for the purpose of this act as a domestic investment company. Every such investment company organized in any other state * * * shall be known for the purpose of this act, as foreign investment company."

Section 2 requires that before offering or attempting to sell any stocks, bonds, debentures, or other securities of any kind or character, other than those specifically exempted in section 1 of this act, to

any person or persons, or transacting any business in this state, the investment company shall file a statement of its condition and affairs with the auditor of the state.

Section 5 provides:

"It shall be the duty of the auditor to examine the statement and documents so filed, and if said auditor shall deem it advisable he shall have made a detailed examination of such investment company's affairs, which examination shall be made under the supervision of said auditor, and such examination shall be at the expense of such investment company, as hereinafter provided. And if the said auditor, upon his investigation, finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract or securities contain and provide for a fair, just and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, debentures and other securities by it offered for sale, said auditor shall issue to such investment company a statement reciting that such company has complied with the provisions of this act; that detailed information in regard to the company and its securities is on file in the auditor's office for public inspection and information; that such investment company is permitted to do business in this state; and such statement shall also recite in bold type that such auditor in no wise recommends the securities to be offered for sale by such investment or security company."

It is then provided that if the auditor shall make an adverse finding on the matters of solvency, fairness, or the plan of business and the promise of a fair return on the stocks, etc., it shall be unlawful for the investment company to do business in the state until it makes such changes as shall satisfy the auditor that it meets the requirement of the law. The act then provides a penalty against—

"any person or persons, agent or agents, who shall sell or attempt to sell, or who shall offer for sale in this state any of the stocks, bonds, debentures or any other securities of any investment company, domestic or foreign, which has not obtained the statement provided for in section five, or the stocks, bonds or other securities of other concerns by it offered for sale, who have not complied with the provisions of this act, or any investment company, domestic or foreign, which shall do any business, or offer or attempt to do any business," without complying with its requirements.

In the first place, it seems quite clear that the statute is limited in its application to corporations, and to individuals acting in concert by organization—that is, by making a whole of interdependent parts—and was not intended to apply to a single individual conducting his own business. This is apparent from the use of the limiting adjective "organized," used in the first section of the act. Neither the absurdity of calling a single individual a company, nor the impossible thing of legislating against his doing acts when "organized," could have been intended. Not only do the words of the first section exclude the individual, but the text of the entire statute indicates an intention to apply and limit the legislation to business organizations or combinations of a number of persons. By sections 3 and 5 the application of the law is clearly limited to those who are associated together under some sort of articles or agreement of association. It is true that the first section of the statute in designating those to be subject to its provisions uses the singular "individual"; but under the well-known rule the court should hold the plural to have been intended when that construction is required by the context as in this instance, and especial-

ly where it will aid in sustaining the validity of the statute. *People v. Aurora*, 84 Ill. 157; *Ellis v. Whitlock*, 10 Mo. 781.

It is next to be observed that the statute does not restrict the borrowing of money or even relate to the borrowing or lending of money, but regulates, for the protection of the public, the business of those organized combinations of individuals "which sell or negotiate for the sale of any stocks, bonds, debentures, or other securities." It is vital to consider that this language cannot be construed to fetter a corporation, or partnership, or other association of individuals engaged in other business by forbidding it to sell a security acquired in the regular course of such other business; on the contrary, by its meaning appearing from the context, it limits the organizations or combinations to which it applies to those which sell or negotiate securities as the whole or a constituent part of their business either as a temporary measure or as a permanent enterprise. Thus construed, the statute meets a very important public purpose, without undue restraint of personal liberty. Frauds or impositions in the sale of securities are not usually effected by sale to the public of the obligation of a single individual. Usually an organization is effected of two or more persons under an organization name to give the appearance of greater responsibility and to make such responsibility more illusory. When the whole or a constituent part of the business either as a temporary measure or a permanent enterprise is to raise money by the sale of the securities of such an organization to the public—that is, to any one who will buy, I am unable to find any ground for holding that the state may not in the exercise of its police power provide for such examination into the business of the organization as is reasonably necessary to protect its citizens against imposition. The case on this point comes distinctly within the scope of the police power as defined and illustrated in the decisions of the Supreme Court of the United States above cited.

It is argued, however, that the powers conferred on the auditor are so broad and vague as to be arbitrary, in that they require him to refuse a license or certificate unless he finds that the investment company (1) is solvent; (2) that its plan of business and proposed contracts or securities contain and provide for a fair, just, and equitable plan for the transaction of business, and (3) in his judgment promises a fair return on the securities by it offered for sale. Received standards of solvency, of fairness, of the prospect of fair returns on investment are sufficiently definite for a conclusion to be reached with reasonable certainty, after investigation, that a business enterprise falls above or below them; and therefore reaching such a conclusion after investigation does not denote the exercise of arbitrary power. Certainly no objection can be made to the ascertainment of solvency, for that is now intrusted by law, without objection, to public officials in the examination of banks and other institutions. It is true that no exact standard of what is a fair plan of business and what is a promise or prospect of a fair return on a bond or other security can be laid down with accuracy. But in many ways the affairs of men depend on the ascertainment by public authority of fair valuation, fair sale, fair value, fair return on investment. Such ascertainment is re-

quired in passing on rates and management of railroads and other public service corporations by commissions; in deciding on the sufficiency of sanitation and fire protection, and on the fitness of men to practice medicine and other professions; and in passing on many other matters in which the public has a special concern. Indeed, the necessity and legality of intrusting to men the power and duty to ascertain and determine what is reasonable or fair between citizens or between the citizen and the public enters of necessity into the whole fabric of the law, not only in its judicial, but in its executive and legislative department.

The distinction between this power to determine the fairness or reasonableness of a matter or the fitness of a person which may be conferred, and mere arbitrary power which cannot be conferred, is set out and illustrated in *Yick Wo v. Hopkins*, Sheriff, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and numerous other cases.

In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, the court says:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with, or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

It is no objection to the discretionary power conferred on the auditor that he may exercise it arbitrarily; for the presumption is that he will not, and the citizen is protected from arbitrary action by the judicial power. *Chicago v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176.

Discussion of the position that the statute undertakes to confer on the auditor legislative and judicial power is unnecessary, since the point was recently decided against the contention of the plaintiff in *Manufacturers' Light & Heat Co. et al. v. Lee Ott et al.*, Public Service Commission of West Virginia (D. C.) 215 Fed. 940, on the authority of *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729.

The statute only indirectly affects interstate commerce in the correction of an evil upon which Congress has not legislated. It relates to commercial transactions within the state, and places the citizens of other states on an equal footing with the citizens of West Virginia. It is not therefore a regulation of interstate commerce within the exclusive power of Congress. *Minnesota Rate Case*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151; *Brimmer v. Rebmman*, 130 U. S. 78, 11 Sup. Ct. 213, 35 L. Ed. 862.

The plaintiffs have no ground to complain that the statute exempts state and national banks, surety or guaranty companies, trust companies, duly authorized insurance companies, real estate mortgage companies, dealing exclusively in real estate mortgage notes, building and

loan associations, and corporations not organized for profit. The classification was not arbitrary and was within the power of the Legislature. *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128; *Broadnax v. State of Missouri*, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219.

In *Compton v. Allen*, Circuit Judge Smith and District Judges McPherson and Pollock decided on July 6, 1914, a statute of Iowa, similar in terms to be unconstitutional; and the same result was reached in *Alabama & N. O. T. Co. et al. v. Doyle* (D. C.) 210 Fed. 173, as to a statute of the state of Michigan. The statutes as construed in these opinions are more restrictive of the sale of securities than we find the West Virginia statutes to be. On the other hand, the Supreme Court of Florida, in *Ex parte Taylor*, decided June, 1914, has held a similar statute constitutional. No case has been found which passes upon a statute precisely like that here involved. Section 4 of the act must be declared unconstitutional, in that it imposes a burden on the individual citizens of other states not imposed on citizens of West Virginia by requiring them to file an irrevocable consent that an action may be commenced against them by service of process on the state auditor. This deprives the citizens of the state of West Virginia and denies to them the equal protection of the laws. *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743. But the elimination of this section does not materially affect the remainder of the statute and does not destroy the validity of its other provisions.

In my opinion the statute should be held constitutional and the injunction refused. If the plaintiffs do not fall within the terms of the statute, the fact may be proved in their defense to the indictment; but it is not available in an action to enjoin the enforcement of the statute as a nullity. *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778.

UNITED STATES v. KEYSTONE WATCH CASE CO. et al.

(District Court, E. D. Pennsylvania. January 2, 1915.)

No. 773.

1. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—"RESTRAINT OF TRADE" PROHIBITED.

To fall within the prohibition of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821), it is necessary that the "restraint of trade," which it is the purpose of both sections to prevent, should be direct, and not merely incidental, and should also be undue or unreasonable. If it be both direct and undue, no disguise will save it; but the courts will search for the substance and the actual effect of the transaction, and will grant the needful relief.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 10; Dec. Dig. § 12.*

For other definitions, see *Words and Phrases*, First and Second Series, *Restraint of Trade*.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MONOPOLIES (§ 14*)—ANTI-TRUST ACT—ACTION CONSTITUTING "RESTRAINT OF TRADE."

The mere fact that a manufacturing corporation has largely increased its business, either by enlarging its plants or purchasing the plants and business of other concerns, if they are acquired openly and by proper methods, does not effect an undue "restraint of trade," within the meaning of Sherman Anti-Trust Act, §§ 1, 2, where the volume of production is not lessened, but increased, prices are not inflated, and the power given by the volume of business is not improperly used to injure either competitors or the public.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.*]

3. MONOPOLIES (§ 17*)—ANTI-TRUST ACT—ACTS CONSTITUTING RESTRAINT OF TRADE.

Defendant, the Keystone Watch Case Company, acquired the plants, business, and good will of several manufacturers of filled watch cases and also of two or three manufacturers of watch movements. All of the plants so purchased were continued in operation and their production increased. After it had acquired and was operating such plants, its board of directors adopted, and it issued to a large number of the prominent jobbers and wholesale dealers in the United States, a circular in which it stated its intention to thereafter sell its products only to those dealers who voluntarily conformed to its wishes, which were (1) that certain of its cases and watches, which were not patented, should be resold only at such prices as it should fix, and (2) that dealers to whom it sold the same should not deal in any cases except those made by it. It then proceeded to strictly enforce such policy, to which some of the jobbers conformed, while those who refused were cut off from purchasing the Keystone products, which constituted perhaps 50 per cent. of those in the market. *Held*, that while, up to that time, there was nothing unlawful in its acts, the adoption and enforcement of such policy operated as a direct and unlawful restraint upon interstate trade, in violation of Sherman Anti-Trust Act, §§ 1, 2.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

4. MONOPOLIES (§ 17*)—ANTI-TRUST ACT—UNLAWFUL RESTRAINT OF TRADE.

Defendant made a watch movement known as the "Howard," which was a high grade watch, material parts of which were covered by valid patents. Defendant made direct agreements with the jobbers to whom it sold the watch, fixing the price at which they might sell to retailers, and also by a mere notice on the boxes in which the watch was sold to retailers attempted to fix the price at which they should sell. *Held*, that the agreement with the jobbers was within its rights under the patent law, but that when it sold to the jobber it had fully exercised its right, and its notice to subsequent purchasers was an unlawful restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

5. MONOPOLIES (§ 12*)—UNLAWFUL RESTRAINT OF TRADE—STANDARD FOR DETERMINING.

Whether a combination or course of action is unlawful, as likely to effect an unreasonable restraint of trade, where those engaged in it have made no declaration of its purpose, must be determined in the light of past experience and observation; but if, at the time the question is submitted for decision, it has already been in effect for a sufficient length of time, the question may better be determined by the effect it has actually produced.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MONOPOLIES (§ 12*)—UNLAWFUL RESTRAINT OF TRADE—STANDARD FOR DETERMINING.

While a large increase in the business of a manufacturer necessarily results in a restraint of the trade of competitors, the business is not for that reason, nor because of its size alone, to be condemned as unlawful; but, it is unlawful, as an unreasonable restraint, if the growth has been accomplished by fraudulent, unfair, or oppressive methods against competitors, by arbitrarily fixing or maintaining prices, by limiting production or otherwise, by deteriorating the quality of the article produced for the same price, or by arbitrarily reducing the wages of workmen or the price of raw material.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

7. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—RESTRAINT OF "TRADE."

The prohibition against restraint of "trade," embodied in Sherman Anti-Trust Act, §§ 1, 2, is directed to the business of buying or selling for gain, whenever the transaction forms a part of commerce among the states or with foreign countries.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, First and Second Series, Trade.]

8. MONOPOLIES (§ 12*) — ANTI-TRUST ACT — RESTRAINT OF TRADE — "RESTRAINED."

Trade may be "restrained," within the meaning of Sherman Anti-Trust Act, §§ 1, 2, by being hindered, obstructed, or destroyed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

9. MONOPOLIES (§ 12*)—DEFINITION—ANTI-TRUST ACT.

The usual meaning of "monopoly" is the acquisition of something for one's self, and while the word is used most appropriately when the whole of a given trade is acquired, the terms of Sherman Anti-Trust Act, § 2, make it applicable to monopolization of a part of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, First and Second Series, Monopoly.]

In Equity. Suit by the United States against the Keystone Watch Case Company and others. Decree for the United States.

Thomas Watt Gregory, Atty. Gen., and Thurlow M. Gordon and Wm. T. Chantland, Sp. Asst. Attys. Gen., all of Washington, D. C., for the United States.

Peter B. Olney, George Carlton Comstock, and Harold T. Edwards, all of New York City, and Hyneman & Bartlett and John G. Johnson, all of Philadelphia, Pa., for defendants.

Before BUFFINGTON, HUNT, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. In December, 1911, the United States filed a petition, or bill in equity, against the Keystone Watch Case Company of Pennsylvania and seven individuals, officers and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

directors of the company, charging them with violating the Anti-Trust Act of 1890. The generic charge is that the defendants—

“* * * have heretofore made—and the business of said corporation defendant is conducted under and in pursuance of—certain contracts, combinations, and conspiracies, in restraint of the trade and commerce among the States and with foreign countries in filled watch cases and in a watch known as the Howard watch, and are attempting to monopolize the said trade and commerce in filled watch cases and said watch, and have monopolized a part thereof.”

The bill then goes on to state:

“The watch industry in the United States is divided into two parts, to wit, the watch case industry and the watch movement industry. Of all watch cases manufactured and sold, more than 90 per cent. are filled watch cases; that is, cases made of a base metal surfaced with gold of a varying quantity and degree of purity, the number of solid gold and silver cases being comparatively so small as to constitute a negligible quantity in the market. Hereinafter, when watch case industry or trade is mentioned, it is the filled watch case industry or trade to which reference is had.

“Originally there were engaged in the manufacture of filled watch cases in the United States, and in the interstate and foreign trade and commerce therein, a number of separate and independent firms and corporations, no one of which possessed such a per cent. of the industry and trade as to enable it to exercise a dominating influence over the same, and each of whom was engaged in competition with all the others. This condition of the industry and trade continued until about the year 1899.”

Taking up the situation at this point, the government makes certain specific averments, of which one group relates to the period from 1899 to 1903; another, to the period from 1903 to 1910; and a third, to the period from 1910 to the time of filing the bill. In our view of the case, a division into 2 periods will be sufficient—the first, before 1903; and the second, from the beginning of that year onward. But, before turning to the facts, we may state briefly the rules that have been laid down by the Supreme Court to govern controversies under the act of 1890.

The first and second sections of the act are as follows:

“1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.”

The scope of these sections has been determined by the Supreme Court in the Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. It will be sufficient to quote the following passage from the opinion:

"As to the first section, the words to be interpreted are:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, * * * is hereby declared to be illegal."

"As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is: What was the rule which it adopted?

"In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

"(a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

"(b) That, in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination, by which an undue restraint of interstate or foreign commerce was brought about, could save such restraint from condemnation. The statute under this view evidenced the intent, not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

"(c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts—those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce—and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus, not specifying, but indubitably contemplating and requiring, a standard, it follows that it was intended that the standard of reason, which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

"And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace * * * every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations.
* * *

"By reference to the terms of section 8 it is certain that the word 'person' clearly implies a corporation as well as an individual.

"The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States, and any one of the classes of things forming a part of interstate or foreign commerce.

"Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by 'monopolize.' But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred, and the indication which

it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly—that is, an undue restraint of the course of trade—all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade—that is, unduly restraining it by means of every contract, combination, etc.—the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section; that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about, or are brought about, be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criterion to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason, guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented, if no extraneous or sovereign power imposed it, and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.”

[1] To fall within the prohibitions of the statute it is necessary that the unlawful restraint of trade—and this is not always the same thing as the mere restraint of competition—should be direct, and not merely incidental, and should also be undue or unreasonable. If it be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief. There are many methods by which trade may be unduly restrained, and among these are contracts or combinations to fix and maintain prices, or to boycott the goods of a manufacturer or other dealer. We confine our attention to these two violations of the act, because the present controversy turns essentially upon the facts relating to these subjects. And we need not discuss the law further, since there is no dispute concerning the accuracy of the foregoing statements, but may turn at once to the relevant facts.

As might be expected in a record so voluminous, the evidence, whether oral or in writing, is not always either relevant or competent; but we shall not discuss it in detail, contenting ourselves with finding such of the ultimate facts as seem to be necessary. They are as follows:

The present Keystone Company is the second of that name, both of them being Pennsylvania corporations. The first was organized in 1886, and was the successor of several Philadelphia manufacturers, beginning with James Boss, the inventor of the filled or rolled-plate case, and comprising also John Stukert, Hagstoz & Thorpe, and C.

N. Thorpe & Co. These firms and their corporate successor manufactured superior cases and acquired an excellent reputation in the trade. Owing to the death of certain persons that had been interested in the business, and to the consequent need of providing for the demands of their estates, some new financial arrangements seemed to be desirable. At the same time an association known as the T. Zurbrugg Company was manufacturing an inferior grade of watch cases at Riverside, N. J., and some of the persons interested in that association had certain financial connections with the two estates just referred to. (A year or two before, the Zurbrugg Company had bought a small business, owned by J. Muhr & Bro. of Philadelphia, and had combined it with their own.) It was believed by the old Keystone Company and by the Zurbrugg Company that a union of the two enterprises would be mutually advantageous, so that both grades of cases might be made under one management. Accordingly, a new company—the present defendant—was incorporated, and this company bought outright the title to the plant, business, and good will of the old corporation and of the Zurbrugg Company. The persons interested in these two enterprises received either cash or stock in the new company at their option. This transaction took place in July, 1899.

In the following August the Philadelphia Watch Case Company was organized for the purpose of selling the product of the Riverside plant. All of its capital stock was owned by the Keystone Company. As already stated, this product was inferior in grade, and a separate sale thereof seemed advisable, in order to avoid confusing the cases made in the two plants respectively.

Early in 1900 the capital stock of the New York Standard Watch Company, a New Jersey corporation with a plant at Jersey City, was in the market. This company did not manufacture cases, its only product being inexpensive movements. The Keystone Company purchased for cash the capital stock of the Standard Company, the object being to supply the demand for cheap completed watches. The Keystone Company had found some difficulty in selling its cheaper watch cases because of the lack of cheap movements to go with them, the movements manufactured by the principal movement companies being relatively too expensive. The separate corporate organization of the Standard Company was continued, and the size and the product of the plant were increased.

Early in January, 1901, the Philadelphia firm of Bates & Bacon, a small manufacturer of cases, sold all its property to the Keystone Company, the machinery at cost, and the finished product at selling prices.

In the same month, a small movement business at Waltham, Mass., owned by the United States Watch Company, offered to sell out to the Keystone Company, and in June, or thereabouts, the sale was made. The object of the purchaser was to manufacture medium-priced movements at Waltham, and for this purpose additional capital was furnished, and the plant and facilities were enlarged. A New Jersey corporation by the same name—United States Watch Company—with an authorized capital of \$1,000,000 was organized, and operated the Walt-

ham plant for about two years, manufacturing medium-priced movements only. The business, however, was not successful.

In January, 1903, the watch movement business of the E. Howard Clock Company was offered for sale by a receiver. This company had formerly manufactured an excellent and favorably known movement, but for several years the business had been discontinued. Seeing an opportunity to use the reputation of the Howard movement to aid the United States Watch Company's business at Waltham, the Keystone Company bought the good will, machinery, and trade-marks of the Clock Company, so far as they related to watches and watch movements, and moved everything to Waltham. The United States Watch Company was thereupon abandoned, and a new company was organized under the laws of New Jersey, called the E. Howard Watch Company—all of its stock being owned by the Keystone Company—and the Howard Company took over the United States Company's plant, and has since been manufacturing fine and expensive movements at Waltham. The watch movements formerly manufactured by the E. Howard Clock Company had in no way competed with the product of the Keystone Company, whose movements were neither high-grade nor expensive.

In December, 1902, the common stock (4,000 shares) of the Crescent Watch Case Company of Newark, N. J., was offered to the Keystone Company, and was purchased in the following February, being paid for partly in cash and equivalent obligations, and partly (one-fourth) in the common stock of the Keystone Company. (Later, in 1906, the preferred stock of the Crescent was also bought by the Keystone Company for cash.) The reasons for the purchase were these: The Crescent cases and the movements of the well-known Waltham Watch Company (not the United States Company referred to above) had both been handled by one firm, who acted as the exclusive selling agent for each, so that the sale of Keystone cases to be used with the movements of the Waltham Watch Company was interfered with, and the sale of Crescent cases to be used with other than Waltham movements was also interfered with. The union of the two companies seemed likely to eliminate both these hindrances. Moreover, their respective sales were in different markets, where they competed, not so much with each other as with other manufacturers, of whom there were several actively engaged in business and apparently prospering. The union was voluntary on the part of both companies; the Keystone Company exercised no pressure or coercion upon the Crescent, and the trade of neither was restricted or diminished. Moreover, prices to the public were not raised as a result of the union, except perhaps to a small extent.

From time to time the issued capital stock of the Keystone Company had been increased, reaching \$6,000,000 in the end—all of it having been issued for cash—and in 1910 all the assets of the Philadelphia, the Standard, the Howard, and the Crescent Companies were formally transferred to the Keystone Company, and the four companies first named abandoned their separate organizations (which had

theretofore been maintained) and ceased to exist, either actually or in effect.

In 1903 the Keystone Company became interested in the watch case business in Canada under the following circumstances:

For several years the American Watch Case Company of Toronto, Limited, had been manufacturing in the Dominion, but its plant was not satisfactory, and for this or some other reason its business was for sale. This fact became known to the Keystone Company, and to the Elgin and the Waltham movement companies. No one of these three had been able to do much in the Canadian market, owing in part to the tariff of that country, and in part to other reasons not important to enumerate. These three companies determined, therefore, to use the Toronto Company in order to enter the Canadian market with Keystone cases, and also with Elgin and with Waltham movements, and to that end bought the capital stock of the Toronto company—the Keystone acquiring 851 shares out of 2,000, and the rest being held largely in the interest of the Elgin and the Waltham companies. The American Watch Case Company has since that time improved its methods of manufacture, and has increased its business. Later a selling agent for Canada was organized, in which the Keystone Company owns the capital stock. If this transaction has any relevancy, we need only add that it did not restrain, but rather benefited, the foreign trade with Canada in cases and in movements.

[2] Up to this time, we discover nothing unlawful in the operations of the Keystone Company. No doubt it had been growing, and it had grown in part by acquiring or controlling several other plants; but it had not acquired them by improper methods, and it had not used its acquisitions improperly. There was no concealment about its growth, and the trade was well informed about its operations. Its plants were enlarged or improved, the volume of production was increased, prices were not inflated, competitors were not unlawfully attacked, and we find nothing in the evidence that would justify us in condemning the foregoing steps in the company's activity. A merchant may without offense add one department to another as his business prospers, or his ambition expands; for the size and the varied character of his enterprise do not in themselves violate the Anti-Trust Act. Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the consumer; but, if the power given by the volume of a particular business is improperly used to injure either a competitor or the public, or if such power evidently tends toward the injury of either, the mischief either done or threatened is condemned by the statute.

[3] In this connection, it may be observed that, as power increases, the temptation to abuse it is likely also to increase, so that the acts of an influential factor in a particular trade may well be scrutinized with more suspicion than the acts of a weak and inconspicuous contributor. And we have now reached a point in these transactions when we think the evidence establishes that the defendant company did use its power unlawfully. Beginning in 1904, or thereabouts, it made several attempts—perhaps not very numerous, but numerous enough—

that showed a definite purpose to restrain trade by attempting to fix and maintain prices, and by using a species of boycott or blacklisting in order to lessen the trade of its rivals. We shall not stop to detail the attempts of this character that were made during the period from 1904 to 1910, because the policy and system to which we refer were manifested with unmistakable distinctness in the latter year, and were carried on with vigor and persistence. It will be sufficient, therefore, to state what was attempted, and what was actually done, from January, 1910, forward.

On the 15th of that month, the following circular was formally adopted by the Keystone Company's board of directors, and was sent to 131 of the largest and most prominent jobbers or wholesalers in the United States:

"The Keystone Watch Case Company, Nineteenth and Brown Sts.

"Philadelphia, January 15th, 1910.

"Dear Sir: We inclose herewith our new price list which we are mailing to the retail trade today. These prices are subject to the usual catalogue discount and the case discount only.

"We also inclose memoranda of the prices at which Boss, Crescent, Planet, Crown, and Silveroid cases and Excelsior watches will be billed in future to our jobbers. These prices are net, subject to the cash discount only.

"These prices are confidential.

"For the best interests of our business we have determined to sell our goods exclusively to jobbers whom we find voluntarily conforming to our wishes as to the disposition by them of such goods.

"We shall make all specific sales, except of Howard watches, without any restrictions whatever.

"Whether or not our wishes as hereinafter stated be complied with, we shall from time to time exercise our right to select the jobbers to whom we shall sell our goods, and we shall, irrespective of any past dealings, refuse to sell to those jobbers who, in our opinion, handle our goods in a manner detrimental to our interests, or whose dealings with us are in any other respect unsatisfactory.

"Our present wishes are as follows:

"First. Our goods bearing the following trade-marks, to wit, Boss, Crescent, Planet, Crown, Silveroid, and Excelsior, will be sold by us to our jobbers at fixed prices, subject to a cash discount, and we desire that sales of these goods by jobbers, whether to retailers or to jobbers, shall be without deviation at the prices fixed by us for sales to retailers, subject only to the cash discount.

"Second. Howard watches are sold only under the terms of the license covering their sales.

"Third. On all our other goods we place no restrictions as to the prices at which they are to be sold by jobbers.

"Fourth. And, further, we desire that the jobbers to whom we sell our goods bearing the following trade-marks, to wit, Howard, Boss, Crescent, Planet, Crown, Silveroid, and Excelsior, shall not deal in any watch cases other than those manufactured by us.

"Fifth. All advertisements of our goods will be subject to our approval.

"Very truly yours,

The Keystone Watch Case Company."

Officers or agents of the company followed up this circular by visits to the selected jobbers—although perhaps not to all of them—and assured them that the letter meant exactly what it said, and that the policy outlined therein would be rigorously carried out. And it was insisted upon and was carried out. Some of the jobbers assented to the company's wishes, and with more or less reluctance gave up buy-

ing from other manufacturers, while the jobbers that refused to assent were cut off from the Keystone product altogether, unless they obtained it through surreptitious channels.

We do not think it necessary to spend time over the foregoing circular. We regard it, not as a request, but as a threat; and not as an empty threat, but as a real menace from a strong manufacturer. The defendant company attempts to justify both the circular and its own conduct before and after the circular was issued, by the argument that the selected jobbers were its "exclusive agents," and therefore were properly burdened with any conditions to which they might agree. But the relation of principal and agent did not exist between the company and the jobbers. They were not agents, paid for their services by salary or commission, and owing a duty to report and account; they were merely customers of the defendant company, who bought its unpatented cases by a transaction of outright purchase, and thereby took a complete title to the cases and acquired an unrestricted right to sell. And, moreover, it should be observed that they were already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy. Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the cases of its competitors were concerned; and we think the proposition need not be discussed that this was *pro tanto* a direct and unlawful restraint of trade.

And it is not sufficient to answer that these competitors appear to have withstood the attack with more or less success, and that their total trade did not always, or even often, diminish. Where or how they made up the loss that they must have sustained is not material; it is certain that they must have lost whatever trade they had previously enjoyed with those jobbers that yielded to the threat of the defendant's circular; and it seems clear, therefore, that in this degree at least there was an unlawful restraint of trade. In other words, if this section of the trade had not been taken away from the defendant's competitors, we may reasonably suppose that they would have retained it; and this fact seems to be a final answer to much of the evidence, the tables and lists, of varying scope and value, that have been laid before us, and were offered to show that on the whole not much damage, if any, was done by the offending circular and the defendant's unlawful conduct. A recent decision of the Supreme Court on the general subject of blacklisting is *Eastern States, etc., Ass'n v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, opinion delivered June 22, 1914.

The proportion of the trade in filled cases that the defendant company was enjoying from 1903 onward is in dispute, and is not altogether easy to determine with accuracy; but we shall do the defendant no injustice if we adopt the figures of its counsel, and say that:

"When the acquisitions were completed [the company] had from 50 to 55 per cent.; when the petition was filed, it had from 42 to 47 per cent."

But we have no hesitation in adding that, even with this proportion of the business, the defendant did not dominate the trade. It had then, and has always had, a number of active and successful rivals, and we see no reason to doubt that there was business enough for all. No complaint on the part of the other manufacturers would have been made or would have been justified, as far as we can determine, if the defendant had not undertaken the policy we have condemned; and it is essentially this—and one other matter to be spoken of presently—that furnishes the government with just ground for complaint. It is probable that the policy has not been successful, save in a limited degree and for a limited time; but in our opinion it is a plain restraint of trade within the act of 1890, and the government is entitled to enjoin it.

One or two other matters referred to in the pleadings and in the evidence should be briefly referred to: First, the defendant company's agreements with the Waltham and the Elgin movement companies respectively. These companies are not parties to the bill, and no relief is prayed against the agreements. The subject was introduced by the government merely as an argument to support its averment that the defendant has been steadily pursuing the definite object of restraining interstate and foreign trade in filled cases. The facts are as follows:

The course of the watch trade in the United States differs from its course in foreign countries. Here, both the jobber and the retailer buy movements and cases separately, and the retailer fits the case and the movement together as the ultimate consumer may desire. But in foreign countries both the jobber and the retailer deal in the completed watch. Efforts by the American companies to change the foreign course of trade were unsuccessful, and it was found that the custom there must be respected, and that watches must be exported in completed form. The agreements referred to were made with the object of securing a share in this comparatively unoccupied field. The Keystone Company obtained from the Waltham and the Elgin companies the exclusive right to sell their movements in certain foreign countries, fitting the movements into the Keystone cases. The Waltham contract covers the continent of Europe, with the exception of France and Spain, and in this territory the Waltham company had previously been doing but little business. The Keystone cases were to be made at the Riverside plant, and all the movements were sold to the Keystone Company at favorable prices, for such export trade only. The Elgin contract makes the Keystone Company the sole export jobber of the Elgin movements, except for trade to Canada, and fixes prices of the movements for export only, providing that the Keystone Company shall fit the movements into its own cases, and shall then export the complete watch.

We see nothing unlawful in these contracts. On the contrary, they appear to show a laudable effort to increase American trade with foreign countries. They were intended to help our own merchants in the struggle to enter new markets, and we are unable to find that they operated injuriously to restrain the trade of any American competitor.

[4] The other subject is the system under which the Howard watch was sold. The defendant company attempted to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a direct agreement with the jobber. As we understand the decisions, such an agreement was within the company's lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose, and as the owner of these patents the company had the right to make a direct agreement with the jobbers whereby a minimum price was fixed at which the jobber might sell. *Bement v. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. But the company went further, and by mere notice to the retailer, accompanying the box in which the watch was sold by the jobber, attempted to fix the minimum price at which the retailer might sell to the consumer. No direct agreement was made with the retailer. When the company sold the watch to the jobber it had fully exercised its right to vend, and had no right to use the notice subsequently given in order to control the price at which the retailer might sell. *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185.

We should end the discussion at this point, if it were not for the recent decision in *U. S. v. Harvester Co.* (D. C.) reported in 214 Fed. at page 987. The majority opinion, as we understand it, is put upon the ground that the combination there in question—which was made in 1902, but was not proceeded against until 1912—was and continued to be unlawful because at the beginning it suppressed competition between corporations that controlled about 80 per cent. of the trade in harvesting machines. This conclusion was reached, although there was no evidence of coercion in the original combination, and no evidence of oppression or of actual injury to trade in the subsequent conduct of the business. In the principal opinion, Judge Smith says:

"While the evidence shows some instances of attempted oppression of the American trade by the International and the American Companies, such cases are sporadic, and in general their treatment of their smaller competitors has been fair and just; and if the International and American Companies were not in themselves unlawful there is nothing in the history of the expanding of the lines of manufacture, so as to make an all the year around business, that could be condemned.

"The real question is whether the combination of the companies was illegal in the beginning, or became so with the additions subsequently made."

And Judge Hook in his concurring opinion takes the same ground, saying (214 Fed. 1001):

"The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership, or a corporation. On the contrary, it was created by combining five great competing companies, which controlled more than 80 per cent. of the trade in necessary farm implements, and it still maintains a substantial dominance. That is the controlling fact; all else is detail. * * *

"It is but just, however, to say and to make it plain that in the main the business conduct of the company towards its competitors and the public has been honorable, clean, and fair. Some petty dishonesties were tracked in at the start, mostly by subordinates who had been in the service of the old

companies; but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the government's petition which found no warrant whatever in the proof. They were of such a character, and there was so much of them, apparently without foundation, that the case is exceptional in that particular."

Judge Sanborn dissented, on the ground that as the suit was in equity the court had no power to punish past violations of the Anti-Trust Act, but was only authorized to prevent and enjoin further acts violative thereof; taking the position that the question for decision was whether at the beginning of the suit in 1912 the Harvester Company was unreasonably restraining, or attempting to restrain or monopolize, interstate or foreign trade. In considering this question he laid stress upon the argument that the statute forbids such acts only as injure the public unduly in some of the following particulars:

- "(1) Raising the prices to the consumers of the articles they affect;
- "(2) Limiting their production;
- "(3) Deteriorating their quality;
- "(4) Decreasing the wages of the laborers and the prices of the materials required to produce them; or
- "(5) Practicing unfair and oppressive treatment of competitors."

After reviewing the evidence, he came to the conclusion on the facts that for at least seven years before the suit was begun the defendant had not been injuring the public, either by unreasonably restricting competition, or by acquiring an undue share of the business, or by excluding other manufacturers or dealers, or by practices that were unjust or unfair or oppressive to competitors, or by raising prices to the consumer, or by limiting production of the articles manufactured, or by deteriorating the quality of such articles, or by decreasing the wages of labor, or by reducing prices of raw materials, and that the defendant was not threatening to do these things in the future. On the contrary, he found that the acts complained of by the government had had the opposite effect, and had resulted in benefit to competitors, to consumers, to laborers, and to the producers of raw materials.

With this difference of opinion in a strong and highly respected court, it may perhaps have some value if (with some hesitation) we add our own contribution to the discussion of this vastly important and much considered subject. We shall try to state our views briefly, although it may conduce to clearness if we outline the subject from the beginning.

[7, 8] The act of 1890 is directed against restraint of interstate or foreign trade; that is, against restraining the business of buying or selling for gain, whenever the transaction forms a part of commerce among the states or with foreign countries. Trade may be restrained—that is, hindered, or obstructed, or destroyed—in many ways and by many devices, but these are all covered by the first and second sections of the act. In these sections two classes of prohibited acts are described: (1) The concerted action of two or more persons, which may take the form of a contract, a combination in whatever form, or a conspiracy; and (2) monopoly, or the attempt to monopolize, which may be the act of one person alone, or of more than one. These two

classes are intended to be all-embracing, and thus far in the history of the statute no variety of device has escaped their sweep.

[8] In the usual meaning of the word, monopoly may be said to be the acquisition of something for one's self, and perhaps it would be applied most appropriately when the whole of a given trade is acquired. Practically, however, we need not contemplate so extreme a case of control or acquisition, and indeed the act itself is not primarily concerned with an offense so rare. The second section deals with the monopolizing, or the attempt at monopolizing, "any part" of the trade or commerce referred to; and it is clear enough, therefore, that Congress had chiefly in mind, not so much the monopoly of a whole (although the language might properly be construed to cover that also), as the much more likely case of the monopoly of a part smaller than the whole. But the question immediately arises: At what point does a business become so large that the statute condemns it? Or—to state the question in other words—is the mere size of a business enough to bring it within the disapproval of the act? Section 2 gives us no help, for "any" part, if strictly construed, might range from a minute and inconsiderable fraction to a part just less than the whole. If, therefore, a merchant, either an individual or a corporation, by the most commendable zeal and industry should succeed in diverting to himself a very small part of a competitor's business, he would be monopolizing a "part" of the trade, and would be condemned by the letter of the act. And in like manner, if the statute is using the strict meaning of "restraint of trade," no merchant could act in combination with his own partner in successful competition for part of a rival's business, even by the fairest and most honorable means, except at the risk of "restraining" trade. Further examples are needless; many more might be given. Clearly, therefore, as it seems to us, the act could not have been intended to bear a meaning so subversive; and it seems plain that the Supreme Court was abundantly justified in turning to the rule of reason, and in holding that of necessity Congress must have been dealing with undue or unreasonable restraints of trade, whether such restraints take the form of monopolies in whole or in part, or of concerted action under any guise whatever.

[5] But to say that a transaction is undue or unreasonable implies that it has been judged by a standard. The standard of course is reason, but various questions at once present themselves for answer. For example, who is to apply the standard? The legislation of Congress does not attempt the task itself, and under our system of government the duty must of necessity be undertaken by the courts, who must judge each case according to its own facts. But when such a question comes to be considered, where is a court to find the standard of reason? It seems to us that it must be found in the gradually accumulated results of general experience and observation, in the gathered wisdom of the community, for this is the product of a common and a prolonged effort by men who theorize and by practical men alike to deal as fairly, as justly, and as equitably as may be possible with situations that are often obscure and complicated, and of high importance to large classes and to many individuals. Obviously a standard

should have a true relation to the subject measured; and, since the inquiry here is whether in a given case trade is likely to be, or has actually been, unduly restrained, reason can answer the question only by going to the facts of life and drawing upon the accumulated store of knowledge.

Now, the world has already learned some lessons that have become part of its common stock. One of them is that, when men announce their intention in entering upon a given transaction, declaring it to be the accomplishment of a particular object, their declaration may usually be accepted as correct. Not always, of course, but as a rule; and especially is this true if the concealment of their intention would advance their interest. Let us suppose that several persons combine to do certain acts that may, or may not, have the effect of restraining trade. If they expressly declare their intention to be the restraint of trade, we shall hardly go wrong in believing them. And if such a situation be unlikely, a better illustration may be found in supposing that they agree to do the acts, but say nothing about their intention. In that event, if according to the common course of experience and observation the acts proposed will certainly have the result of restraining trade, their unexpressed intention will be of no consequence whatever; neither will it be of any consequence, if the reasonable probability be that trade will be restrained by the proposed conduct.

But another and ordinarily a better way of determining whether a course of conduct under examination is in restraint of trade is sometimes available, and that is by considering its actual effect. It goes without saying that such a test can only be applied after the course in question has actually been carried out in some degree, has actually been tried by experience; and this leads to the further question: When should the standard of reasonableness be applied? Evidently this will depend on the time when the question is submitted for decision. This time may either precede the proposed course of conduct, or it may follow the beginning of such a course so quickly that no body of experience, or no sufficient body, has yet come into existence. In that event the nature of things compels the court to enter the field of prophecy, or of probable anticipation. In such a situation, nothing else can be done. A court can only deal with the situations that are laid before it, and in the case supposed it must avail itself of whatever light may be had, and must exercise its best judgment with such aid as may be at hand. But, if the suit be deferred until the lapse of time and the actual effect of the conduct complained of have permitted facts to accumulate and have tried the project in question by the test of experience, we can hardly doubt that prophecy or probable anticipation should be considered inferior in force to the evidence of what has actually taken place. In this world we must do our best with the means at our disposal. Even if prophets are always in danger of being discredited by the event, we are sometimes compelled to speculate about the future; and our duty then is to check our speculations as much as possible by taking account of such probabilities as may arise from past experience and observation. In like manner, when we are face to face with what has actually happened, we may safely lay prophecy

aside, in order to accept the services of a better guide, one that can be relied upon with a firmer confidence.

[6] And this brings us to the next question, no matter at what point of time the inquiry may be undertaken, namely: What are the ordinary marks of such a course of conduct as may properly be condemned as a restraint of trade? Without attempting to enumerate them exhaustively, a few general observations may be made. Trade is restrained by putting hindrances in the way of the persons that conduct it. Whatever makes it more difficult for such persons to carry on their business restrains them, and restrains their trade; but (to speak generally) as every successful effort of a merchant to increase his own trade makes it harder for his rivals to succeed, and therefore restrains their trade, and as Congress certainly did not intend to condemn the proper exercise of business zeal and energy, we must recur to the rule of reason and ask—not merely what is restraint of trade, but what is unreasonable restraint of trade? On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivalry must not be pursued. And if these words are criticized as too general, we may reply that such generality is apparently unavoidable, as some recent legislation of Congress testifies, and, moreover, we may safely deny that the words are too vague for satisfactory use; for it must be remembered that the common agreement of moral opinion in the community furnishes an adequate guide to their practical meaning and their practical application. They are not likely to be misapprehended or misapplied. Then, too, prices must not be arbitrarily fixed or maintained. Ordinarily the play of the great forces that influence the market will determine prices, and these forces must be allowed to have their unhindered effect. And a corollary from this consideration is that an artificial scarcity must not be produced, since the effect of such a scarcity is to raise prices to the consumer. Moreover, the public is also injured if quality be impaired, so that the old price buys a worse article; and other injuries are done, if the wages of the laborer be arbitrarily reduced, and if the price of raw material be artificially depressed.

In the complexity of human affairs there may be other methods of unreasonably restraining trade, and these may be left for consideration as they are made to appear; but those already referred to are the methods that have usually been employed, and we need not enter the field of conjecture. Now, if all or some of these marks of unlawful restraint be present or may fairly be expected, the statute requires the application of an appropriate remedy; but if none of them be present, after sufficient experience has shown what will actually happen, on what satisfactory ground is condemnation to be pronounced? Not, we think, merely on the ground of size. As population has swelled, and as vast aggregations of men have multiplied their wants, the inevitable trend of modern affairs has called for large business enterprises, as well as for small; and we think it no more than reasonable to say that, when a large business has proved itself to be beneficial and not harmful to the community, it should not be condemned merely be-

cause it is large. We do not consider, and we do not deny, the right of a nation to adopt such a legislative policy in this respect as its constitution may permit; but, until a policy of limitation be so adopted, we see no possible test of reasonableness to be applied except such tests (and those like them) as have already been sufficiently referred to. And, from whichever side the subject may be approached—from the side of what is likely to happen, or from the side of actual experience—the standard of reasonableness should be applied according to the facts and circumstances of the particular case under examination.

As will no doubt be observed, we have already applied the rules we have been considering to the case in hand, and have expressed our opinion concerning the several acts of the defendant company that are attacked by the government, so that we need say nothing further except a word concerning the relief that should be granted. The defendant declares that the policy of boycott had been given up before the bill was filed—and there is some testimony to this effect—but the circular has never been withdrawn or negatived, and the company's resolution of January, 1910, has never been rescinded. We feel no hesitation in acting on the assumption that the policy was at least formally in force when the government began the suit now before us, and we have no doubt that an injunction should be granted. But we see no sufficient evidence that the public interest requires us to break up the existing corporate entity. *U. S. v. Great Lakes Towing Co.* (D. C.) 208 Fed. 746. The record satisfies us that the watch case business is not suffering from the absence of live and healthy competition, and except in the directions already mentioned—namely, the retail sales of the Howard watch, and the policy of boycott—we think the court is not called upon to interfere. But, in case conditions in the future should make it desirable for the government to ask for additional relief, even to the point of breaking up the defendant corporation, we shall retain jurisdiction of the bill, with leave to the government to take such action hereafter as may seem appropriate.

A decree may be drawn in accordance with this opinion.

VALERI v. PULLMAN CO.

(District Court, S. D. New York. December 30, 1914.)

FOOD (§ 25*)—LIABILITIES FOR INJURIES—WARRANTY OF QUALITY.

The proprietor of a buffet car on a railroad is not an insurer of the wholesomeness of the food served thereon, and can only be held liable for injury to a patron from the consumption of deleterious food so furnished on the ground of a failure to exercise reasonable care in respect to its quality and preparation.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. § 25.*]

At Law. Action by Delia M. Valeri against the Pullman Company. On motion by defendant to dismiss complaint. Motion sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Carl S. Brown, of New York City (Grant Hoerner and Adolph Bangser, both of New York City, of counsel), for plaintiff.

Worcester, Williams & Saxe, of New York City (Edwin D. Worcester, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. This was an action to recover damages for personal injuries sustained by plaintiff through eating food served to her by defendant upon its buffet car. The complaint alleged that the food was unwholesome, but contained no allegation of negligence on the part of the defendant, and sought to recover upon an alleged implied warranty that the food was fit for consumption. At the close of the entire case defendant moved to dismiss the complaint upon the ground:

"That, even if the food were unwholesome, there is nothing to hold the defendant liable for the existence of that fact; that the defendant was not liable for any express or implied warranty as to the wholesomeness of the food served, but was only liable for due care and diligence in the careful preparation of the same; and that no evidence whatever has been given to show that the defendant failed in any respect in the care and diligence required in the preparation and serving of that food."

The court reserved its decision upon this ground and took a special verdict, which resulted in a finding by the jury that the food served to the plaintiff by the defendant was unwholesome, that the injuries complained of by the plaintiff were the proximate result of consuming such food, and that the plaintiff was entitled to \$2,000 for injuries thus sustained. The defendant now asks to have the complaint dismissed, and the plaintiff moves for judgment on the special verdict. The question, squarely raised, therefore, is whether the liability of the defendant, who apparently differs in no wise from any other person keeping a restaurant, is that of an insurer of its food, or whether it is only liable to exercise reasonable care in providing and serving such food as it offers for consumption.

It seems to me idle, in determining this question, to seek analogies derived from implied warranties in sales of goods. In the first place, one is met at the outset by the legal theory which has long prevailed that food furnished by a victualer is not a sale. As early as 1701 Sergeant Wright, in the case of *Parker v. Flint*, 12 Mod. 254, noted that an innkeeper "does not sell but utters his provision"; and Prof. Beale, in his book on *Innkeepers and Hotels*, § 169, says:

"As an innkeeper does not lease his rooms, so he does not sell the food he supplies to his guests. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of the food supplied to him; nor can he claim a certain portion of food as his own, to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest; or as it was quaintly put in one old case 'he does not sell but utters his provision.'"

The same doctrine was applied to the food furnished by an innkeeper in the old case of *Crisp v. Pratt*, Cro. Car. 549. Prof. Bur-

dick, in his book on Sales (2d Ed. page 113), expresses a like view, and the recent case of *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533, decided by the Supreme Court of Errors of Connecticut, also adopts the same theory.

But whether or not the transaction in question was a sale seems to me immaterial. Indeed, it is not impossible that food purchased upon a Pullman car à la carte differs from the food supplied by an innkeeper under the older custom of furnishing a meal to his guest table d'hôte, and it may be that in a Pullman car, where a certain specific article of food is ordered and paid for, the transaction is a sale. But, whether or not that be the case, the law of implied warranties that articles sold are merchantable or fit for the purpose intended is totally inapplicable to such a cause of action as the present one. If the food was entirely inferior to that ordered, there would probably be upon the mercantile theory no other damage than the difference between the food furnished and good food of the sort ordered. If the food was unfit for consumption, the remedy would be an action to recover back the purchase money, if it had been paid.

This discussion is really aside from the main question in this case, and is only indulged in by reason of the fact that it has occupied the attention of the courts in so many opinions, and been discussed so fully by counsel. The case at bar comes down to this: In the absence of any specific authority in the federal decisions, is there any ground in reason for imposing upon a restaurant keeper an obligation to furnish wholesome food to his patrons at all hazards; that is to say, is his obligation that of an absolute insurer of his food? Of one thing I feel reasonably clear, that no such obligation was ever imposed upon innkeepers or victualers under the English common law. In spite of the most exhaustive briefs of counsel in this case, no decision of the English courts has been pointed out, indicating the existence of such an obligation, and it seems to me most unlikely that such an obligation was ever recognized in the common law, using that word now in a historical sense, or it would have been enforced in numerous adjudicated cases. The opportunity for actions involving the breach of such an obligation has been far too common, and the absolute liability long imposed upon an innkeeper in respect to the goods of his guests has furnished too close an analogy to such an obligation, to permit the innkeeper to escape if the obligation had ever been thought to exist at common law.

The courts have enforced certain rules of absolute liability in the case of innkeepers, common carriers, owners of vicious animals, manufacturers of poisonous drugs, and in England, under the doctrine enunciated in *Rylands v. Fletcher*, 3 H. L. 330, in the case of persons who bring upon their lands elements likely to do mischief if they should escape.

My own feeling is that protection to the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has a particular interest in such a way as reasonably to insure its safety. In other words, pure food laws, and rigorous inspection of meats, canning factories, and other

sources of food supply, would seem to me a much more effective way of protecting the public than by the imposition of the liability of an insurer upon those who furnish food. The former method corrects the evil at its source. The latter method only imposes an obligation in cases which ex hypothesi cannot be guarded against by the individual by the exercise of due care. It shifts the loss from the person immediately suffering the injury to a person who has neglected no precaution in supplying the food. This certainly is not in accord with the general tendencies of the common law. I am inclined to think that the imposition of such an obligation would tend to lead in the long run to the prosecution of unfounded claims, rather than to the protection of individuals or the public.

I have thus discussed what seemed to me the general principles involved in this case, as well as my own views of public policy, because of the fact that no decision appears to have been rendered in regard to this liability by any court of the United States. There have been numerous cases in state courts holding that the liability of one who furnishes goods to the public is to exercise due care and nothing more. The principal cases adopting this view are the following: *Bigelow v. Maine Central R. R.*, 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; *Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 438; *Travis v. L. & N. R. R. Co.* (Ala.) 62 South. 851 (decided in June, 1913; *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533 (decided September, 1914). Judge Sanborn in the case of *Clancy v. Barker*, 131 Fed. 163, 66 C. C. A. 471, 69 L. R. A. 653, defined the general liability of an innkeeper, in respect to the person of his guests, as follows:

"An innkeeper was not an insurer of the safety of the person of his guest against injury, but * * * his obligation was limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitor."

Professor Beale, in his book on Innkeepers (section 169), says:

"The innkeeper is not an insurer of the quality of his food, but he would be liable for knowingly or negligently furnishing bad or deleterious food."

In the state of New York there has been no decision by the highest court passing directly upon the question involved in this case, but there have been two decisions of the Appellate Division, Third Department, within the past year. In *Race v. Krum*, 162 App. Div. 911, 146 N. Y. Supp. 197, the plaintiff became sick from the effects of eating strawberries and cream at the defendant's soda water fountain, alleged to have been poisonous and full of ptomaines. The answer admitted an allegation in the complaint that the defendant, in selling the cream to plaintiff, "warranted it to be wholesome." Upon an appeal from a judgment for the plaintiff, the judgment was affirmed by a majority of three to two. The dissenting judges delivered an opinion by Woodward, J., which is the only opinion reported, in which he says:

"The very interesting question of how far the purveyor of ice cream impliedly warrants the product to be free from poisons which can be detected only by bacteriological and chemical analysis, if at all, is not presented by this record, for the answer admits a general warranty as broad as that

alleged in the complaint, and rests upon a denial of the breach of such warranty. Whether, under a proper pleading, this court would be willing to hold that a person selling ice cream impliedly warranted the same to be free from poisonous ptomaines, which could not be detected in the practical conduct of the business, and which no reasonable care could exclude, is purely academic here, for the defendant has consented by his pleadings to stand upon the broad proposition that he did warrant the quality in the same degree that the plaintiff has alleged."

It would appear, therefore, that the question of whether there was any implied warranty was not up for decision, but upon a motion for a reargument, reported in 163 App. Div. 924, 147 N. Y. Supp. 818, the court in a *per curiam* opinion held that the admission in the answer was only intended as the admission of an implied warranty, but added that the motion for a reargument should be denied, because the majority of the court was of the opinion that as a matter of law there was an implied warranty that the food was fit for consumption.

In *Leahy v. Essex Co.* (Sup.) 148 N. Y. Supp. 1063, also in the Appellate Division, Third Department, a plaintiff, who ate a piece of pie in defendant's restaurant and was injured thereby, brought action alleging a sale of the pie and an implied warranty by defendant of its wholesomeness. The complaint was dismissed, on the ground that it could not be determined whether her sickness was due to that particular fact. The Appellate Division reversed the judgment and ordered a new trial, saying, however, upon the subject of implied warranty, that it had held that there was such a warranty under somewhat similar circumstances in the case of *Race v. Krum*, 162 App. Div. 911, 146 N. Y. Supp. 197.

There was no opinion by the majority of the court in the first case, and upon motion for reargument there was no discussion of the important question involved and no citation of authorities. In the second case there was likewise no discussion of the question, and no citation of authority other than that of the first case. It can be readily seen, therefore, that these two cases, which are the only New York authorities sustaining the plaintiff's contention, are not of great weight.

The source from which this doctrine of implied warranty was derived was the old case of *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339, decided in 1815, and frequently quoted since. That was the case of a sale of meat known by the defendant to be unwholesome, by which plaintiff's family were made sick. The principle involved was obviously entirely different from that in the present case, and the action was apparently one for deceit. The court, however, remarked in the course of its discussion that, in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome. That this dictum did not represent the New York law was stated by the New York Court for the Correction of Errors in *Wright v. Hart*, 18 Wend. 449.

Inasmuch as the highest court of New York has never passed upon the question at issue, and I find that its expressions in regard to the matter are not altogether harmonious, I have felt at liberty to reach an independent judgment as to what is the common-law applicable to

the situation, irrespective of the two decisions of the Appellate Division which I have referred to.

In my opinion there is no well-considered authority and no public policy which afford any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food.

I therefore direct that the complaint be dismissed upon the merits.

THE KNICKERBOCKER (two cases).

(District Court, W. D. Washington, N. D. October 28, 1914.)

Nos. 2674, 2702.

SALVAGE (§ 31*) — ASSISTING BURNING SCHOONER — AMOUNT OF COMPENSATION.

Libellant's tug went to the assistance of a fishing schooner, which had taken fire in the hold, in the daytime. The tug ran two lines of hose on board, which were handled by the crew of the schooner while the tug pumped, and the fire was extinguished in about 25 minutes. The tug was of the value of \$30,000, and the saved value of the schooner was \$6,000. The service was promptly and efficiently rendered, but involved no particular danger to the tug or her crew. *Held*, that the owner was entitled to a salvage award of \$600, and the master and crew of \$400.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 75-77; Dec. Dig. § 31.*]

In Admiralty. Suit by E. N. Charlesworth and others against the American steamer Knickerbocker, submitted with suit by the Stimson Mill Company, as owner of the steam tug Tillicum, against said steamer. Decrees for libellants.

James Kiefer, of Seattle, Wash., for master and crew.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for owners.

Kerr & McCord and C. H. Hanford, all of Seattle, Wash., for claimant.

NETERER, District Judge. These are two admiralty cases, heard together, in which the owner, master, and crew of the steam tug Tillicum seek to establish their claims for salvage against the American steamer Knickerbocker for services rendered on the 27th of January, 1914. On this day, about 11 o'clock in the forenoon, the American fishing schooner Knickerbocker was discovered on fire while in the waters of Puget Sound on the westerly side of West Point Spit. The Tillicum was lying about one-half a mile from this vessel, in Shilshole Bay, "coming up alongside the Grace Dollar to pump fresh water aboard." A message was delivered to the captain of the Tillicum, calling his attention to the fact that the fishing schooner was afire. The Tillicum immediately went to the rescue with all possible speed. On the way it got its fire pump and apparatus into shape. Two dories

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had left the distressed vessel before the arrival of the Tillicum, in which the compass and "stuff of any value" had left the ship. In the dories were three of the crew of the burning vessel. The captain and other members of the crew remained on board. The Tillicum came alongside the Knickerbocker and fastened on the starboard side with two lines, one forward and one aft, about amidships. The fire was in the hold of the Knickerbocker. Two hose were passed to the captain and crew of the Knickerbocker by the master of the Tillicum, one 2½-inch hose and the other 1½-inch hose. These hose, carrying two streams of water, were turned on the fire by the crew of the Knickerbocker. The captain of the Tillicum and two of his crew were on the deck of the Knickerbocker, to keep the hose straight and from becoming kinked. The fire was extinguished in about 25 minutes. After the fire was extinguished, at the request of the master of the Knickerbocker, the Tillicum towed the burned vessel to the Seattle Dry Dock & Shipbuilding plant. It took about an hour and a half to tow the vessel to the dock. The Tillicum was a vessel valued at \$30,000. The Knickerbocker was a larger vessel, the salved value of which was \$6,000. Both vessels burned crude oil. The men of the crew of the Tillicum testified that they believed the Knickerbocker was a gasoline burner, but there are no extraneous facts disclosed upon the trial upon which to base such a conclusion. The heat of the fire on the Knickerbocker was at no time intense. The crew of the Knickerbocker handled and applied the hose to the fire, and the Tillicum pumped the water for this purpose. The master and crew of the Tillicum have instituted actions in which they pray an allowance of \$5,000, alleging the value of the vessel to be \$40,000. The owners of the rescuing vessel ask for judgment in the sum of \$3,000.

Upon the trial it was stipulated that both causes be tried together. The claimant made tender, and offered to pay, at the time the testimony was being taken, to the master and crew of the Tillicum the sum of \$400 for services rendered, and to the owners of the Tillicum the sum of \$600, making a total of \$1,000. The libelants contend that the service rendered was a meritorious service, and that the sum tendered was not sufficient compensation. The main elements to be considered by the court in determining the amount of salvage are stated by the Supreme Court of the United States, by Justice Clifford, in the case of *The Blackwall*, 10 Wall. 1, 14 (19 L. Ed. 870) as follows:

"(1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued."

Having due regard to these various factors, it may be concluded that the assistance rendered was very prompt and energetic and skillful to the degree required. There is no element of particular danger disclosed by the testimony. There was no risk incurred by the salvors of consequence. The burden of the danger and of the extraordinary service was assumed by the master and crew of the burning vessel.

They manipulated the nozzles of the hose and placed themselves in a position of closest contact with the destroying element. The value of the property saved, I think, from the testimony, cannot be placed above \$6,000. The time employed, exclusive of the time for towing the vessel to the dry dock, was about 25 minutes. There was no expense of any consequence incidental to the service rendered, nor were there any lives imperiled in the salvage service. That there was no great element of danger to the lives of the participants is somewhat emphasized by the fact that one of the crew of the Tillicum was asleep and was permitted to slumber during the entire service rendered.

Salvors have a right to claim compensation for beneficial service voluntarily rendered in rescuing a vessel from peril, and have a lien upon the property saved, and it is the policy of the law to deal liberally with salvors, so as to stimulate extraordinary exertion and courage in rescuing imperiled property and human lives; but a rescued vessel must be treated fairly in view of all of the surrounding circumstances. I think, in the light of all of the circumstances developed by the testimony, that the amount tendered is liberal compensation for the services rendered. *The Elmbank*, 69 Fed. 104, 16 C. C. A. 164; *The America* (D. C.) 136 Fed. 510; *The Loyal*, 204 Fed. 930, 123 C. C. A. 252; *The Brina P. Pendleton* (D. C.) 200 Fed. 848; *Reichert v. Carfloat* (D. C.) 213 Fed. 127. This tender was not made until after the trial of the case before the commissioner had commenced and some of the testimony had been taken. While there was no money actually tendered, the offer to pay was made, and there was no disposition to accept it. I think the facts in this case come well within the holding of this court in *The Calcium*, 218 Fed. 267, filed April 28, 1914.

A decree may be entered in favor of the crew of the Tillicum for the sum of \$400, this to be divided among the seamen in the proportion that the wages received by the several men bears to this amount; and a decree may also be entered in favor of the Stimson Mill Company, owners of the tug Tillicum, in the sum of \$600. I think the costs in this case should be divided between the several parties; the libelants to pay each one-fourth of the costs, and the claimant to pay one-half of the costs; no proctor's fees to be charged against either party.

DAMON et al. v. SULLIVAN.

(District Court, N. D. Iowa, W. D. December 1, 1914.)

No. 88.

ADVERSE POSSESSION (§ 12*)—CHARACTER—POSSESSION WHILE TITLE IS IN DISPUTE.

The possession that will ripen into an adverse title against the owner of the legal title within the period of ten years provided by the Iowa statute for bringing actions for the recovery of real property must be under claim of right or color of title that is not challenged by the owner of the legal title within such period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 387-393; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Albert N. Damon and others against John Sullivan. On demurrer to parts of answer. Demurrer sustained.

See, also, 202 Fed. 285.

Action to recover possession of 80 acres of land in O'Brien county, this state, and damages for the wrongful detention thereof. Submitted on plaintiff's demurrer to that part of defendant's answer which pleads adverse possession and the statute of limitations based thereon.

John E. Stryker, of St. Paul, Minn., for plaintiffs.

Alfred Pizey and D. H. Sullivan, both of Sioux City, Iowa, for defendant.

REED, District Judge. The land involved is a part of the land granted by the act of Congress of 1864 to the state of Iowa for the benefit of the Sioux City & Pacific Railway Company. The plaintiffs derive title under that grant and a patent of the United States to their ancestor, Myron H. Damon, of February 27, 1901, pursuant thereto. After the issuance of such patent the defendant John Sullivan, some time in 1903, commenced a suit in equity in this court against the said Damon, in which he claimed to have settled upon said land under the homestead laws of the United States, and to be the owner thereof under such settlement, and that the patent for the land to Damon was issued through error of law by the Land Office of the United States, and prayed that Damon be adjudged to hold the legal title to the land in trust for him. Damon defended such suit, denying the allegations of the defendant, claiming that he had settled upon the land under the homestead laws of the United States and was the rightful owner of the land thereunder. Pending the suit, Damon died, and in 1912 the defendant in this suit, as plaintiff in that suit, revived the same against the heirs and representatives of Damon. Upon final hearing a decree was entered in that suit in 1913, dismissing the plaintiff's bill and awarding the land to the plaintiffs in this suit as the surviving heirs of Myron H. Damon. The defendant was in possession of the land pending that suit, and, having refused to surrender the same to the plaintiffs upon their demand after such decree, they brought this action September 15, 1914, to recover such possession and damages for the wrongful detention of the land.

The answer of the defendant, among other defenses, sets up his possession of the land during the pendency of the former suit, and claims that such possession was adverse to the plaintiffs and their ancestor, Myron H. Damon, and pleads such possession and the Iowa statute of limitations of ten years in bar of the action.

But possession of real estate by one pending litigation in regard to the ownership thereof, in which litigation the owner of the legal title is asserting his right to the land as against the one in possession claiming to be the owner, cannot under the Iowa statute be rightly held to be adverse to the owner of the legal title, so as to ripen into a title against such legal owner, when such litigation is pending during all or a part of the time the one claiming to hold adversely is in possession. The possession that will ripen into an adverse title against the owner of the legal title within the statutory period of ten years

provided by the Iowa statute for bringing actions for the recovery of real property must be under claim of right or color of title that is acquiesced in by the owner of the legal title, and not challenged by him within such period. *Larum v. Wilmer*, 35 Iowa, 244; *Hintrager v. Smith*, 89 Iowa, 270, 56 N. W. 456; *Litchfield v. Sewell*, 97 Iowa, 247, 66 N. W. 104.

The claim of right or color of title under which the defendant claimed in the equity suit was challenged by the defendants and their ancestor, Myron H. Damon, in that suit, immediately after it was brought, and continued until the final decree therein, and was then held void as against the plaintiffs' title, and they were adjudged the lawful owners of the land; and the decree in that suit is a bar against the assertion of any title or right of possession of the property by the present defendant. See cases above cited.

Forty acres of the land involved was sold for taxes during the pendency of the equity suit, and a tax deed was issued in 1907 to the purchaser at such sale, which purchaser subsequently conveyed the land acquired under such deed to the widow of Myron H. Damon, who is now deceased, leaving the present plaintiffs as her heirs at law. The plaintiffs set forth such tax title in their petition in this action, and assert it as an additional right to such 40 acres of land, and defendant pleads the five-year statute of limitations of Iowa against such tax title. But that title adds nothing to plaintiffs' right of recovery, for they or their ancestors, being the legal owners of the land, were liable to the county and state for such taxes, and their acquisition of the title based upon the sale of the land for such taxes is in effect but the payment by them of such taxes. If plaintiffs relied alone upon the tax title as their right of recovery, it may be that the five-year statute of limitations would bar the right of recovery thereof; but, as they were the owners of the patent title, the acquisition of the tax title confers upon them the full title of the property, and the right of recovery thereof from the defendant, who is simply holding over after the decree in the equity suit which adjudged that he has no right thereto.

Treating paragraphs 6 and 7 of the defendant's answer as a separate division thereof, the demurrer thereto is sustained, to which ruling the defendant excepts. The defendant may amend his answer within 20 days after the filing of this order, or he may stand upon his answer, as he may then elect. It is ordered accordingly.

LA BELLE BOX CO. v. STRICKLIN.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1914.)

No. 2507.

1. MASTER AND SERVANT (§ 258*)—ACTIONS FOR INJURIES—PETITION—SUFFICIENCY.

In an action for injuries to an employé in a lumber yard, thrown from a platform in front of an approaching train by a collision between an empty truck which he was pushing and a loaded truck drawn by a horse, a petition, alleging that the horse was driven wantonly, heedlessly, carelessly, and negligently, and that the driver carelessly, wantonly, and recklessly failed and neglected to give plaintiff notice of the danger, stated a cause of action for ordinary, as distinguished from wanton or willful, negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. PLEADING (§ 257*)—AMENDMENT—NECESSITY OF AMENDMENT.

Where defendant denied the allegations of petition for negligence and affirmatively alleged that plaintiff, with full knowledge that a loaded truck was coming and with sufficient room to place himself out of danger, without any necessity needlessly exposed himself to whatever dangers were incident to the operation of the loaded truck, the court did not err in refusing to permit an amendment affirmatively alleging contributory negligence, since the answer in substance alleged contributory negligence, and the charge gave defendant the benefit of that defense, all known witnesses testified fully, and there was nothing to suggest that any further evidence of contributory negligence could have been produced.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 764; Dec. Dig. § 257.*]

3. MASTER AND SERVANT (§ 203*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé in a lumber yard was pushing an empty truck along a platform, and when about to meet a loaded truck turned close to the edge of the platform. The loaded truck did not turn out far enough and collided with the empty truck, and either as a result of the collision or of the swing of the loaded truck as it pulled away such employé was thrown from the platform in front of an approaching train. *Held*, that he did not assume the risk of such injury, as he had no reason to anticipate that he would be negligently knocked from the platform.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. MASTER AND SERVANT (§ 228*)—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

The injured employé's conduct bore no causal relation to the injury distinguishable from his negligence contributing thereto, which, if slight, did not bar a recovery under the express provisions of Page & A. Gen. Code Ohio, § 6245-1.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

5. COURTS (§ 405*)—REVIEW—JURISDICTIONAL QUESTIONS.

Though no question of jurisdiction was suggested to the court below or to the Circuit Court of Appeals, that court might not overlook jurisdictional defects disclosed by the record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—34

6. REMOVAL OF CAUSES (§ 86*)—INSUFFICIENCY OF PETITION—EFFECT.

In an employé's action for injuries, commenced in an Ohio state court, the petition alleged that defendant was a Michigan corporation operating a factory in Ohio, but did not allege plaintiff's residence or citizenship, except that he was temporarily employed in such factory. Defendant's petition for removal to the federal court, filed about one month after the suit was commenced, alleged that plaintiff "is" a citizen of Ohio. Plaintiff, without moving to remand, filed an amended petition which defendant answered on the merits, and after a trial judgment was rendered for plaintiff. It was stipulated at the trial that plaintiff then resided at B. in Ohio, and he testified that he lived there, and that shortly before the accident he had been working at other places in Ohio. *Held* that, while the petition for removal was defective for failure to show that plaintiff was a citizen of Ohio when the action was commenced, this did not require a reversal of the judgment, since a petition which seems to be intended to state good cause for removal, but is merely imperfect in reciting one of the necessary facts, and which is accepted by the state court as sufficient, removes the case and gives jurisdiction to the federal court, and, if the existence of diverse citizenship can fairly be presumed from the entire record, the judgment will be affirmed as in cases commenced in the federal court, notwithstanding the mere possibility of lack of jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Action by Charles Stricklin against the La Belle Box Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Hoffman, of Pittsburgh, Pa., for plaintiff in error.

G. D. Kinder, of Martin's Ferry, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This was a suit to recover damages suffered by Stricklin while he was employed in the lumber yard of the box company, at Martin's Ferry, Ohio. There was a long platform between the railroad track and the lumber piled in the yard. Stricklin was pushing an empty truck along this platform and was about to meet a loaded truck drawn by a horse and driven by another employé. Stricklin turned out close to the edge of the platform, next to the railroad, and stopped. The loaded truck did not turn out far enough, the hub of its wheel struck the hub of Stricklin's truck, and, either as the result of the blow so given or of the swing of the load of lumber as the driver pulled away, Stricklin was knocked off the platform, fell onto the railroad track, and was badly hurt by a railroad car just then approaching. He recovered a verdict of \$4,750, and the company assigns error, raising a question on the pleadings and claiming that there was no evidence of negligence. Under the Ohio statute in force (the Norris Act, §§ 6242, 6245—1, Page & A. General Code), plaintiff's contributory negligence would not be a bar, if it was slight as compared with defendant's negligence (*McMyler Co. v. Mehnke* [C. C. A. 6] 209 Fed. 5, 7, 126 C. C. A. 147);

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the fellow-servant rule would not apply if, as the jury found, the negligent driver was a foreman in charge of the work.

[1, 2] The question upon the pleadings was this: The petition charged that the horse was driven "wantonly, heedlessly, carelessly, and negligently," and that defendant was negligent in that the driver "carelessly, wantonly, and recklessly failed and neglected" to give plaintiff notice of the danger. The answer denied any lack of due care in driving the cart, and denied that the company drove the truck "heedlessly, wantonly, recklessly, carelessly, or negligently, or in any other manner without any warning to the plaintiff," and alleged affirmatively that, with full knowledge that the truck was coming and with sufficient room and opportunity to place himself out of danger, the plaintiff "without any necessity therefor, and of his own volition, so placed himself in relation to said cart and such horse as to needlessly expose himself to whatever dangers were incident to the operation of said car on said platform." On the trial, defendant claimed and the court held that the evidence did not show wanton or willful negligence as distinguished from ordinary negligence; but further held that the petition might be treated as one charging merely ordinary negligence, since it stated no facts sufficient to show willfulness or wantonness. The company then desired to amend its answer so as to allege contributory negligence, and urged that, since the defendant had supposed the action was for willful negligence which it knew could not be proved, it had not affirmatively pleaded contributory negligence, as was required under the Ohio practice in an action for ordinary negligence. This application to amend was denied, and the jury was instructed that the action was one for ordinary negligence, and that Stricklin's contributory negligence, if it was slight as compared with defendant's negligence, would not bar recovery, but should be given effect in reducing damages.

In this, there was no error. Not only was the court plainly right in treating the petition as one for ordinary negligence—at least inclusively if not exclusively—but the answer did, in substance and effect, allege contributory negligence, although it did not use those words. The charge gave defendant the benefit of that defense, all known witnesses testified fully, and there is nothing to suggest that defendant could have produced any further evidence if it had pleaded the affirmative defense of contributory negligence.

[3, 4] The basis for the claim that there was no evidence to show negligence justifying a recovery seems to be that plaintiff's act in standing so near the edge of the platform that he would be knocked off if the foreman drove against him was the sole proximate cause of the injury. This theory cannot survive its statement. Plaintiff did not assume the risk of such injury, since it was not customary or even occasional to knock the men off the platform in this manner, and the employé does not assume the risk of negligence which he did not have reason to anticipate. *Sterling Paper Co. v. Hamel* (C. C. A. 6) 207 Fed. 300, 304, 125 C. C. A. 44. If Stricklin's conduct bore any causal relation to the injury, it was indistinguishable from negligence contributing thereto (see *McMyler v. Mehnke*, supra, and cases cited)

and, so characterized, it was covered by the Ohio statute and by the court's charge in pursuance thereto.

[5, 6] It would be clear that the judgment must be affirmed, save for one thing. The case was commenced in the state court and was removed by defendant on the ground of diversity of citizenship. No question of jurisdiction was ever suggested to the court below or to this court, but we are bound not to overlook any jurisdictional defect that the record may disclose. See cases cited in our opinion this day filed in *R. R. v. Stephens*, 218 Fed. 535, 134 C. C. A. 263. The original petition alleged that the defendant "is and was, at the time of the grievances hereinafter complained of, a corporation of the state of Michigan, and owns and operates, and then owned and operated, a box factory in the city of Martin's Ferry, Ohio." It says nothing about either the residence or citizenship of plaintiff, unless by alleging that "the plaintiff at said time was employed by the defendant as a common laborer in and about its factory," and that he was working at the box factory temporarily; his regular trade being that of a puddler. The defendant's petition for removal does not in terms say that the controversy is between citizens of different states, but alleges that the jurisdictional amount is involved; that the defendant was, when the suit was commenced, and still is, a corporation, duly organized under the laws of Michigan, and was not and is not a citizen of Ohio; and "that the plaintiff is a citizen of the state of Ohio and resides at Bridgeport, Belmont county, Ohio." The injury was suffered October 6, 1911, the suit was commenced December 20, 1911, and the removal petition filed January 19, 1912. On the last-named day, the state court entertained the petition, fixed and approved the bond, and ordered that the cause be certified from that court to the United States District Court. Notice of filing the petition and bond had been theretofore given to the plaintiff as required by the Code. After the removal, it came about that plaintiff filed, in the court below, the second amended petition upon which the trial was had. This was not a mere amendment, but was a pleading complete in itself. It contained nothing bearing on plaintiff's residence or citizenship, in addition to what was found in the original petition. The defendant answered to the merits. The bill of exceptions does not contain all of the evidence. It only certifies that "there was no other or further evidence offered on behalf of either party as to how the accident occurred." At the opening of the trial, held December 9-11, 1912, counsel entered into a stipulation in part as follows: "It is also agreed that the plaintiff resides at Bridgeport, Ohio; that the defendant box company is a corporation organized and incorporated under the laws of the state of Michigan," etc. Plaintiff testified, "I live down at Bridgeport," and that he went to work for the box company a few days before the accident; that he had been confined to the house for the 14 months since the accident; that before he was injured he was a puddler by trade, working in that occupation for 30 years, excepting occasionally when the mills were stopped; and that shortly before the accident he had been working as a common laborer at Fulton and Bellaire. These places named, as well as Martin's Ferry, are all in Belmont county, and within a few miles of Bridgeport.

It will be noticed that the petition for removal is defective in that it does not allege Stricklin's citizenship at the time when this suit was commenced, but only at the time, 30 days later, when the removal petition was filed. That, for such defect, the judgment which has been recovered should be reversed and the case remanded to the state court must always be unfortunate; but that, in the present case, Stricklin, after commencing his suit in the proper court, after having been taken against his will into the federal court, spent a year in reaching trial, gone through the trial and recovered a judgment for an amount which was certainly not excessive, if his story was true, and then having lost two years more in getting the case to its present position—that after all this, and after continual acquiescence in the jurisdiction of the federal court and without any affirmative reason to doubt that the facts existed which gave the jurisdiction, he should be sent back to begin over again because the other side made an imperfect allegation, is a result not to be reached unless imperatively required by settled rules.

It is clear, however, that a line of Supreme Court decisions (Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; Crehore v. Railway Co., 131 U. S. 240, 243, 9 Sup. Ct. 692, 33 L. Ed. 144; Jackson v. Allen, 132 U. S. 27, 34, 10 Sup. Ct. 9, 33 L. Ed. 249; Young v. Parker, 132 U. S. 267, 271, 10 Sup. Ct. 75, 33 L. Ed. 352; Graves v. Corbin, 132 U. S. 571, 590, 10 Sup. Ct. 196, 33 L. Ed. 462; La Confiance Co. v. Hall, 137 U. S. 61, 11 Sup. Ct. 5, 34 L. Ed. 573; United States v. County Court, 144 U. S. 568, 12 Sup. Ct. 921, 36 L. Ed. 544) does compel this result, unless they have been modified by something later. The sum of these decisions, as applied to a situation of this class, certainly is that such an allegation of the citizenship of a party at the date of commencing suit in the state court as to demonstrate that he was not, at that moment, a citizen of the same state as the other party, is of the essence of jurisdiction, and, being so essential, its absence can neither be overlooked nor supplied by inference nor cured by amendment. This court has applied this principle with great strictness. *Macey Co. v. Macey*, 135 Fed. 725, 729, 68 C. C. A. 363.

Kinney v. Columbia, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, clearly amounts to a withdrawal of the strict earlier rule. In that case there was in the removal petition no allegation as to the citizenship of the plaintiff at any time; but this point was touched only by the statement that the controversy "is" between citizens of different states. This allegation had been held insufficient, and it comes no nearer to saying that plaintiff was a citizen of Utah when the suit was commenced than does the present petition to saying that Stricklin was a citizen of Ohio when the suit was commenced. Indeed, the latter allegation is rather closer, because it positively states his citizenship at a date only a few days from the vital date. Although some special features are recited in the *Kinney Case*, its necessary effect is that a petition for removal which seems to intend to state good cause, but which is merely imperfect in reaching one of the necessary facts, does give jurisdiction to the federal court and does remove the case. Obviously, if the case remained in the state court, as all of the earlier

cases held, the federal court could not authorize amendment; the same case could not be in two courts at the same time. True, in the Kinney Case, a motion to amend was made before trial, but that circumstance bears on the justice and fairness of permitting amendment—not on the power to do so. In approving an amendment even before trial, the decision necessarily implies that the case was present in that court and was not within the grasp of the state court. We have recognized the Kinney Case as liberalizing the former strictness. *Rife v. Underwriters*, 204 Fed. 32, 36, 122 C. C. A. 346.

It is not without significance that the Code (section 29 [Comp. St. 1913, § 1011]) now requires notice of the removal proceedings, and we have thought this implied a right to be heard to some extent and so was vital. *Butterworth v. Sessions*, 205 Fed. 502, 123 C. C. A. 570; *Arthur v. Maryland Co.* (D. C.) 216 Fed. 386, 387. An order of a state court, after such notice and hearing, may well operate to cure an imperfect showing in a way that could not be assumed under the former practice.

Once do away with the thought that in such a case—where the removal petition was only imperfect, and where the state court had approved the transfer—the jurisdiction remains and is in the state court, and there seems no reason why it should not be viewed as liberally after judgment as is a case begun in the federal court. This is especially true where, after removal, plaintiff has filed an amended but incomplete petition and issue has been again joined.

It is now well established, as to a suit commenced in a federal court, that even where the pleading allegations of diverse citizenship are incomplete, yet if no question is made on that point and its existence can fairly be presumed from the entire record which reaches an appellate court, including the proofs as well as the pleadings, the court will not reverse for that reason. *Robertson v. Cease*, 97 U. S. 646, 648; *Sun Ass'n v. Edwards*, 194 U. S. 377, 382, 24 Sup. Ct. 696, 48 L. Ed. 1027; *Mahoning Co. v. O'Hara* (C. C. A. 6) 196 Fed. 945, 948, 116 C. C. A. 495; *R. R. v. Stephens*, supra. Here we observe that the petition says plaintiff was working in Ohio at the time of the accident; that plaintiff did not move to remand, as he naturally would have done if he had not been a citizen of Ohio when the suit was commenced; that the allegation in the removal petition of citizenship on January 19th, in connection with plaintiff's earlier situs as working in Ohio in October, strongly suggests his citizenship on December 20th; that, at the opening of the trial, the counsel stipulated an agreement on the subject of diverse citizenship, which clearly all counsel and the court thought showed jurisdiction; and that plaintiff testified he resided at Bridgeport, and for some time before the accident had been working in the vicinity and had been helpless at home ever since the accident, in October. In spite of all these things, it may be true that he had become a citizen of Ohio within a few days preceding January 19th; but this is not the natural presumption, it is highly improbable. We think the case is fairly within the principle of the Kinney and Sun Cases. Indeed, the fact analogy to the latter is very close as to inferring citizenship. The mere possibility that there was no jurisdiction will not justify reversal.

We make a different disposition of the case from that made of the Stephens Case because here the necessary citizenship may fairly be inferred; there, it may not be. That a railroad is doing business in a state has little, if any, tendency to show its organization under the laws of that state.

The judgment is affirmed, with costs.

CHICAGO, R. I. & P. RY. CO. v. STEPHENS.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1914.)

No. 2492.

1. COURTS (§ 405*)—UNITED STATES COURTS—DETERMINATION OF QUESTIONS OF JURISDICTION.

It is the duty of the Circuit Court of Appeals to consider a claim that the pleadings and proof do not show diverse citizenship, though counsel fail to argue that question, and attempt to waive the assignments of error raising it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

2. COURTS (§ 322*)—UNITED STATES COURTS—JURISDICTION—ALLEGATIONS IN PLEADINGS.

A declaration, in an action against a railroad company, alleging that plaintiff was a citizen of Tennessee and that defendant was a corporation existing and doing business in the states of Arkansas and Tennessee, did not show diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

3. COURTS (§ 322*)—UNITED STATES COURTS—JURISDICTION—ALLEGATIONS IN PLEADINGS—"CITIZEN."

In an action against a railway company by a citizen of Tennessee, a declaration, alleging that the railway company was a citizen of Arkansas, without any allegation that it was organized as a corporation under the laws of Arkansas, did not show that it was a "citizen" of Arkansas, within Const. U. S. art. 3, § 2, providing that the judicial power of the United States shall extend to controversies between citizens of different states, and Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1913, § 991]) § 24, giving District Courts original jurisdiction in case of diverse citizenship; especially where the corporate character of defendant was neither admitted nor proved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

For other definitions, see Words and Phrases, First and Second Series, Citizen.]

4. APPEAL AND ERROR (§ 1178*)—REVERSAL FOR NEW TRIAL ON ISSUE OF JURISDICTION.

Where diverse citizenship was not sufficiently alleged or proved, but it appeared probable that the facts would warrant an amendment showing the required diversity, a judgment would be reversed and the cause remanded with permission to frame and try an issue of fact with respect to diversity of citizenship alone without setting aside the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. TRIAL (§ 420*)—MOTION FOR DIRECTED VERDICT—WAIVER.

Any claim of error respecting the denial of a motion for a directed verdict, made at the close of plaintiff's evidence, was waived by defendant by presenting its evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

6. TRIAL (§ 176*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR DIRECTED VERDICT.

A motion to direct a verdict is addressed to the condition of the case at the close of the evidence, and not to errors in the charge subsequently delivered, especially where no exception is taken to the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 399; Dec. Dig. § 176.*]

7. TRIAL (§ 141*)—QUESTIONS FOR JURY—MATTERS NOT IN ISSUE.

Where, in a passenger's action against a railroad company for injuries caused by remaining all night in a cold and filthy depot, plaintiff's purchase of a ticket and defendant's failure to complete the performance of the contract of carriage were admitted for all intents and purposes, it was not necessary to submit any question relative thereto to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

8. CARRIERS (§ 275*)—PASSENGER'S ACTION FOR INJURIES—SUFFICIENCY OF DECLARATION.

A declaration, alleging that plaintiff purchased a ticket from defendant's authorized agent over the line of a connecting carrier to W., and from W. to her destination over defendant's railroad; that upon reaching W. she was told she could go no further on account of high water; that after spending the night in the depot at W., which was filthy, cold, and inadequately heated, and contained men who were drunk and used unpleasant language, she turned back; that, though the railroad company knew of the high water and was issuing daily bulletins relative thereto, the agent negligently and wantonly sold plaintiff a through ticket; and that in consequence she sustained certain injuries—though possibly open to a demand for specifications concerning the acts and omissions of defendant, was sufficient, in the absence of such a demand, to advise defendant of the nature of the testimony that would be offered, and to justify evidence tending to show negligence on defendant's part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1076, 1077; Dec. Dig. § 275.*]

9. CARRIERS (§ 272*)—DUTIES TOWARD PASSENGERS—ACCOMMODATIONS AT STATIONS.

A railway company, which authorized the agents of a connecting carrier to sell through tickets over its line, was chargeable with notice that persons holding such tickets might be brought to the junction point in ignorance of the withdrawal of its regular train from that point because of high water, and, though such high water justified the withdrawal of the train, it did not justify it in failing to furnish such passengers with facilities for their accommodation and safety in the depot at the junction point, at least for a reasonable time after their arrival.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1072-1074; Dec. Dig. § 272.*]

10. CARRIERS (§ 278*)—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

Where the holder of a through ticket reached the junction point of defendant's road and another railroad at midnight, in ignorance that defendant's train scheduled to leave that point at 3:25 had been withdrawn because of high water, and not having sufficient money to pay the expense of going to a hotel in addition to the expense of the return trip made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

necessary by the withdrawal of such train, and being unable until morning to clear up conflicting statements as to trains for her destination, she remained until 9 o'clock in the depot, which was cold and filthy, and where she was frightened by the conduct of a drunken man, it was a question for the jury whether she was justified in remaining in the depot the rest of the night, and it could not be said as a matter of law that she was not a passenger when she entered the depot, or that she lost her rights in that respect by staying there too long.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.*]

11. CARRIERS (§ 272*)—DUTIES TOWARD PASSENGERS—ACCOMMODATIONS AT STATIONS.

If she was justified in remaining in the depot until the next morning, she was a passenger to whom defendant owed the duty of exercising reasonable care and diligence to furnish her with a reasonably safe and comfortable depot until the departure of the train for which she was waiting, under the common law and by Kirby's Dig. Ark. § 6634, requiring railway companies running trains at night to keep their waiting rooms open day and night for the use of passengers and at proper times and seasons to keep them clean and comfortably heated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1072-1074; Dec. Dig. § 272.*]

12. EVIDENCE (§ 528*)—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.

In an action for injuries caused by remaining all night in a railway depot which was filthy and cold, where plaintiff was frightened by the conduct of a drunken man, expert testimony as to whether these conditions would cause the nervousness and irregularity in the menstrual flow of which plaintiff complained was properly admitted, as it related to a subject not familiar to the layman, and the opinion only of a competent expert would be of any value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Mrs. W. G. Stephens, by next friend and husband, W. G. Stephens, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

S. P. Walker, of Memphis, Tenn., for plaintiff in error.

H. E. Taylor, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The railroad company seeks to reverse a judgment and set aside a verdict recovered against it for personal injuries sustained by Mrs. Stephens. The action was originally brought by Mrs. Stephens against the Chicago, Rock Island & Pacific Railroad Company and the receivers of the Missouri & North Arkansas Railroad Company. The receivers appeared specially by motion to dismiss the action as to them and their company, on the grounds that the company did not own or operate a railroad in Tennessee, and that the service attempted to be made upon them was insufficient. The motion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was granted as to service, and Mrs. Stephens then filed an amendment to her declaration, stating her complaint against the Chicago, Rock Island & Pacific Railroad Company alone.

[1-3] 1. Jurisdiction. Although eleven assignments are presented with the writ of error, defendant's counsel in their brief attempt to waive all of them except the first, sixth, and eleventh. This waiver is effective without doubt, save as to the second. That assignment is based upon a claim of error in entering judgment against defendant "for the reason that it does not appear in proof" that defendant "was a nonresident of the state of Tennessee," and upon the further claim that the declaration alleges that defendant "was a resident of the state of Arkansas, but fails to allege that it was a nonresident of Tennessee." It is the duty of the court to consider the question thus presented, in spite of the failure of counsel to argue it or the effort to waive it, because jurisdiction cannot be acquired by consent, nor be presumed; it must affirmatively appear upon the face of the record. *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Thomas v. Board of Trustees*, 195 U. S. 207, 211, 25 Sup. Ct. 24, 49 L. Ed. 160; *Nichols Lumber Co. v. Franson*, 203 U. S. 278, 282, 27 Sup. Ct. 102, 51 L. Ed. 181; *Chi., B. & O. Ry. Co. v. Willard*, 220 U. S. 413, 419, 31 Sup. Ct. 460, 55 L. Ed. 521. Jurisdiction was invoked and rested only on the ground of diversity of citizenship. It is plain enough from the pleadings and proofs that Mrs. Stephens is a citizen of Tennessee and a resident of Memphis; but difficulty arises with respect to the Rock Island Company. It is alleged in the declaration that the company is "a corporation existing and doing business in the state of Arkansas and Tennessee," and, in the amendment, that the company "is a citizen of the state of Arkansas; * * * that the said railroad company is a corporation * * * operating a line of railroad from Wheatley, Ark., into Memphis, Tenn." In the summons issued against the railroad it is stated that the Rock Island Company is "a citizen of (the) state of Arkansas." Nothing further appears in the record tending to show the corporate character or place of origin of the company; indeed, these facts do not seem to have been regarded as important elements of the issues. The trouble with the allegations of the declaration is that they would not, if admitted, be sufficient under the authorities to justify taking jurisdiction of the action; for they charge that the company is "a corporation existing and doing business in the state of Arkansas and Tennessee." This might be true, and still the corporation might not have been created under the laws of either of those states, or it might have been only in virtue of the laws of Tennessee of which state the plaintiff is a citizen. The allegations of the amendment, however, amount to an assertion that the company is a corporation and a citizen of the state of Arkansas, and, if admitted, it might be said with much show of reason that this is tantamount to alleging that the company was organized as a corporation under and according to the laws of Arkansas; for in no other way could the corporation be a "citizen" of that state within the meaning of the federal jurisdictional clauses touching controversies or suits of a civil nature "between citizens of dif-

ferent states" article 3, § 2, Const.; section 24, Judicial Code.¹ Still, the corporate character of defendant is neither admitted nor proved here; and according to the controlling decisions an allegation that a corporation is a citizen of a given state is not sufficient to show jurisdiction. *La Fayette Ins. Co. v. French*, 59 U. S. (18 How.) 404, 405, 15 L. Ed. 451; *Muller v. Dows*, 94 U. S. 444, 445, 27 L. Ed. 207. See, also, *American Sugar Refining Co. v. Johnson*, 60 Fed. 503, 511, 9 C. C. A. 110 (C. C. A., 5th Cir.); *Atlantic Coast Line Co. v. Whilden*, 195 Fed. 263, 115 C. C. A. 254 (C. C. A., 5th Cir.); *Parker Washington Co. v. Cramer*, 201 Fed. 878, 879, 120 C. C. A. 216 (C. C. A., 7th Cir.); *United States v. New York S. S. Co.*, 216 Fed. 61, 63, 132 C. C. A. 305 (C. C. A., 2d Cir.).²

¹ Of course, in a literal sense it was never supposed that a corporation was a citizen, and yet in a federal jurisdictional sense the courts came at last to treat it as a citizen. This development of the law was worked out, as is well known, upon the theory that the members of the corporate body should be conclusively presumed to be citizens of the state in which the corporation was created; and so, under the franchise the members could sue or be sued in the corporate name; and, as was said by Mr. Chief Justice Taney in *Ohio & Mississippi R. Co. v. Wheeler*, 66 U. S. (1 Black) 286, 296, 17 L. Ed. 130, and by Mr. Justice Gray in *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 451, 12 Sup. Ct. 935, 36 L. Ed. 768, it was upon this presumption that the decision was reached in 1844 in *Louisville Railroad Co. v. Letson*, 2 How. 497, 557 (11 L. Ed. 353), where the earlier decisions declaring a narrower doctrine were in effect overruled; Mr. Justice Wayne saying: "But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is that a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person."

In *Railroad Co. v. Koontz*, 104 U. S. 5, at pages 11, 12 (26 L. Ed. 643), Mr. Chief Justice Waite said: "A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that state. * * * By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."

And in *Shaw v. Quincy Mining Co.*, supra, 145 U. S. at page 451, 12 Sup. Ct. at page 937 (36 L. Ed. 768), in allusion to the language just quoted, Mr. Justice Gray said: "The same doctrine has been constantly maintained by this court in applying to corporations the judiciary acts, conferring on the Circuit Courts of the United States jurisdiction of suits between citizens of different states."

And it is settled that a corporation cannot be a citizen of any state, except of the state under whose laws it was first created. *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Missouri Pacific Ry. Co. v. Castle*, 224 U. S. 541, 546, 32 Sup. Ct. 606, 56 L. Ed. 875; *Walters v. Chicago, B. & Q. R. Co.* (C. C.) 104 Fed. 377, 380.

² It will be observed that we have treated the allegations of jurisdiction both of the declaration and the amendment as though they had been distinctly admitted by defendant. We have done this because, as stated in the opinion, we do not regard those allegations as sufficient to show jurisdiction. The case would be different if the allegations were in proper form and not put in issue by either an appropriate plea or answer. *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 52-54 (C. C. A., 6th Cir.) 69 C. C. A. 28; *Roberts v. Langenbach*, 119 Fed. 349, 350, 352 (C. C. A., 6th Cir.) 56 C. C. A. 253; *Hartog v. Memory*, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725.

[4] What disposition then should be made of the case? If, after verdict and judgment and while the case was in control of the court below, the plaintiff had sought to amend her declaration by appropriate and definite allegations, and to show that the Rock Island Company was in truth a corporation created in accordance with the laws of Arkansas, she would no doubt have been given opportunity to cure the defect in question. *Mexican Central Railway v. Duthie*, 189 U. S. 76, 77, 23 Sup. Ct. 610, 47 L. Ed. 715. It is true that the Chief Justice said in the course of the opinion in that case that if the petition had remained as it was originally framed, and the case had been carried to the Circuit Court of Appeals, that court "would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend"; but the orders of reversal in the cases there referred to seem to have been to remand the causes "for further proceedings," and not in terms for new trial (and see *Denny v. Pironi*, 141 U. S. 121, 124, 11 Sup. Ct. 966, 35 L. Ed. 657, and citations); and it is not perceived why the reversal of the judgment should necessarily include the setting aside of the verdict. Permitting the verdict to stand in a case like this and reversing the judgment, only to remand the cause with permission to frame and try an issue of fact with respect alone to diversity of citizenship, would no more deprive the defendant of the right of trial by jury than was done in the *Duthie* Case, just cited (*Parker Washington Co. v. Cramer*, supra, 201 Fed. 880, 120 C. C. A. 216; *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 54, 55, 69 C. C. A. 28 [C. C. A., 6th Cir.]; *McEldowney v. Card* [C. C.] 193 Fed. 475, 483, by Sanford, District Judge); and the trial court could then exercise its powers under section 954 of the Revised Statutes (Comp. St. 1913, § 1591) as completely as the trial court did in the *Duthie* Case. Such a course as this is sanctioned even in criminal cases, where the sentence is erroneous. *Ballew v. United States*, 160 U. S. 187, 202, 203, 16 Sup. Ct. 263, 40 L. Ed. 388; *Haynes v. United States*, 101 Fed. 817, 820, 42 C. C. A. 34 (C. C. A., 8th Cir.); *Whitworth v. United States*, 114 Fed. 302, 305, 52 C. C. A. 214 (C. C. A., 8th Cir.); *Mitchell v. United States*, 196 Fed. 874, 878, 116 C. C. A. 436 (C. C. A., 9th Cir.). True, in the instant case no attempt was made by counsel in the court below, and none has been made here, to provide for curing the defect; it scarcely need be said that in such circumstances the defect cannot be cured in this court (*Fred Macey Co. v. Macey*, 135 Fed. 725, 729, 68 C. C. A. 363 [C. C. A., 6th Cir.]); and we cannot pursue a course here like the one we have this day adopted in *La Belle Box Co. v. Stricklin*, 218 Fed. 529, 134 C. C. A. 257. We have the impression, however, that the facts will warrant the amendment and show the required diversity; for (a) the assignment of error touching jurisdiction is, as we have seen, based simply upon the absence of proof that the Rock Island "was a nonresident of the state of Tennessee," which of course is entirely consistent with the organization of the company in another state (and see *Butterfield v. Miller*, 195 Fed. 200, 204, 205, 115 C. C. A. 152 [C. C. A., 6th Cir.]), and (b) in attempting to waive assignments, as before indicated, counsel for defendant frankly state in their brief that:

"After careful consideration the defendant is of the opinion that none of these other assignments are well taken, and will therefore not burden the court with a discussion of them."

We are therefore constrained to believe that the case should be considered upon its merits, with the purpose of avoiding another trial if reversible error is not found and diversity of citizenship in fact existed. *Atlantic Coast Line R. Co. v. Whilden*, supra, 195 Fed. 263, 115 C. C. A. 254; *Atchison, T. & S. F. Ry. Co. v. Gilliland*, 193 Fed. 608, 611, 113 C. C. A. 476 (C. C. A., 9th Cir.); *Newcomb v. Burbank*, 181 Fed. 334, 336, 337, 104 C. C. A. 164 (C. C. A., 2d Cir.); *Parker Washington Co. v. Cramer*, supra, 201 Fed. 880, 881, 120 C. C. A. 216. We are the more content to adopt this course because defendant appears to have presented its full defense upon the merits, and, upon proper amendment below, will be given opportunity to contest the jurisdictional issue.

2. The Merits. According to allegations of the declaration and proofs offered, the Missouri & North Arkansas Railroad Company operates a line of railroad between Crosby and Wheatley, Ark., and the Chicago, Rock Island & Pacific Railroad Company a line between Wheatley and Memphis. Mrs. Stephens, to whom we shall hereafter refer as "plaintiff," purchased of the ticket agent stationed in the depot of the first-named railroad at Crosby a full-fare passenger ticket, entitling the holder to be carried from that place over such first-named road to Wheatley and thence over the Rock Island to Memphis. Plaintiff was accompanied by her two small children, for whom she purchased a half-fare ticket which otherwise corresponded with her own. The purchases were made April 7, 1912, when a flood was threatened, and plaintiff in consequence inquired of the ticket agent whether she would have "any trouble in getting to Memphis on account of this water," and the agent answered: "Oh, no; you will go right on through." These tickets were not marked, "Subject to delay"; yet plaintiff was carried only to Wheatley and was there neglected by defendant and exposed to cold and other discomforts for which the conveyance was allowed.

[5] The complaint made in the amendment to the declaration is contained in two counts. After setting out in the first count the purchase of the two tickets at Crosby, plaintiff in substance and effect alleged that in such sale and delivery of tickets the agent represented both of the railroad companies; that after purchasing the tickets she boarded the train of the first-named company and was transported to Wheatley, where she was told she could go no further on account of the high water, and to return to Kensett, Ark.; that after spending the night in the depot at Wheatley, which was filthy and also "cold and inadequately heated, and which contained men, all of whom were drunk and using language that was not pleasant to the ear of a lady, and especially to children, she went back to Searcy, Ark." This count is based upon alleged breach of the contract, and specified injuries suffered in consequence. The second count is in tort, and alleges that the railroad company (Rock Island) knew of the high water and was issuing daily bulletins warning the public of the height it would reach on the following

day, the 8th of April; that, at the time the ticket was sold to her by the common agent of the two companies, such agent knew that she could not be carried to Memphis, and nevertheless negligently and wantonly sold her a through ticket; that in consequence she sustained the injuries, which are again specifically described. Among the allegations of injury it is stated in each count that the plaintiff suffered from cold and fright, which caused "irregularity of her menses," nervousness, and hysteria, resulting in frequent and serious periods of insomnia and pain. At the close of plaintiff's evidence, defendant moved for a directed verdict. This was overruled, and defendant presented its evidence, which of course was a waiver of any claim of error respecting such denial of the motion.

From the whole evidence it is plain enough that the railroad agent at Crosby, who sold plaintiff her ticket, was authorized to make such sales on behalf of defendant the Rock Island Company, as well as the other company; that the depot at Wheatley was a union station used and maintained by both railroad companies; that the plaintiff and her children were carried over the road of the first company from Crosby to Wheatley without notice or warning that they could not be carried thence over the Rock Island road to Memphis; that the train on which they had been brought to Wheatley continued on its line beyond that place; that plaintiff and her children were so required to leave the train at the depot, the union station mentioned; that plaintiff was there first told, though not by an agent of either of the railroad companies, that neither the regular train nor any other would be run from Wheatley to Memphis and that she with her children would better return on the morning train to Kensett (which seems to be a station in Arkansas near Searcy where the husband was staying). Further, as we understand the testimony, the train carrying plaintiff and her children reached the union depot in Wheatley at about midnight of April 7th, and the plaintiff and her children entered the waiting room of the depot and remained there until about 9 o'clock the next morning, when they returned to Kensett on a train running over the road on which they had been brought to Wheatley. Concededly the depot was unattended during the night by any one representing either of the railroads. The night was cold, and the waiting room in which plaintiff and her children were located was filthy, and, moreover, the room was not heated during any of the time they remained there, and so was exceedingly uncomfortable. Plaintiff and her children (a boy then about 11 years of age, and another child whose age or sex does not appear) were greatly frightened by the conduct of at least one drunken man, and the mother was also suffering from the cold. Plaintiff testified that her monthly period was then in progress, that it was stopped by a cold contracted in this waiting room and had never returned, and that this had caused her much suffering, although she had been in perfect health before and regular in the respect mentioned. It is true that upon plaintiff's leaving the train at Wheatley she was directed to the waiting room by a night watchman of a rice mill close by; that this watchman, having to be absent a short time, returned to the waiting room and found the door locked, but was able to make plaintiff understand that if she would

unlock the door he would procure coal and heat the waiting room for her, or that he would accompany her and the children to a hotel some four blocks distant, or that he would furnish them a comfortable place to sit in the rice mill. Plaintiff declined these offers, because of her state of fright and that of her children, which was first induced by a threatened intrusion of the drunken man mentioned and during the absence of the rice-mill watchman; moreover, she and her son believed that this watchman was drinking, though it appeared at the trial that they were mistaken in this belief; and an additional reason for declining to accompany the watchman to the hotel was that she had not sufficient money with her to pay the expense, in addition to the railroad fare in case of her return to Searcy. This watchman was the person who had told plaintiff upon her arrival that no train would leave for Memphis, but she had been informed by another person that she could get a train out that night (as we understand for Memphis). However, she was not able to have these conflicting statements as to an outgoing train officially cleared up until the next morning.

Defendant moved for an instructed verdict at the close of all the evidence, which was overruled. It also presented certain requests that were denied. It reserved exceptions and assigned errors to these rulings, but reserved no exception to the charge. The court gave instructions later upon inquiries made by the jury, and here again defendant reserved no exception. The first assignment relied upon concerns the overruling of defendant's last motion to direct a verdict. The theory of this assignment is threefold: (1) That while the basis of the first count is an alleged breach of the contract of carriage, the court withdrew the question from the jury, and submitted as questions of fact, whether plaintiff became a passenger of the Rock Island by presenting herself with that purpose at its depot in Wheatley, and whether under the circumstances she acted with reasonable prudence in remaining in the depot the rest of the night; and, say counsel, since the declaration nowhere charges that "the Rock Island maintained its depot at Wheatley in a negligent, improper or careless manner," the charge proceeded upon a theory not sustained by the pleadings. (2) That plaintiff cannot recover as a passenger of the Rock Island, because, upon receiving notice at Wheatley that no train would leave for Memphis, she ceased to be a passenger, even though it be held that she was a passenger up to that time; the Rock Island in no event owing her any duty further than to allow her a reasonable time to leave the premises. (3) That if plaintiff was a passenger of the Rock Island, then, as a matter of law, she did not have the right to use the depot except for a reasonable period before the regular time for departure of the train (3:25 a. m.); and that defendant certainly owed her no duty for the portion of the night succeeding that time.

[6-9] It ought to be sufficient to say of the first, if not also of the second and third, of these claims of error in the charge, that a motion to direct is addressed to the condition of the case at the close of the evidence, and not to errors in the charge subsequently delivered to the jury; and this is accentuated here by the fact that at the time the charge was given it was satisfactory to the defendant. Further,

these contentions are without merit. There was no occasion to submit to the jury any question of fact, touching either plaintiff's purchase of the ticket at Crosby or the failure of the Rock Island to complete the performance of the contract of carriage; for those facts were to all intents and purposes admitted at the trial. While it may be true that the declaration as amended was open to a demand for specifications concerning the acts and omissions of the Rock Island, still the allegations were sufficient fairly to advise the company of the nature of the testimony that would be offered at the trial; no such demand was made, and no claim of surprise was presented at the trial respecting the testimony offered, except in one respect as to which error is not assigned. As it seems to us therefore learned counsel misconceive the real scope and effect of the declaration, and also ignore the legal duty resting upon the Rock Island, when they urge that it was error to receive evidence tending to show negligence in defendant or that there is a variance between the facts proved and the amended declaration. The other two features of error claimed under the first assignment overlook the legal effect of the sale and delivery at Crosby of plaintiff's through ticket to Memphis. The Rock Island could not at once concede the rightful sale of that ticket and discharge itself of all obligations thereunder by simply deserting its depot at Wheatley, upon the theory that any person who might arrive there, as plaintiff did, with a ticket like the one here, would be entitled to remain only a reasonably sufficient time to leave the premises; nor can the Rock Island rightfully insist that the trial court was bound to charge the jury, as matter of law, that plaintiff could not stay at the depot for the portion of the night remaining after her arrival at Wheatley. It is not enough to say that the presence of an extraordinary flood justified either of these contentions. Conceding that the existence of the flood justified the Rock Island in withdrawing its train for Memphis, it does not follow that it was also justified in failing to furnish plaintiff, at least for a reasonable time in view of all the circumstances, with facilities for her accommodation and safety in the depot at Wheatley. The company was chargeable with notice that one or more persons, holding through tickets, might be brought there on the other train in ignorance of the withdrawal of the regular train for Memphis. This results from the conceded authority of the agent at Crosby to sell the through ticket to plaintiff; for it in effect concedes an agency in the connecting line, the Missouri & North Arkansas Railroad Company, to cause such tickets to be sold for through passage of the purchasers to Memphis on any of the passenger trains of that road. In saying this we are mindful of the fact that the form of the ticket in question (that is, whether made up of coupons or not) is not shown; but it is not claimed, as it could not well be, that the form is important in a case like this. *Young v. Pennsylvania R. Co.*, 115 Pa. 112, 118, 7 Atl. 741; *Railway v. Loftis*, 72 Ohio St. 288, 299, 74 N. E. 179, 106 Am. St. Rep. 597, 3 Ann. Cas. 3; *C. & A. R. R. Co. v. Mulford*, 162 Ill. 522, 528, 44 N. E. 861, 35 L. R. A. 599; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 302; *Milnor v. N. H. R. R. Co.*, 53 N. Y. 363, 368; *Moore v. M., K. & C. Ry. Co.*, 18 Tex. Civ. App. 561, 562, 45 S. W. 609; *Kansas City, Mem-*

phis & Birmingham R. Co. v. Foster, 134 Ala. 244, 255, 256, 32 South. 773, 92 Am. St. Rep. 25; 2 Hutch. on Carriers (3d Ed.) § 1049, pp. 1209, 1210; 2 Redf. on Ry. (6th Ed.) § 201, pp. 313, 314, 315. We have seen that plaintiff was carried to the depot at Wheatley in ignorance of the withdrawal of the regular train for Memphis. We do not overlook the testimony of the Rock Island trainmaster that a telegram was sent to the Wheatley operator at 8:30 a. m. of the 7th of April, giving directions on account of the flood conditions to discourage all passenger business, to sell tickets "Subject to delay," and to explain to passengers that should they get water-bound they would be "at their own expense"; but neither the point from which the telegram was sent nor the time it was received at Wheatley is shown. It is not pretended that plaintiff was advised of this telegram, and it cannot be that she is responsible for the failure of either the Rock Island or its connecting carrier agent seasonably to notify her of these conditions.

[10, 11] Thus plaintiff reached defendant's depot at midnight in possession of a through ticket purchased at the beginning of her trip, with the implied consent of defendant, and we are asked to hold, as matter of law merely, that she was not a passenger when she entered the depot; and, if she was, that she lost her rights in that respect by staying there too long. We are not disposed to believe that the law is so extreme and harsh as to sanction any such rule. That would deny to plaintiff, as also defendant, the right to have the jury pass upon the facts and circumstances which brought about the conditions prevailing at the Wheatley depot. Was plaintiff in fault, or was defendant, for the confusing plight in which plaintiff evidently found herself upon her arrival at this depot? In view of the court's charge and the verdict, we are not called upon to determine whether plaintiff was a passenger of the Rock Island when she entered the waiting room of the depot. Her intent in that behalf is manifest, and, with her rightful purchase and possession of the Memphis railroad ticket, her right to treatment as a passenger would as matter of law be difficult to refute. Whether the conditions justified her in remaining in the waiting room the rest of the night was clearly a question for the jury, under appropriate instructions. Counsel for defendant frankly admit that after diligent search they have been unable to find apposite authority to sustain their contention. The ultimate and controlling issue submitted to the jury in substance was whether, in view of the scheduled departure of the Memphis train, the time when plaintiff entered the depot, and the length of time she subsequently remained there, were or were not under the facts and circumstances of the case reasonable. The trial court made plaintiff's relation as a passenger of defendant at the time she entered the depot depend upon the jury's finding on this issue; charging the jury that if she then was a passenger the company was under duty to exercise "reasonable care and diligence in furnishing her with a reasonably safe and comfortable depot * * * until the departure of the train for which she was waiting." These views met with no exception and certainly were as favorable to defendant as on any rational theory it was entitled to.

The statute law of Arkansas imposes upon railroad companies running trains at night the duty to keep their waiting rooms "open both day and night for the free and unrestricted use * * * of their passengers," and also at proper times and seasons to keep such rooms clean and "comfortably heated." Kirby Dig. of Stat. of Ark., § 6634, p. 1379. The rule of this statute, if not of the act itself (Acts of Ark. 1899, pp. 152, 153), was upheld in *St. Louis, I. M. & S. Ry. Co. v. Wilson*, 70 Ark. 136, 140, 66 S. W. 661, 91 Am. St. Rep. 74, and the validity of the statute was again recognized in *St. Louis, I. M. & S. Railway Co. v. Laurence*, 106 Ark. 544, 547, 153 S. W. 799. Apart from this statute, we think there was a common-law duty resting upon these companies to provide plaintiff with reasonable accommodations at this station. In *McDonald v. Chicago Northwestern Railroad Co.*, 26 Iowa, 124, 138 (95 Am. Dec. 114), Dillon, C. J., having occasion to consider the subject, said:

"But I have no hesitation in saying that, without any statute enacting it, there is a common-law duty on these companies to provide reasonable accommodations at stations for the passengers who are invited and expected to travel on their roads. See *Caterham R. Co. v. London R. Co.*, 87 Eng. C. L. 410."

See, also, *Draper v. Evansville, etc., R. Co.*, 165 Ind. 117, 120, 74 N. E. 889, 6 Ann. Cas. 569; *St. Louis I. M. & S. Ry. Co. v. Wilson*, supra, 70 Ark. 140, 66 S. W. 661, 91 Am. St. Rep. 74; *Boothby v. Railway*, 66 N. H. 342, 344, 34 Atl. 157; *Grimes v. Pennsylvania Co. (C. C.)* 36 Fed. 72, 74; *Texas & Pacific Ry. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 129, 30 S. W. 720; *St. Louis Southwestern Ry. Co. of Texas v. Foster* (Tex. Civ. App.) 112 S. W. 797, 799; 2 Hutch. on Car. (3d Ed.) § 931, p. 1047.

The next assignment relied on concerns a request presented for the purpose of submitting to the jury a question discussed in the second ground of the first assignment, and we have already said enough of the first assignment to disclose our views upon the second.

[12] The last assignment is a challenge of the competency of a question put to a physician as an expert, for the purpose of eliciting his opinion whether the conditions under which plaintiff suffered in the waiting room would cause the nervousness and irregularity in menstrual flow of which complaint was made. The objection is not that there was an absence of evidence tending to prove any of the facts hypothetically stated in the question, or that the statement was incomplete or calculated to misinform or mislead; it is that the facts recited in the question should have been submitted to the jury for its solution alone. This ignores a cardinal principle of opinion evidence; the opinion only of a competent expert would be of any value in such a matter; and the object of introducing the opinion was to inform the jury upon a subject not familiar to the layman. We do not see any ground for error in the question. *Marbury v. Illinois Cent. R. Co.*, 176 Fed. 9, 14, 15, 99 C. C. A. 483 (C. C. A., 6th Cir.); *Benjamin v. Holyoke Street Ry. Co.*, 160 Mass. 3, 5, 35 N. E. 95, 39 Am. St. Rep. 446; *McKeon v. Chicago, Milwaukee & St. Paul R. Co.*, 94 Wis. 477, 483, 69 N. W. 173, 35 L. R. A. 252, 59 Am. St. Rep. 910.

The judgment, not the verdict, is reversed, without costs to either side. The cause is remanded for the purpose of determining the question of jurisdiction; if, under leave of the court below, plaintiff shall properly amend the declaration and establish jurisdiction in that court, the judgment will be re-entered; if jurisdiction be not shown, the cause will be dismissed.

LEHIGH VALLEY COAL CO. V. YENSAVAGE.

(Circuit Court of Appeals, Second Circuit. October 27, 1914. Dissenting Opinion, November 10, 1914. On Rehearing, November 30, 1914.)

No. 277.

1. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION.

Where jurisdiction over the subject-matter depends on diverse citizenship, or because the action is between an alien and a citizen, and the parties are in fact citizens of different states, or one is a citizen and the other an alien, the objection that the suit is brought in a district where neither is an inhabitant does not survive general appearance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

2. COURTS (§ 325*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—PROOF—DISTRICT OF SUIT.

The rule that, where the record requires proof of diversity of citizenship in order to show federal jurisdiction, it is enough that issue is taken on the allegations and that the record contains no proof, does not apply where the objection goes only to the proper district of trial, especially where the defect appears on the face of the complaint, in which case it may be waived by the defendant, and is waived by his appearing and pleading to the merits, though he attempts to preserve the point by joining a demurrer to the court's jurisdiction over him personally, and though such was proper state practice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. § 325.*]

3. COURTS (§ 325*)—FEDERAL COURTS—JURISDICTION—ISSUES—DIVERSITY OF CITIZENSHIP.

Where, in a suit in a federal court depending on diversity of citizenship, proper citizenship appears on the face of the complaint, defendant does not waive his right to plead to the jurisdiction by originally pleading to the merits, provided, as soon as it appears that the citizenship has not been properly alleged, defendant applies for leave to withdraw his general appearance and plead to the jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. § 325.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

4. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION—PLACE OF TRIAL—PLEA TO MERITS AND FORM.

Where plaintiff, an alien, sued defendant, a Pennsylvania corporation, in the federal court of the Eastern district of New York, alleging that plaintiff was a resident and citizen of New York, and that defendant was a citizen of Pennsylvania, and defendant pleaded to the merits, and, on its subsequently appearing that plaintiff was an alien, continued to press the plea to the merits, with a plea to the jurisdiction, the option, if any,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to withdraw the plea to the merits and plead to the jurisdiction was waived, and the latter plea was therefore properly denied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

5. MASTER AND SERVANT (§ 88*)—INDEPENDENT CONTRACTOR.

Where plaintiff at the time of his injury was working in a coal mine pursuant to employment by another miner, working under contract with defendant, plaintiff was a servant of defendant company, and not of an independent contractor, and hence defendant was liable for a failure to take statutory precautions for plaintiff's safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.*]

Rogers, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of New York.

This was an action in the District Court for the Eastern District of New York, commenced on November 4, 1912, for damages arising from an accident while in the defendant's employ.

The original complaint stated that the plaintiff was a resident and citizen of the county of Kings, and that the defendant was a resident and citizen of the state of Pennsylvania. Plaintiff served an amended complaint on the 6th of February, 1913, repeating the allegation that he was a resident and citizen of the county of Kings and that the defendant was a resident and citizen of the state of Pennsylvania. Defendant denied in each case the allegations of the plaintiff's residence, and the case came to trial on the 23d of June, 1913.

On the plaintiff's cross-examination it appeared that he was an alien. Thereupon the defendant made the following objection: "For the purpose of the record, in order that it may appear that we do interpose the objection, since it appears upon the record of the case, I ask that the complaint be dismissed, and the action be dismissed from this court, on the ground that this court has no jurisdiction over this action; the action being one brought by an alien against a corporation organized under the laws of the state of Pennsylvania, and a citizen of Pennsylvania, having its principal office and place of business in Pennsylvania, according to the allegations of the complaint."

This motion was denied, and exception taken. At the close of the plaintiff's case the defendant renewed its motion in the following terms: "The defendant moves to dismiss on the ground that it appears by the record that this court has no jurisdiction." This was denied, and an exception again taken. The motion was again repeated at the close of all the testimony, again denied, and an exception taken.

It appeared that the plaintiff had been employed by a miner in the employ of the defendant, and the point was also raised that the plaintiff was not directly in the employ of the defendant, as contemplated by the Pennsylvania statutes. More facts in regard to this issue appear in the opinion. The point was overruled, and an exception taken.

The jury returned a verdict in the sum of \$37,500, the injuries being extremely severe, which the court afterwards reduced to \$25,000, which reduction the plaintiff accepted, rather than take a new trial. A writ of error was sued out upon the judgment so entered, and the case now comes before this court.

Clifton P. Williamson, of New York City, for plaintiff in error.

George C. Holt, of New York City, for defendant in error.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LEARNED HAND, District Judge. Upon the point of jurisdiction we think the court below was right. *Roberts v. Lewis*, 144 U. S. 654, 12 Sup. Ct. 781, 36 L. Ed. 579, decided that a denial of the allegation of citizenship raised the question of jurisdiction over the subject-matter, and that, where the record shows no proof on the issue, the court has no power to proceed. The proof under the pleadings here at bar did not show the exact ground of jurisdiction over the subject-matter which was alleged, but it did show a controversy between an alien and a citizen of the state of Pennsylvania, over which no one questions that the District Court for the Eastern District of Pennsylvania would have had jurisdiction.

[1] The first question is whether in such a case the District Court for the Eastern District of New York had jurisdiction. It is well settled by a long line of authorities that where jurisdiction over the subject-matter depends upon diverse citizenship, and the parties are in fact citizens of different states, the objection that the suit is brought in a district where neither is an inhabitant does not survive general appearance. *Interior Construction Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. That is to say, the limitations imposed by Congress as to the place of trial are only for the convenience of the defendant, and do not involve the jurisdiction of the court at all, properly speaking. The difference of opinion which at one time existed in the case of removed causes (*Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Re Tobin*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061), never applied to those of original jurisdiction.

When the plaintiff is an alien, the same jurisdiction over the subject-matter exists as when there is diversity of citizenship. *Re Tobin*, supra, would be a complete answer after appearance in a suit by an alien to the objection that the action was brought in the wrong court, were it not that *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, throws some doubt upon whether the decision in *Ex parte Tobin*, supra, may not have turned upon a question of procedure. Certainly it is true that in *Ex parte Harding*, supra, the court said that it would not usually consider such questions upon application for mandamus. We believe, nevertheless, that the decisions in *Ex parte Tobin*, supra, and *Ex parte Nicola*, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, when made, were meant to be upon the merits, though, as Judge Lewis showed in *Sagara v. Chicago*, etc., Ry. (C. C.) 189 Fed. 220, the question must remain open to some doubt.

However, there is no conceivable reason why a different rule should apply to the case of an alien suing a citizen out of the proper district, from that which governs a citizen so suing, and we do not understand that the defendant so claims.

[2] The real question, therefore, is whether the defendant has lost the point by appearance and pleading to the merits. As we have said, where the record requires proof of diversity of citizenship, it is enough that issue is taken on the allegations, and that the record contains no proof. *Roberts v. Lewis*, supra. But we think that the rule is different where the objection goes only to the proper place of trial. Cer-

tainly, where the defect appears upon the face of the complaint, a defendant waives the objection by appearing and pleading to the merits, even though he tries especially to reserve the point by joining a demurrer to the court's jurisdiction over him personally. *Western Loan Co. v. Butte & Boston Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. And this is no less true in actions at law in states whose practice reserves to defendants the right to do exactly that thing. In this respect federal courts do not follow the state practice. Similarly, when, although the complaint on its face shows jurisdiction, the defendant has been served out of the place of its residence, he may not couple a demurrer to the court's jurisdiction over him personally with a plea to the merits. *St. Louis & San Francisco Ry. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659.

It is true that the demurrer to the jurisdiction in the last case would seem to have been bad anyway, as it raised only the facts stated on the face of the complaint; but the decision went upon the broader ground that the two pleas could not be coupled, though that was allowed by the state practice. These cases finally dispose of the position that the state statutes are to control on the effect of a general appearance and on the right to couple pleas in abatement with pleas to the merits. They show that *Roberts v. Lewis*, *supra*, decided no more than was well settled law before; i. e., that the substantial jurisdiction of the District Court must appear in the record, and that when an allegation has been traversed it does not constitute proof. The unfortunate ambiguity arising from the use of the word "jurisdiction" has, we think, been the reason for supposing that the decision in fact went any further than this.

The case at bar presents only this difference from *St. Louis & San Francisco v. McBride*, *supra*, and *Western Loan Co. v. Boston & Butte Mining Co.*, *supra*, that the defendant in those cases was apprised of all the facts when he coupled together his plea to the merits and his plea to the jurisdiction, while here he was not. We do not think it necessary to decide that the defendant should miscarry for taking the plaintiff at his word, and pleading to the merits upon the faith of an allegation which, if true, would have entitled him to sue in the court which he chose. We do not, therefore, wish to be understood as deciding, where the plaintiff alleges residence in the district of suit, and the defendant traverses the allegation only by denying any information about it, that if, during the proceedings, it appears that the plaintiff cannot prove his allegation, the defendant's general appearance has bound him.

[3] All we wish to lay down is that, when once the truth appears, then at least the defendant must choose between his plea in abatement and his plea to the merits. Assuming that it is not bad to couple the two positions before the defendant is informed, there can be no justification in allowing him to proceed thereafter in the alternative. The rule which forbids him to do this when advised from the outset must surely forbid him to continue with the same option after the option is once presented. We therefore believe that to proceed with a general plea to the merits, when once the facts were out, was entirely within

the rule laid down in the two cases cited, regardless of whether the defendant could or could not reserve the point in any way merely by a traverse to the allegation.

The proper course, therefore, for the defendant, was to ask leave to withdraw its appearance and to plead specially, a practice well recognized in other situations raising the same question. *Hohorst v. Hamburg American Co.* (C. C.) 38 Fed. 273 (reversed on another point in *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211); *Jenkins v. York Cliff Improvement Co.* (C. C.) 110 Fed. 807; *Hagstoz v. Mut. L. Ins. Co.* (C. C.) 179 Fed. 569. Such leave would have been by no means a matter of course. It would have rested in the discretion of the court. *U. S. v. Armejo*, 131 U. S. lxxxii Append., 18 L. Ed. 247; *Re Ulrich*, 3 Ben. 355, Fed. Cas. No. 14,327. In its consideration the court would have had to inquire how far the defendant knew the truth, or had already been put upon inquiry, before the trial. It is, of course, possible that, had such a practice been adopted, the court in the exercise of its discretion would have concluded not to allow the general appearance to be withdrawn; and in any event the issue was one in which the plaintiff had the right to be heard.

In *Leonard v. Merchants' Coal Co.*, 162 Fed. 885, 89 C. C. A. 575, this court affirmed the ruling of a referee who in similar circumstances dismissed the complaint. The opinion certainly assumes that the New York Code controlled, and that a plea in abatement like this, could stand along with a plea to the merits. *St. Louis & San Francisco Ry. v. McBride*, supra, was apparently not brought to the court's attention, however, and *Western Loan Co. v. Boston & Butte*, supra, had not been decided. These cases are, of course, controlling, even as against a former decision of this court. There was, besides, a feature of the case which distinguishes it as a decision from that now at bar. When the fact appeared that the plaintiff lived in Brooklyn, the referee took testimony to see whether the defendant had not known the facts at the time of appearing, and found against him on that issue. This was exactly the issue which the plaintiff here had the right, but never the opportunity, to try, and adopted, though a little informally, the only permissible practice. It is true that, after the referee had decided this point against him, the plaintiff in that case asked leave to present further proof upon the issue, which the referee refused to grant upon the ground that the issue would be irrelevant, a reason which, under the decision we now make, was erroneous. Yet the mere decision, taken narrowly, was correct, in that the referee had once passed upon the issue, and was not bound to reconsider it, even though the grounds for his refusal to do so were not tenable.

[4] We therefore conclude that the decision of the District Court was correct upon the pleadings as they stood, and that as the defendant did not adopt the only allowable course, but continued to press his plea to the merits with his plea to the forum, he lost his option. No doubt this is a somewhat rigid application of the rule, but no more we think than is required by the two decisions upon which we rely. The plea is at best very technical, and in the case at bar has nothing upon the merits to commend it. A defendant may justly complain of being

taken out of his domicile for the trial of a cause, but his right depends only upon his own convenience, and there is no reason why he should be allowed to reserve such a point while he continues to contest the actual merits of the controversy, else we have what this case itself presents, the expense of a trial and appeal, with corresponding delay, in the end all turning upon whether the defendant has been sued in the proper place. Doubtless this result is unavoidable if the defect goes to the very grant of power to the court itself, since a federal court has no general jurisdiction to determine disputes which do not come within the Constitution and the statutes; but, as we have shown, no such question here arises, and it is of consequence that procedure should not admit of the disposition of causes wholly independently of their merits, when the law does not inevitably involve that unfortunate result.

[5] The next question is of Terowsky's relation to the defendant: Was he an independent contractor? The only case in which any Pennsylvania court appears to have passed upon this matter is unfortunately a decision of the Superior Court, and therefore not binding upon us, though it is quite in point. *Mingak v. Vesta Coal Co.*, 51 Pa. Super. Ct. 584. The other cases all concern the payment of wages of the mine laborers, except *Welsh v. Charles Parrish & Co.*, 148 Pa. 599, 24 Atl. 86, and *Welsh v. Lehigh & Wilkesbarre Coal Co. (Pa.)* 5 Atl. 48. In these cases the facts are not very clear, except that the job which was being done under written contract was to drive an air shaft to a colliery, to which it had not yet reached. The defendants had no control over it, except general supervision to see that it was done satisfactorily. This was not part of the business of mining. Such a work might well be regarded as done under an independent contract.

In the case at bar the necessary conclusion of the defendant's theory is that Terowsky, as well as the plaintiff, was not an employé of the company, and that they owed him none of the duties of a master to a servant. The company is therefore not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors, to whom they owe as little duty as to those firms which set up the pumps in their mines. Thus what is confessedly only a means of speeding up the miners and their helpers becomes conveniently an incidental means of stripping from them the protection of the statute. The laborers, under this contention, are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital; the miner is to take his chances in the mine without the right to a safe place to work, or any other protection except as an invited person. This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage.

It is true that the statute uses the word "employed," but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent up-

on the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their "hand," if any one is. Because of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken.

Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.

The other exceptions do not require consideration, and the judgment is affirmed, with costs.

ROGERS, Circuit Judge (dissenting). I am unable to concur in the opinion of my Associates. The plaintiff below has recovered a verdict for \$37,500, which with his consent was reduced so that judgment was entered for \$25,036. No one can read the testimony in the record in this case without feeling the utmost sympathy for the plaintiff, whose injuries, resulting from the explosion for which he sues, have left him a pitiable wreck. If we could decide cases upon sympathy, it would be easy to reach a conclusion, and to affirm the judgment. But in the administration of justice courts proceed according to the law, and have no right to proceed contrary thereto, even in a case which appeals as strongly as this does to the pity and compassion of mankind. My Associates recognize as fully as I do the duty which rests upon us in this respect. The difficulty is that we differ in our understanding of the principles which are applicable to the unfortunate facts as we find them in the case at bar.

This action was commenced in the United States District Court for the Eastern District of New York. The complaint, which was verified, alleged that the plaintiff was a citizen and resident of the city of New York, borough of Brooklyn, county of Kings, state of New York, and that the defendant was a corporation organized under the laws of Pennsylvania. The defendant answered the complaint, and by its answer put in issue the allegations relating to plaintiff's citizenship. Afterwards an amended complaint was filed, which contained similar allegations to those in the original complaint as to the plaintiff's citizenship and residence, except that it was stated that the plaintiff was a resident of the Eastern district of New York. The answer to the amended complaint again put in issue the allegations as to the citizenship and residence of the plaintiff. Upon the trial it was brought out upon cross-examination of the plaintiff that he was in fact an alien. He was a Lithuanian and had never been naturalized. As soon as this fact was disclosed, the defendant below objected to the jurisdiction of the court, and a motion was made to dismiss. The motion was denied, and an exception was duly taken. At the close of the plaintiff's case the motion to dismiss for lack of jurisdiction was renewed, and again denied, and exception was again taken. At the close of the whole case the plaintiff was permitted, over the objection of the defendant, to amend his complaint by substituting the following paragraph:

"First. That the plaintiff is a resident of the city of New York, borough of Brooklyn, county of Kings, state of New York, and Eastern district of New York, and is an alien and subject of the empire of Russia."

The defendant again renewed the motion to dismiss, and the motion was once more denied, and an exception was again taken. Upon these facts the question presented to this court is whether the District Court of the United States for the Eastern District of New York had the right to hear and decide the case after the fact was disclosed upon the trial that the plaintiff was an alien.

The general rule is that all aliens who are *sui juris*, and not otherwise specially disabled by the law of the place where the suit is brought, may maintain suits in the proper courts; it being understood, however, that alien enemies are not within the rule. *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784. And no jurisdiction, it has been held, has been conferred upon the federal courts of a case in which both of the parties are aliens. *Montalet v. Murray*, 4 Cranch, 46, 2 L. Ed. 545; *Mossman v. Higginson*, 4 Dall. 12, 1 L. Ed. 720. But a federal court has jurisdiction of a suit brought by an alien against a citizen, or by a citizen against an alien. *Chappedelaine v. Dechenaux*, 4 Cranch, 306, 2 L. Ed. 629; *Reinach v. Atlantic, etc., R. Co. (C. C.)* 58 Fed. 33. Moreover, the alien need not reside abroad to sue. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

No question is raised as to the right of the plaintiff below to bring his suit. The right to sue, and to sue in a federal court, is beyond question. But was the suit brought in the right federal court? The Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) provided that no civil suit should be brought before the Circuit or District Courts against an inhabitant of the United States in any other district than that whereof he was an inhabitant or in which he shall be found at the time of serving the writ. And this provision was incorporated, in substance, in various acts of Congress subsequently passed. But in 1887 and in 1888 acts were passed which provided that a civil suit must be brought in the district of which the defendant is an inhabitant, except when founded on the residence of parties in different states, in which case it was provided that the case should be brought in a district of which either party is an inhabitant. Act March 3, 1887, c. 373, 24 Stat. 552; Act Aug. 13, 1888, c. 866, 25 Stat. 434.

The suit now before the court could not be based on diversity of citizenship; the plaintiff not being a citizen of the United States. He was bound, therefore, to bring his suit in the district of which the defendant was at the time an inhabitant. And the defendant was not an inhabitant of the Eastern district of New York, nor of any district in New York. But, being incorporated under the laws of Pennsylvania, it was an inhabitant of that state, and could not be an inhabitant of any other state, in which it had not been incorporated, even though it was engaged in business in the other state. In *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274, Chief Justice Taney said in 1839:

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. * * * It must dwell in the place of its creation, and cannot migrate to another sovereignty."

In *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 450, 12 Sup. Ct. 935, 937 (36 L. Ed. 768) (1892) the court refers to the above statement made by Chief Justice Taney and says:

"This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship, of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

And the court, after a review of all the decisions, held that a corporation incorporated in one state only, could not be compelled to answer, in a Circuit Court of the United States held in another state, in which it has a usual place of business, to a civil suit at law or in equity, brought by a citizen of a different state. In that case the Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern district of New York, by a citizen of another state, the court said that there could be no question of waiver, and it denied the petition for a writ of mandamus to the judges of the Circuit Court of the United States for the Southern District of New York to command them to take jurisdiction of the suit.

In that case the suit was brought by a citizen, and in this it is brought by an alien. But an alien has no more right than a citizen to sue a corporation in the federal courts in a district in which it is not an inhabitant. In *Galveston, etc., Railway Co. v. Gonzales*, 151 U. S. 496, 506, 14 Sup. Ct. 401, 405 (38 L. Ed. 240) (1893), the Supreme Court states that:

"The provision that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant is of universal application, except that, if the plaintiff be also a citizen, he may bring it in his own district, if he can obtain service upon the defendant in that district."

And the rule was established that, if an alien desires to commence an action or bring a suit against a citizen of the United States, he must resort to the domicile of the defendant in order to bring it. In that case a citizen of Mexico brought suit against a Texas corporation in the Circuit Court for the Western District of Texas. The corporation had its principal office within the Eastern district of Texas but operated a line of railway in the Western district, where it maintained a ticket and freight office and depot and had an agent on whom process under the laws of Texas might be served. Defendant appeared specially and objected to the jurisdiction of the court, interposing a plea in abatement.

The question remains whether the objection that the suit was brought in the wrong district was properly and seasonably raised. The plaintiff below alleged in his original and in his amended complaint that he was a citizen of New York. And the defendant in its answer denied that it had any knowledge or information sufficient to form a belief as to the truth of the allegation. Under the common law a denial in this form was insufficient to put the facts so denied in issue, and was treated as an admission of the truth of the facts as alleged. See 31 Cyc. 199. A traverse not made positively, but on information and

belief, would be stricken out at common law. 31 Cyc. 189. But in a large number of states these rules have been changed by statutes which provide that, when defendant has no knowledge or information sufficient to form a belief respecting any or all of the facts alleged in the complaint, he may deny such knowledge or information in his answer, and this will put in issue the facts to the same extent as though they had been denied. 31 Cyc. 198. And such is the law of the state of New York. *Warner v. U. S. Land, etc., Co.*, 53 Hun, 312, 6 N. Y. Supp. 411; *Nichols v. Corcoran*, 38 Misc. Rep. 671, 78 N. Y. Supp. 242; *Stockton v. Kenney*, 24 Misc. Rep. 300, 52 N. Y. Supp. 1006.

It is true that facts either actually or presumptively within the knowledge of the defendant cannot properly be put in issue by a denial of knowledge or information sufficient to form a belief. But it is not necessary to inquire whether the defendant actually or presumptively knew that the plaintiff was not a citizen at the time it put in its answer. For, if we could assume that its answer was sham and evasive, so long as it remains on the files it raises an issue, even though it might have been the duty of the court to have stricken it out if convinced that it was in fact evasive and a sham. See *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352; 31 Cyc. 200, 201. According to the law of New York the citizenship of the plaintiff was in issue. And the practice in a federal court in common-law cases conforms to the practice of the state in which the federal court is sitting. In *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579 (1892), the court said:

"Doubtless, so long as the rules of pleading in the courts of the United States remain as at common law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant, except by plea in abatement, and was admitted by pleading to the merits of the action. *Sheppard v. Graves*, 14 How. 505 [14 L. Ed. 518]. But since 1872, when Congress assimilated the rules of pleading, practice, and forms and codes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several states, all defenses are open to a defendant in the Circuit Court of the United States, under any form of plea, answer, or demurrer, which would have been open to him under like pleading in the courts of the state within which the Circuit Court is held."

In the above case the plaintiff alleged in his petition that he was a citizen of Wisconsin. As such he sued a defendant who was a citizen of Nebraska, suit being brought in Nebraska. Plaintiff alleged his Wisconsin citizenship in his petition. Defendant in his answer denied each and every allegation in the petition. The court held that this put the plaintiff's citizenship in issue.

In *Leonard v. Merchants' Coal Co.*, 162 Fed. 885, 89 C. C. A. 575 (1908), this court held that under the New York practice, followed by the federal courts sitting in New York state, a defendant does not waive his right to object to the jurisdiction by including in his answer every defense upon which he relies. And in that case a foreign corporation sued in a federal court entered a general appearance and demurred to the complaint for want of jurisdiction, the complaint alleging no jurisdictional facts. An amended complaint was filed, alleg-

ing diversity of citizenship and that plaintiff was a resident of the Southern district of New York. Defendant thereupon answered, denying that plaintiff was a resident of the Southern district, and alleging that he was a resident of the Eastern district. The answer also joined issue on the merits and set up a counterclaim. Upon the trial the testimony showed that the averments of the answer were correct as to plaintiff's residence. When this fact was disclosed, the referee before whom the cause was tried stopped the taking of further proofs on the merits and dismissed the complaint. We sustained the dismissal. This case I agree is overruled.

I do not question the rule that an act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts, but is rather in the nature of a personal exemption in favor of the defendant and is one which he may waive. Neither do I overlook the fact that in numerous cases it has been held in the federal courts that a general appearance waives the objection that suit is brought in the wrong district. See 3 Cyc. 522. But those cases are not applicable to the facts of this case under the system of pleading and practice established in the local state in which the court below was sitting.

The majority opinion, however, states that a general appearance is a waiver of the objection that the wrong forum has been selected, and that such an objection cannot be raised so long as the general appearance stands. The opinion states that the defendant's proper course was to ask leave to have a mistrial declared, to withdraw its general appearance, and then to appear specially to object to the forum. I have no doubt that one who puts in a general appearance, having knowledge at the time he does so of irregularities in the service of process, waives them and submits himself to the jurisdiction of the court, and that he cannot thereafter without the consent of the court withdraw his general appearance. In such case he must, of course, apply to the court for leave to withdraw his appearance. That was what was decided in the Matter of Isaac Ulrich, 3 Benedict, 355, Fed. Cas. No. 14,327 (1869). So in *United States v. Armejo*, 131 U. S. lxxxii, Append., 18 L. Ed. 247, it was held that after the lapse of a term a general appearance could not be changed to a special appearance without leave of the court first obtained. In *Hohorst v. Hamburg American Packet Co.* (C. C.) 38 Fed. 273 (1889), the court decided that it had power to allow a general notice of appearance to be amended, so as to make it special. In *Jenkins v. York Cliffs Imp. Co.* (C. C.) 110 Fed. 807 (1901), it was held that, while the withdrawal by a defendant by permission of the court of an appearance entered through a misapprehension relieved him of an unintended waiver of fundamental questions as to the jurisdiction, it did not authorize him to attack the service made upon him on a mere matter of form. In *Hagstoz v. Mutual Life Ins. Co. of New York* (C. C.) 179 Fed. 569 (1910), it was held that where, in a suit against a foreign corporation doing business in Pennsylvania, the plaintiff, after defendant's general appearance, amended the præcipe and summons, so as to allege that plaintiff was a resident and citizen of New

Jersey, instead of Pennsylvania, defendant would thereupon be permitted to withdraw its general appearance in order to attack the court's jurisdiction.

These are the cases the majority opinion cites in support of the position assumed that, having entered a general appearance, the defendant could not upon the trial have the case dismissed upon motion made as soon as it appeared from the testimony that the plaintiff was an alien and not a citizen. I am unable to discover anything in any of the opinions rendered in the cases cited which establishes that principle, as applied to the facts of this case. Under the law of the forum in which this suit was commenced the defendant, as we have seen, did not by his answer waive his right to object on the ground that the suit was brought in the wrong forum, provided it developed on the trial that the plaintiff was not a citizen as he had alleged. As his appearance and answer did not in this forum amount to a waiver, there could be no necessity for a formal withdrawal of them. That can be necessary only in a forum where they do amount to a waiver.

I am unable to see that *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101 (1907), rules this case and justifies the conclusion reached by my Associates. In that case plaintiff was a citizen of Utah and defendant a citizen of New York, and the action was commenced in the Circuit Court for the District of Montana. The defendant demurred to the complaint on the ground (1) that the court had no jurisdiction; (2) that it had no jurisdiction of defendant; (3) that the complaint did not state facts sufficient to constitute a cause of action; (4) that it was uncertain; (5) that it was unintelligible. The court overruled the demurrer on the first three grounds and sustained it on the fourth and fifth grounds. Thereupon an amended complaint was filed, and a demurrer was again interposed. The court below held that inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the defendant had waived its personal privilege. Thereafter the trial judge reversed his ruling and dismissed the case for lack of jurisdiction. This final ruling of his was reversed by the Supreme Court, which held that by pleading both to the jurisdiction and the merits defendant had waived its personal privilege; the case being within the general jurisdiction of the court, although instituted in the wrong district.

In the case at bar the facts are different. The defendant in its answer stated that:

"Defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph or subdivision of the complaint designated '1.'"

Paragraph 1 of the complaint is as follows:

"1. That the plaintiff is a resident and citizen of the city of New York, borough of Brooklyn, county of Kings, state of New York."

And when on cross-examination the plaintiff testified that his father never lived in the United States and that he himself had never taken out citizenship papers, the defendant's counsel immediately asked that

the complaint be dismissed on the ground that the court had no jurisdiction over the action, being one brought by an alien against a corporation organized under the laws of the state of Pennsylvania, and a citizen of Pennsylvania, having its principal office and place of business in Pennsylvania, according to the allegations of the complaint. The motion to dismiss was denied, and exception taken.

The defendant, in my opinion, was entirely within its rights when it asked to have the case dismissed as soon as the fact was developed that plaintiff was an alien. Until that time it was without knowledge of the plaintiff's want of citizenship, and so not bound to do more than to put the matter in issue. In the *Western Loan & Savings Co. Case*, supra, defendant had knowledge of the defect in jurisdiction, and pleaded to the merits at the same time that he pleaded the want of jurisdiction. I think the two cases are distinguishable in principle.

On Rehearing.

PER CURIAM. As we adhere to our original opinions after having given the question herein the most careful attention, we think the petition for a rehearing must be denied.

Regarding the request that we certify the question to the Supreme Court, we are unable to see how we can consistently certify a question that we have already decided.

Petition denied.

LEE LINE STEAMERS v. ROBINSON.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1914.)

No. 2481.

1. PLEADING (§ 90*)—PLEA—GENERAL ISSUE AND OTHER DEFENSES.

The rule that, where the law authorizes a defendant to set up several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another, applies only where the defenses so made are inconsistent. Where they are consistent, as where a plea of the general issue is coupled with another defense explanatory thereof, the rule does not apply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. § 90.*]

2. CARRIERS (§ 316*)—ACTION FOR INJURY TO PASSENGER—BURDEN OF PROOF.

Evidence that a passenger on a steamboat was stabbed by an employé of the boat, who was at the time with other employés at a place where they had been called in the performance of their duties, was sufficient to raise a presumption of negligence on the part of the carrier, and place upon it the burden of proving a plea that the employé acted in self-defense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.*]

3. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE—ACTION FOR INJURY TO PASSENGER.

Instructions given by the court, in an action against a carrier by water for injury to a passenger from an assault by an employé of the boat, considered and, taken together, held free from error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by Will Robinson against the Lee Line Steamers. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Kyser, of Memphis, Tenn., for plaintiff in error.

L. B. Phillips, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. It is sought to reverse a judgment entered in the court below upon a verdict rendered in favor of Robinson; and we shall refer to him as plaintiff, and to the Lee Line Steamers, a corporation, as defendant. The declaration is a simple narrative, contained in a single count, alleging in substance that defendant owns and operates the steamboat Rees Lee on the Mississippi river between Cairo and Memphis, and is engaged in the transportation of freight and passengers for hire; that on September 25, 1912, plaintiff was a passenger on this boat, going from Cairo, Ill., to Bessie, Tenn.; that in the course of the trip, and as the boat was approaching Hickman, Ky., while plaintiff was demeaning himself in a proper manner, he was negligently, wrongfully, willfully, and maliciously assaulted with a knife, or some sharp weapon or instrument, by one of the employés of defendant, whereby he was permanently injured; and that this employé was a "dangerous and violent man," of which defendant had knowledge at the time of his employment.

Defendant first filed a plea of not guilty, and later introduced a plea of justification, to the effect that the assault complained of was made by its employé in self-defense; that at the time of the trouble plaintiff was advancing toward the employé "in such a threatening manner as to lead a reasonably prudent man to believe that the force used by him was necessary, in self-defense; and that plaintiff was the aggressor" and the "difficulty was a personal altercation" between plaintiff and the employé. Plaintiff joined issue on this plea.

Unless the two pleas must be regarded as inconsistent, a question we consider later, then under the pleadings alone plaintiff was a passenger on defendant's boat and was there injured by defendant's employé. Plaintiff and this employé, one Tillman, are colored men, and (according to the evidence) a place on the boat, called the "monkey deck," was set apart for colored passengers; and the freight deck was assigned to such employés as Tillman, called "roustabouts."

The theory of the case as presented by plaintiff at the trial was, in material part, that Tillman was a dangerous and violent man, and defendant knew this at the time it employed him; that the monkey deck was overcrowded, and in consequence many of the colored passengers were compelled and permitted to seek accommodations on the freight deck, and, while plaintiff was standing in the gangway (about four feet in width) of the freight deck, Tillman and other roustabouts were called by their superior to gather freight for discharge at Hickman; that Tillman in abusive language and with a vile epithet ordered plain-

tiff out of the gangway, but, plaintiff not heeding the order or moving as quickly as Tillman thought he should, Tillman without cause stabbed plaintiff in the abdomen and so seriously and permanently injured him.

The theory of the defense presented at the trial in substance was that Tillman is a quiet and inoffensive man, and he with plaintiff and others were engaged in a game of craps on the monkey deck, when Tillman was called to the freight deck to get the freight ready for Hickman; that, Tillman having won most of the money and started to the freight deck, plaintiff with a knife in his hand followed him to the gangway of the deck and abused and threatened him, and finally struck Tillman on the head with a piece of wood, whereupon, as Tillman testified, "I cut him to keep him from cutting me."

The evidence offered in support and denial of these theories was conflicting, and the contention for reversal is limited to claims of material errors committed in the course of the trial and in the charge of the court. The first assignment presented is that the charge erroneously placed the burden of proof upon the defendant. Defendant relies on this portion of the charge:

"When the plaintiff has proven that he was a passenger on the boat and that he was injured, that makes a prima facie case, and he is entitled to a verdict, unless the defendant proves by the greater weight of the evidence that the injury which he sustained was not caused by its negligence or want of care."

This must, of course, be read in connection with the whole charge; and it must be construed, also, with reference to the evidence. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, 289. This language is immediately preceded by the statement, of which no complaint is made, that "cases of passengers against carriers are not controlled by the same rules as in cases of suits against carriers for damage to property," and is directly followed by a statement, which is undoubtedly true, that "it is undisputed in this case that the plaintiff was a passenger, and that while a passenger he was disemboweled by a knife in the hands of the servant of defendant company." Then the question is put whether defendant has "shown by a preponderance of the evidence that it was not liable for the injury," and thereupon the charge proceeds at length to state the issues and to instruct the jury how rightly to consider and apply the testimony touching the various aspects of each of the theories upon which it was offered.

For example, the first issue so treated was the one involving the duty of defendant respecting the employment of such servants (manifestly roustabouts) as it placed on board and brought into direct contact with passengers. No complaint is made of the rule of law stated in respect of that issue, nor of the mode of submitting to the jury the facts claimed by each party, which would, on the one hand, render the company liable, and, on the other, relieve it of liability; and so the charge continues step by step to the end though some features other than the question of burden of proof are said to be erroneous, and we shall as far as necessary consider those features presently.

Before doing so, we should add that plaintiff in opening his testi-

mony did not content himself with proving that while a passenger he was injured by defendant's servant, with a view of offering the rest of his testimony by way of rebuttal. Plaintiff offered all his testimony relating to the circumstances attending the injury; and while it is not claimed that we should weigh this evidence, it may properly be said that it is substantial and persuasive. Indeed, without questioning its *prima facie* effect, defendant endeavored to meet the merits of the case so made by producing its testimony. It is not pretended that the defendant was entitled to an instructed verdict, at either the close of plaintiff's evidence or of all the evidence.

[1, 2] Why, then, should not a presumption of negligence have been indulged against defendant, casting upon it the burden of showing that it was not in fault? We have seen that defendant filed two pleas, one of not guilty, and the other of justification. It is true that, where the law authorizes a defendant to set up several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. *Glenn v. Sumner*, 132 U. S. 152, 157, 10 Sup. Ct. 41, 33 L. Ed. 301. But this is so only where the defenses so made are inconsistent. *Smith v. Gale*, 144 U. S. 509, 524, 12 Sup. Ct. 674, 36 L. Ed. 521. In the instant case the defenses are not inconsistent; the denial of the first plea is explained and necessarily qualified by the second; in the latter the defendant adopted the act of its servant as its own and as one of self-defense; and if that had been shown to be true it would have relieved the defendant and its servant alike of liability. *N. O. & N. E. Railroad Co. v. Jopes*, 142 U. S. 18, 25, 27, 12 Sup. Ct. 109, 35 L. Ed. 919. Now, under the pleadings and the concurring testimony produced by the parties, the case stood thus: Passenger and carrier, and injury to the former inflicted with a knife by a servant of the latter in the gangway of the freight deck, at a time when this servant and others of his class were on that deck under special call to the performance of duty, with an issue only as to blame for the injury; and it is constantly to be remembered that upon this issue the defendant was seeking through a plea of self-defense to excuse its failure to perform the high degree of care and duty it was under to protect plaintiff throughout his journey against misconduct and assault on the part of its servants. *Steamboat Co. v. Brockett*, 121 U. S. 637, 646, 647, 648, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *Pendleton v. Kinsley*, 3 Cliff. 416, 421, 426, 427, Fed. Cas. No. 10,922, per Justice Clifford, sitting as Circuit Justice; *Alabama City, G. & A. Ry. Co. v. Sampley*, 169 Ala. 372, 377, 53 South. 142.

If the plaintiff had been injured through some defect in the machinery, appliances, or the like, used by defendant in navigating the boat, or in the boat itself, or through collision of this boat with another navigated by defendant, there would be no doubt that evidence similar in its relation to such objects or collision to that of the evidence concerning the issues presented here would have given rise to a presumption of negligence in defendant, and have exacted of it an explanation sufficient in law to acquit it of blame, for the rule is true as well with respect to carriers of passengers upon water as upon

land; and this is shown, not only explicitly by decisions, but also in a striking way by the common use that is made in the decisions of all classes of passenger cases, regardless of the particular means of transportation employed by the carrier in question. *Dunlap v. Steamboat Reliance* (C. C.) 2 Fed. 249, 251, 252-4; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199, 206, 23 N. E. 462; *Rose v. Stephens & Condit Transp. Co.* (C. C.) 11 Fed. 438, 439; *Caldwell v. New Jersey Steamship Co.*, 47 N. Y. 282, 291; *Le Barron v. East Boston Ferry Co.*, 93 Mass. (11 Allen) 312, 317, 87 Am. Dec. 717; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 602, 34 Am. Rep. 245. The rule of presumptive negligence was applied in the court below and, in view of the evidence, was apparently approved respecting injuries to a stevedore, in *The William Branfoot*, 52 Fed. 390, 394, 395, 3 C. C. A. 155 (C. C. A. 4th Cir.), per Chief Justice Fuller sitting in circuit; rule of *prima facie* negligence approved in respect of an "owner and wharfinger of a wharf," in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 554, 555, 11 Sup. Ct. 653, 35 L. Ed. 270; and the last two decisions, with others, were applied by this court, in *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528, 536, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, in sustaining a judgment for loss of lumber from fire superinduced by collision of freight trains, resulting in telescoping certain oil cars and igniting the oil by sparks of unusual size emitted from one of the locomotives—the late Justice Lurton saying (139 Fed. 537, 71 C. C. A. 325, 1 L. R. A. [N. S.] 533):

"But where the character of the accident is such as to strongly point to a cause which is abnormal and negligent, it devolves upon the defendant to explain that that abnormal cause was not due to want of due care."

And generally as to the conditions which will give rise to a presumption of negligence concerning injuries to passengers while being conveyed by railroad carriers and the like, see *Gleeson v. Virginia Midland Rd. Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 862 (35 L. Ed. 458) where, as respects a landslide in a railroad cut and consequent injuries, it was said:

"Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181 [10 L. Ed. 115], and *Railroad Company v. Pollard*, 22 Wall. 341 [22 L. Ed. 877], it has been settled law in this court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551 [11 Sup. Ct. 653, 35 L. Ed. 270]."

Judge Gray's analysis of the last case and others of the Supreme Court, in *Irvine v. Delaware, L. & W. R. Co.*, 184 Fed. 664, 668, 669, 670, 106 C. C. A. 600 (C. C. A. 3d Cir.) is deserving of distinct consideration. See also *Kirkendall v. Union Pac. R. Co.*, 200 Fed. 197, 206, 118 C. C. A. 383, and citations (C. C. A. 8th Cir.); *Southern Pac. Co. v. Cavin*, 144 Fed. 348, 351, 75 C. C. A. 350 (C. C. A. 9th Cir.); *Griffen v. Manice*, 166 N. Y. 188, 193, 196, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630 (an elevator case); *O'Callaghan v. Dellwood*

Park Co., 242 Ill. 336, 345, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407 (a scenic railway case); *Madara v. Railway Co.*, 192 Pa. 542, 547, 43 Atl. 995, in connection with *Levin v. P. & R. R. Co.*, 228 Pa. 266, 267, 77 Atl. 456; *Green v. Pac. Lumber Co.*, 130 Cal. 435, 440, 62 Pac. 747 (a railroad operated by the lumber company); *Benedick v. Potts*, 88 Md. 52, 56, 40 Atl. 1067, 41 L. R. A. 478 (an inclined plane railway case); *Brown v. Union Pac. R. Co.*, 29 L. R. A. (N. S.) 808 (81 Kan. 701, 106 Pac. 1001), and the extended note, with citations, showing a variety of conditions under which the presumption in question will and will not arise.

The theory of the best considered of this class of decisions is that evidence merely of the relation of passenger and his injury is not enough to put the defendant to its proofs; the plaintiff's evidence must in addition so far disclose the attendant circumstances of the injury as to enable a jury fairly to determine whether the passenger is without fault and the carrier is guilty of neglect of the applicable rule of care. Such circumstances will appear, for example, where the accident is clearly outside of the usual course of the particular business when it is conducted in a prudent manner, and the cause and the means of explaining it are apparently within the exclusive control of the carrier. These conditions are naturally suggestive of the rule *res ipsa loquitur*, and of the variety of circumstances under which it is applied as a rule of evidence; and, while the rule is not applicable here, yet, as Judge Cullen said, in *Griffen v. Manice*, *supra*, at page 193 of 166 N. Y., at page 926 of 59 N. E. (52 L. R. A. 922, 82 Am. St. Rep. 630):

"The 'res' * * * includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present. Neither of these rules * * * is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in civil or criminal actions."

It must therefore be conceded that when it comes to applying the rule of presumption of negligence against a carrier for an injury inflicted directly by its servant, and not through a defect in an inanimate thing under the carrier's control, the circumstances attending the injury are essential to a right inference as to the proximate fault. But, considering the obvious fact that the disembowelment of a passenger with a knife in the hands of a servant of the carrier does not ordinarily occur on a steamboat that is under control of her officers and carefully managed by them, in connection with the other facts practically admitted, it is not perceivable why the attendant circumstances were not sufficiently shown to require defendant to explain its servant's conduct; in short, we think enough was disclosed to give rise to a presumption of negligence against defendant, and so to place upon it the burden of proving its plea of justification. *Birmingham Railway, Light & Power Co. v. Coleman* (Ala. Sup. April 24, 1913)

61 South. 890, 891, 892; Kohner v. Capitol Traction Co., 22 App. D. C. 181, 187, 190, 62 L. R. A. 875.

[3] In the second assignment of error defendant complains of the following portion of the charge:

"Had it [defendant] exercised that degree of care and caution which I have just described for the safety and welfare of its passenger[s] while he was aboard its boat, in the preparations it made for the safety, comfort, and convenience of its passengers in what is called the 'monkey deck'? Did it exercise that reasonable degree of care and caution which it owed to this passenger in permitting him and others, as the proof shows, to overflow the monkey deck, if they did overflow it, and get down on the freight deck among the roustabouts? Or, if it had exercised that degree of care and caution which is required of a common carrier, would the passengers whom it was hauling for hire be thrown in contact and commingled with the roustabouts? * * * If, however, you find from the greater weight of the evidence that they confined that trouble in the monkey deck to words, and went downstairs, and then the plaintiff assaulted the servant, who cut him in the bowels with a deadly weapon, and he, in necessary defense of himself, used his knife and disemboweled him, why he could not recover, unless you further find that the company was negligent and had failed to do its duty to this plaintiff in providing him with reasonably safe accommodations and conveniences on the boat while he was a passenger. In other words, does the company exercise that degree of care and caution required of it, which I have just stated, when it provides for its passengers no sufficient place, if it should not be sufficient, other than the intermingling and commingling on the lower deck, or freight deck, of the boat, with the roustabouts?"

The complaint made at the time of the charge was that the crowded condition of the monkey deck was treated as a ground of recovery, and that this was too remote to be considered as a cause of the injury, and, besides, that no such cause of action was alleged in the declaration. Exceptions were reserved accordingly. The court thereupon modified the charge as follows:

"I do not mean to be understood as saying, if they did not have sufficient room in the monkey deck, that, of itself, would warrant you in finding for the plaintiff. I meant to be understood as saying it was the duty of the company to exercise the degree of care which I have described in furnishing suitable conveniences for passengers, and if by failure to have sufficient conveniences for them they were compelled to go down on the lower deck with freight, then you could consider that question, in determining whether it had discharged its duty to this passenger, if he had, under these circumstances, to go to the deck below."

The exception then reserved was that the crowded condition of the monkey deck was not the proximate cause of the injury. We do not regard the portion of the charge before quoted, nor the modification so made, as having been given upon the theory that the overcrowded condition of the monkey deck was to be treated as an independent cause of action. True, testimony was received upon this subject, but without objection on the part of defendant. The testimony was admissible in support of the theory of plaintiff that the overcrowded condition of the deck had caused him to go to the gangway of the freight deck, and not that he had followed Tillman to that point for the purpose of assaulting him. Furthermore, the complaints against this portion of the charge, and the modification, do not seem to have been made with reference to a particular clause that has given us some

concern. It is the part set out in the assignment, which, upon first impression, would appear to qualify the right of self-defense by failure in defendant to provide against overcrowding the monkey deck; that is, to provide against the necessity to associate passengers with roustabouts. Study of the whole charge, however, convinces us that it was not intended so to qualify the right in defendant's servant reasonably to defend himself against aggressions, if there were any, of plaintiff. In the first place, counsel did not call the attention of the court below to the matter, and naturally no assignment upon the subject appears; indeed, counsel for the first time allude to it here. In the next place, such an interpretation of the portion of the charge set out in the assignment is untenable, when considered in connection with the part omitted from the place above indicated by asterisks:

"If, however, upon the other hand, you believe from the greater weight of the evidence that the plaintiff was there on board this boat and assaulted this servant with a deadly weapon, and the servant, in defense of himself, used such force as was necessary to protect himself against death or great bodily harm, and in doing that disemboweled this man, then there would be no liability. If, however, you believe from the proof in this case that this servant who cut the plaintiff and the plaintiff were engaged in a game of craps in the monkey deck, and they had some words there on that subject, and they started and went on downstairs, on the lower deck, and this man, the servant, assaulted plaintiff down there, as he says he did, and cut his bowels out, then the company is liable."

Plainly these alternative hypotheses of liability and nonliability of defendant were fairly in accord with the theories of claim and defense as they were respectively presented by the parties at the trial; and, since neither court nor counsel seem at the time to have been conscious of any qualification of the right of self-defense, it is hardly conceivable that the jury could have been misled, or that any material prejudice could have ensued. Indeed, the alternative of the charge excusing defendant, as stated, was in effect as favorable to defendant as was the corresponding portion of its first request, which appears in the sixth assignment.

The fifth assignment of error concerns a written statement purporting to have been signed by one Tom Johnson. Johnson was unable to write his name, and could have signed the paper only by his mark. When he was called to the witness stand a controversy arose as to whether he had signed the paper. The dispute was of such a nature that the court directed the jury to retire, and then heard testimony touching the execution of the paper. When this testimony was closed, the judge recalled the jury, and examination of the witness was resumed. However, while the testimony was being taken before the judge alone, counsel for plaintiff expressed a desire that it be submitted to the jury; but the court refused, and when counsel for plaintiff wished to make a statement in regard to the disputed signature, counsel for defendant said:

"Your honor is not going into this in this trial before the jury?"

After the jury had been recalled, the trial judge stated that he was satisfied to admit the paper as one "which the negro has put his name to by mark." Whereupon counsel for defendant said:

"I want to get it in the record that I am excepting to your honor's deciding this question of fact, and I want to get it clearly in the jury's mind that your honor is not passing upon what he said."

The court then stated:

"I am not expressing an opinion as to whether what the negro said on the stand is the truth, or that this paper is the truth. That is for you, the jury."

And no further exception was reserved. Plainly defendant is in no position to complain of what was done; and, moreover, we are unable to see how the defendant was prejudiced by the court's action.

Examination of the remaining assignments satisfies us that they should be overruled.

The judgment below is affirmed, with costs.

SOUTHERN COTTON OIL CO. v. ELLIOTTE.

In re BEJACH.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1914.)

No. 2480.

1. BANKRUPTCY (§ 440*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order rejecting a claim in bankruptcy is reviewable only on appeal, under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609); but if the matter partakes of the character of an intervention, presenting a controversy, an appeal may be entertained under section 24a (Comp. St. 1913, § 9608) and section 123, Judicial Code (Comp. St. 1913, § 1120).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 140*)—RECLAMATION OF GOODS—PROPERTY PURCHASED WITH TRUST FUND—CONFUSION OF GOODS.

Claimant, Southern Cotton Oil Company, made advances to the bankrupt under a specific agreement that the money, which was placed in bankrupt's bank account, should be used to purchase cotton seed to be shipped to claimant. Bankrupt used some of the deposit in his general business. All the seed purchased by him after the advances were made was stored in claimant's warehouse and from time to time shipped to claimant, except a quantity which remained in storage at the time of the bankruptcy, a part of which had been paid for directly from the fund by checks, and an unknown part from bankrupt's store or by the use of his gtn. Held that, as the mass of the seed in storage was claimant's, and had been so treated by bankrupt, who had shipped none to others, it should be presumed that the part paid for by him was intended to take the place of the money he had used from the fund, and in any event it became claimant's under the doctrine of confusion of goods, and that in the absence of any state law affecting the question all the remaining seed belonged to claimant as between the parties and as against the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. TRUSTS (§ 352*)—MINGLING OF FUNDS IN BANK—PRESUMPTION AS TO REMAINDER OF DEPOSIT.

Where it appears that trust funds have been mingled with the general funds of a depositor in a bank, that a certain amount remains in the ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

count at the end of a period, and that the account has not been in the interval depleted below the trust amount, or the final amount, that final amount will be presumed to include the trust money, or to be a part thereof.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 520-525; Dec. Dig. § 352.*]

Appeal from and Petition to Revise an Order of the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

In the matter of F. Bejach, bankrupt; C. H. Elliotte, trustee. Appeal from and petition to revise an order of the District Court, brought by the Southern Cotton Oil Company. Petition to revise dismissed, and order reversed on appeal.

Metcalf & Metcalf, of Memphis, Tenn., for appellant.

C. S. Dashiell, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This case is here on petition to revise and on appeal. In order to receive consideration, the appeal must be thought of as one pertaining to section 24a of the Bankruptcy Law, since more than ten days elapsed after the entry of the order and before filing the petition for appeal, and an appeal under section 25a could confer no jurisdiction on this court.

[1] It is clear also that the petition to revise must be dismissed. Whether the matter sought to be reviewed was a controversy arising in bankruptcy or was a proceeding in bankruptcy is far from clear; but, if it was at all of the latter character, it was an order rejecting a claim, and so could be heard only by appeal under section 25a, and not by petition to revise under section 24b. In re Mueller (C. C. A. 6) 135 Fed. 711, 68 C. C. A. 349; In re Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. The proceeding below partook of the character of an independent intervention, thus presenting a controversy in bankruptcy, and also of the character of a proof of claim, partly secured, thus presenting a matter leading to an appeal under section 25a. It seems unlikely that the distinction, with its important consequences, occurred at any time to any of the counsel. No point is made thereon, and we have examined the question only because we must do it to know that we have jurisdiction. The precise situation is not likely ever to arise again, and it is enough to say we think that, in spite of the serious inconsistencies, the matter may fairly be treated as an independent intervention. See Rode & Horn v. Phipps (C. C. A. 6) 195 Fed. 414, 115 C. C. A. 316. Accordingly we consider the merits as if they arose under an ordinary appeal pursuant to section 128 of the Judicial Code (Comp. St. 1913, § 1120).

[2] Bejach, the bankrupt, had conducted, at Kerrville, Tenn., a general store, cotton gin, etc., and had been in the habit of buying cotton seed. In April, 1910, the Southern Cotton Oil Company, the claimant or intervener herein (hereafter called the Company), loaned Bejach

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$1,500, taking his notes therefor, and they made a written agreement by which Bejach could store in the Company's warehouse, at Kerrville, his cotton seed, and by which he agreed "to ship all of his seed to the Southern Cotton Oil Company at equal prices with other buyers; seed to be sold to others only after giving the Southern Cotton Oil Company refusal"—and agreed to pay storage for use of the seedhouse for seed which might be sold to others than the Company. The money then loaned was for general use by Bejach, and was so used by him in his general business. The cotton seed season opened in September, 1910, and Bejach began at once to apply to the Company for advances of money with which to buy seed. It made these advances by check, some of which were sent directly to him, and by him put into his account in a Memphis bank, and some of which were deposited by the Company to his credit in that account. Each of these checks bore, stamped upon its face, the words, "To be used only for the purchase of cotton seed, which seed must be shipped only to the Southern Cotton Oil Company." Whatever inference might be drawn regarding Bejach's acceptance of this limitation merely because of his personal use of some of the checks so indorsed, all of the funds now involved were so advanced pursuant to Bejach's letter of October 25th, which said, "Please * * * deposit for me in Manhattan Savings Bank * * * to my credit \$2,000, with which to buy cotton seed to be shipped to you," and his letter of November 12th, saying: "I wish that you would deposit at the Manhattan Bank * * * \$500 with which to buy seed." While the second letter is not so explicit as the first, the two must be read together, and they establish beyond dispute the fact that these funds were advanced by the Company and received by Bejach for the sole purpose of buying cotton seed to be shipped to the Company. They are quite inconsistent with a general and unqualified title in Bejach to the seed bought with this money, permitting him to ship and sell to whomsoever he wished.

At the time of the bankruptcy there was on hand, in this Kerrville warehouse of the Company, cotton seed of the agreed value of \$563.-76. Of this a portion had been purchased by Bejach directly with the money from the special bank deposit; that is, he had paid for the same with his check drawn on that account. Another portion was composed of seed which he had paid for either with goods from his store or with the services of his cotton gin. There is no method of ascertaining how much of the seed belonged in one and how much in the other class. After the bankruptcy, the trustee took possession of this seed, and the present intervention is to recover its value from the trustee. Both the report of the referee and the opinion of the District Judge go upon the theory that to so much of the seed as was purchased by Bejach from the store or from the gin he had full title free from any claim by the Company, and that, since that part of the seed purchased with the so-called trust funds could not be separately identified, it followed that the intervener had no claim against any of the seed.

It is doubtless true that since the amendment of June, 1910, the test to be applied in such a controversy must be whether, under the law of the state, the intervening claimant could have maintained his claim, by

way of title or by way of lien against a creditor levying an execution; but we find no Tennessee statute or decision fairly covering such a situation, and so the question must be decided under general rules.

The matter would be differently presented if it was our duty to assume that the contract of April 11th contemplated and reached such purchases of seed as were made by Bejach in October, out of money furnished under these later special limitations. It is perhaps a natural first impression that the contract was intended to cover and fix the rights of the parties with relation to all seed which Bejach should buy, either with the money then loaned or with his own money, or with future funds coming from the Company. Even in that view of the facts, the contract provision would seem to be merely an option extended to Bejach, and giving rise to a right on his part only on the happening of a condition subsequent which never did happen, viz., that the Company would refuse to allow the maximum price.

We think the facts do not permit us to approve this first impression. While, if the October advances had been made in general form, it might be presumed that property purchased with them would be within the purview of the April contract, such presumption cannot survive the specific later understanding evidenced by the limitation on the face of the checks and by Bejach's letter. These funds were not to be used to buy cotton seed which Bejach might ship where he wished. They were to be used only to buy seed "which seed must be shipped only to the Southern Cotton Oil Company." The April contract still continued in force over what it purported to cover, viz., Bejach's obligation to "ship all of his seed," and this continued to refer to seed which he purchased with his own money or with money which he borrowed generally from any one. It did not, by anticipation, destroy a later specific contract between him and the Company, fixing their rights and duties regarding the later advances.

In reaching this conclusion, we are not embarrassed by any express finding of fact to the contrary by the referee or by the District Judge. It appears from the record and from the positions taken by counsel in this court that all parties have at all times understood that all of the seed, except an unknown portion, was purchased directly by the use of the special bank deposit, and we think any inference by the referee to the effect that such seed Bejach was at liberty to sell where he pleased was only a conclusion of law. The District Judge said that no question of fact, but only a question of law, was presented to him; and this question seems to have been whether the impossibility of tracing the specific special deposit money into specific seed in the warehouse defeated the intervening claimant's theory of rights.

[3] The limited and special character of the October and November advances, initially constituting them practically trust funds devoted by the agreement of both parties to one special purpose only and entrusted to Bejach for that purpose only, is quite clear—indeed, seems not to be disputed. They did not, as between the parties, lose this character by being deposited in Bejach's general bank account and so mingled with his general funds, even if the Company had known that they were to be so mingled—a condition as to which the record is silent.

Just as it is in such cases presumed, after the fact, that the depositor has drawn out his personal funds, and has not infringed on the trust moneys mingled with his own moneys, so it must be presumed in advance that this honest course is the one which the depositor will take; and when it appears that trust moneys have been so deposited and mingled with the general account, that a certain amount remains in the account at the end of the period, and that the account has not been, in the interval, depleted below the trust amount or final amount, that final amount will be presumed to include the trust money or be part thereof. *National Bank v. Insurance Co.*, 104 U. S. 54, 68, 26 L. Ed. 693; *Board v. Strawn* (C. C. A. 6) 157 Fed. 49, 51, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; *Empire Co. v. Carroll* (C. C. A. 8) 194 Fed. 593, 605, 114 C. C. A. 435; *Brennan v. Tillinghast* (C. C. A. 6) 201 Fed. 609, 613, 120 C. C. A. 37.

In the present case, if we consider the agreed value of all the seed as a credit on the special deposits, there should have been remaining in the bank deposit and belonging to this fund \$432. There actually was on deposit \$563; so there was no ultimate impairment. There could have been no intermediate depletion, because no deposits except these special ones were made after October 25th. It follows that, upon this record and as between these parties, the amounts which were from time to time drawn out and invested in this seed which was in the warehouse at the end are sufficiently identified—that is, identified by presumption as payments out of the trust fund—and as the seed which was so purchased was substituted for and stood in the place of the money which had bought it, the fund is sufficiently traced into the seed. This is the necessary result of the decisions of the Supreme Court and of this court to which we have referred. We find nothing in Tennessee to the contrary; and so we do not meet the question whether local decisions would make a rule of law so far affecting a creditor's right to levy that they would be obligatory upon the federal courts.

To the proposition upon which the case seems to have been decided below, viz., that although part of the seed was a substitute for the trust money, yet plaintiff could not recover because that part could not be identified, there seem to us to be two answers: One grows from the fact that the body of the seed in the warehouse was primarily characterized as seed purchased for and devoted to shipment to the Company. During the season up to this time many car loads had been purchased and so shipped. The Company had advanced for that purpose more than \$6,000 before the advances of the \$2,500 of October 25th and November 12th. Bejach had not shipped any seed anywhere else, and had not, apparently, ever contemplated diverting any of it. Indeed, such of the seed in dispute as was on hand November 12th only escaped shipment to the Company because the car then sent proved unexpectedly not large enough to hold it all, and this was "left over." The suggestion that the Company and Bejach were merely debtor and creditor, and that Bejach had the entire title and interest in the seed he bought with this money, can hardly survive the test of a supposed loss by fire. If, in such case, he had been sued by the Company as for money loaned, he could have truthfully answered:

"I received the money from you to buy seed for you. I spent it for that purpose, and stored the seed in the agreed place, awaiting shipment to you. I have made no default."

Such answer would seem to be a complete exoneration. Nor can it survive the test of applying the law forbidding preferences. If Bejach, being insolvent, had, within four months of adjudication, delivered to the Company seed which he had so purchased with these advances, would it have been an unlawful preference? If not, it must be because the Company had an interest in the seed entitling it to have the shipment made; and that it had such interest, and that in this conduct there would have been no preference, is the necessary result of *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; and *Sexton v. Kessler*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. For these reasons, we think it clear that the character of the general mass was clearly fixed, and if Bejach had mingled with it some of his own seed, unidentifiable and undistinguishable, the doctrine of confusion of goods, as we have applied it in analogous cases, would cause his personal contribution to take the character of the mass. *Holder v. Bank* (C. C. A. 6) 136 Fed. 90, 92, 68 C. C. A. 554; *Smith v. Township of Au Gres* (C. C. A. 6) 150 Fed. 257, 260, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876. The cases here cited, as well as those referring to a bank deposit, do not lose their analogy merely because they pertain, as some of them do, to the case of a tort-feasor. The tort only creates the trust; and it is the existence of the trust, not the manner of its creation, which gives rise to the presumption of identity and the rule of confusion of goods.

The other answer (perhaps not really distinct in principle) is that in so far as Bejach had used otherwise than for buying seed any of the special deposits, and then had put into the warehouse seed which he had purchased out of his store or gin, he was clearly only doing his duty by making good the deficiency in this special fund or in the substitute special property which had resulted from his unlawful temporary devotion of some of the special fund to his general business. This presents a situation substantially like that considered by the Supreme Court in *Gorman v. Littlefield*, 229 U. S. 19, on page 25, 33 Sup. Ct. 690, on page 692 (57 L. Ed. 1047), and makes pertinent the comments of Mr. Justice Day:

"Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good; and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt. * * * We think there should be no presumption that the stock was stolen or embezzled with intent to deprive the rightful owner of it, and when the unclaimed shares are found in possession of the bankrupt it is only fair to accept the general presumption in favor of fair dealing and to decide, in the absence of countervailing proof, that the broker out of his funds has supplied the deficiency for the benefit of his customer, which he had a perfect right to do."

It does not seem necessary to decide the full nature and extent of the claimant's right to this seed; it is sufficient to say that it was su-

perior to any right vesting in the trustee. The case presents most, if not all, of the features of a purchase by an agent, with the principal's money, of property for the principal, and the title to which at once vests in the principal, with the right in the agent to receive compensation, measured, perhaps, by the difference between the maximum market price and the price at which he was able to buy; but in any event the intervener would have a clear equitable right to demand, as against a levying creditor or the trustee, that the property be devoted to the purpose to which, as between the parties, it always had been devoted, and it is now immaterial whether this right be called the title, a trust, or an equitable lien. Liens of that character are enforced under the Bankruptcy Act, where their recognition does not involve interference with any applicable state statute. We considered this subject fully in *Gage Co. v. McEldowney*, 207 Fed. 255, 258, 124 C. C. A. 641.

The order must be reversed, and the case remanded, with instructions that the trustee pay to the claimant the value of the seed in controversy. The appellant will recover costs.

PULLMAN CO. v. JORDAN.

(Circuit Court of Appeals, Fifth Circuit. November 9, 1914.)

No. 2710.

1. DEPOSITIONS (§ 55*)—GROUNDS FOR SUPPRESSION—FAILURE TO CONFORM TO NOTICE AS TO TIME OF TAKING.

Plaintiff, in an action in a federal court in Alabama, elected to take a deposition in accordance with the state law, as authorized by Act March 9, 1892, c. 14, 27 Stat. 7 (Comp. St. 1913, § 1476). Code Ala. 1907, § 4032, as amended in 1911 (Gen. Acts 1911, p. 488) provides that the adverse party at the time of filing cross-interrogatories may demand notice of the time and place of taking the deposition, and may attend and cross-examine the witness orally; also that on failure to give the notice when required the deposition shall be suppressed. Plaintiff gave the notice as demanded by defendant, but the return of the commissioner, which, as required, stated the time and place of taking the deposition, showed that the time was several weeks after that stated in the notice. *Held*, that under the limitation created by the notice, the return did not show that the deposition was taken under the authority conferred on the commissioner, and that the overruling of a timely motion to suppress the deposition was prejudicial error.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 120-124; Dec. Dig. § 55.*]

Conformity to state practice, see notes to *O'Connell v. Reed*, 5 C. C. A. 602; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392; *Diamond Coal & Coke Co. v. Allen*, 71 C. C. A. 110.]

2. DEPOSITIONS (§ 56*)—ALABAMA STATUTE—SUFFICIENCY OF DEMAND FOR NOTICE OF TIME AND PLACE.

That the written demand for notice was addressed to the plaintiff in another suit and to her attorneys, who were, however, the same attorneys who appeared in both cases, was immaterial, where the notice was attached to and filed with the cross-interrogatories, and in view of the fact that the notice demanded was given by such attorneys.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 90-117; Dec. Dig. § 56.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action at law by C. C. Jordan against the Pullman Company. Judgment for plaintiff, and defendant brings error. Reversed.

Forney Johnston, of Birmingham, Ala., for plaintiff in error.

S. L. Sinnott, of Birmingham, Ala., for defendant in error.

Before WALKER, Circuit Judge, and SHEPPARD and CALL, District Judges.

WALKER, Circuit Judge. The plaintiff below (defendant in error here), in the proceedings adopted for securing the testimony of Dr. John A. Lenfestey, elected, as under the statute he had the right to do, to follow the mode prescribed by the laws of Alabama, the state in which the court was held. 3 Fed. Stat. Anno. 22; 27 Stat. L. 7. Having so elected, it was incumbent upon him to proceed in conformity with the requirements of the state law as to the mode of procuring the deposition. R. S. U. S. § 914, 3 Fed. Stat. Anno. 10 (Comp. St. 1913, § 1537). The Alabama statute, which was undertaken to be followed in taking the deposition of the witness on written interrogatories, contains the following provisions, which are made applicable when the opposing party has not taken the steps required to have the deposition taken orally:

"If the party, at the time of filing cross-interrogatories, demands notice of the time and place of taking the deposition, it shall be the duty of the commissioner, or the attorney for the party taking the deposition, to give such party, or his attorney, such notice of the time and place of the taking of the deposition as will enable him to be present, if he so desires. On failure to give notice herein required of the residence of the witness and the commissioner, unless the same be waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it. Provided, however, that no such oral examination shall be had in cases involving less than five thousand dollars, or in cases involving the title to land or specific personal property; and provided, further, that in all cases in which testimony is to be taken by interrogatories, the party against whom the testimony is proposed to be taken shall within the time allowed to file cross-interrogatories have the right to demand reasonable notice of the time and place of taking the testimony and to attend such examination and cross-examine the witness or witnesses orally. And, in the event of such oral cross-examination the other party to the cause may, at the same time and place, on the conclusion of such oral cross-examination, examine the witness orally in rebuttal." Code of Alabama 1907, § 4032, as amended; General Acts of Alabama, 1911, pp. 487, 489.

The defendant below, on September 27, 1913, filed with the cross-interrogatories propounded by him to the witness mentioned a written demand:

"That notice of the time and place of taking the deposition of Dr. John A. Lenfestey, in accordance with the interrogatories propounded to said witness by the plaintiff and cross-interrogatories attached hereto and propounded by defendant to said witness, be given the defendant's attorney, in order that defendant's attorney or attorneys may be present at the taking of such deposition, if they so desire, and cross-examine the said witness, if they desire to do so."

On the same day the plaintiff's counsel in Birmingham gave notice to the defendant's counsel in Birmingham that the deposition of the witness Lenfestey would be taken at a specified place in Mt. Clemens, Mich., at 3 p. m. on September 30, 1913. The deposition was not taken at the time and place stated in this notice. The return of the commissioner named to take the deposition was dated November 7, 1913, and was as follows (omitting the commissioner's signature and his statement of the fees of himself and the witness):

"The undersigned commissioner, in said commission named, hereby certifies that I am personally acquainted with the said witness, Dr. John A. Lenfestey, and know him to be the identical person named in said commission; that he was sworn and examined as above stated, and that his evidence was taken down as near as might be in his own language, and was subscribed by him in my presence, on this seventh day of November, A. D. 1913, at the city of Mount Clemens, Macomb county, Michigan, and that I am not of counsel or of kin to said witness or any of the parties to the said cause, or in any manner interested in the result thereof."

[1] Under the Alabama statute governing the certificate or return to be made by the commissioner, the time and place of taking the deposition must be shown. Code of Alabama 1907, § 4040; *Thrasher v. Ingram*, 32 Ala. 645. There is an additional reason for enforcing a compliance with this requirement when the party against whom the deposition is proposed to be used has exercised the statutory right of requiring notice to be given him of the time and place of taking the deposition. *Birmingham Union Railway Co. v. Alexander*, 93 Ala. 133, 9 South. 525. The making of such a demand has the effect of putting a limitation upon the authority of the commissioner to take the deposition. When that statutory right has been exercised, the commissioner's certificate or return does not show that the deposition was taken under the authority conferred upon him, when it fails to show that it was taken at the time and place stated in the notice given.

When the case was called for trial, and before either the plaintiff or the defendant had announced ready for trial, the defendant moved the court to suppress the deposition above mentioned, assigning as grounds of the motion the absence of notice to the defendant of the time and place of taking the deposition, and that the return of the commissioner did not comply with the requirements of the law. The court overruled the motion. The motion was made in due time. The Alabama statute provides that:

"All objections to the admissibility of the entire deposition in evidence must be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition and appears after the commencement of the trial." Code of Alabama 1907, § 4042.

The motion would have been in due time if it had been made after the parties had announced ready for trial, but before the trial was entered upon. *National Fertilizer Co. v. Holland*, 107 Ala. 412, 18 South. 170, 54 Am. St. Rep. 101. As the statute distinctly specifies the time within which such a motion may be made, it cannot be held that it should be repeated, or that the ground of objection it states to the deposition as a whole should be presented in any other way, at a later stage of the trial. It is a manifest purpose of the statute under

which the above-mentioned demand of notice by the defendant was given to prohibit the taking of the deposition without a substantial compliance with such demand, unless such compliance is waived. A deposition is subject to be suppressed if it is taken at a time and place other than those fixed as authorized by law. *Collins v. Fowler*, 4 Ala. 647; *Jordan v. Hazard*, 10 Ala. 221; *Herndon v. Givens*, 16 Ala. 261; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; 13 Cyc. 915, 916. Assuming, without conceding, that it would have been permissible to examine the witness at a later day than that named in the notice served upon the counsel for the defendant if the commissioner had, at the time and place named, postponed or adjourned the taking of the deposition, yet there was no evidence, either in the commissioner's return or elsewhere, to support the conclusion that there was such an adjournment, or that the commissioner, the witness, or any one connected in any way with the case, appeared at the time and place stated in the notice. The commissioner's return does not, in any way, indicate that the deposition was taken at the time and place stated in the notice served upon the defendant's counsel, or that he made any pretense of a compliance with the terms of it. The legitimate conclusion from what the certificate or return says and fails to say is that the deposition was taken at a time other than that stated in the notice, and without there having been any compliance with the demand of notice made by the defendant, or a waiver of the requirement by the defendant. No argument is needed to enforce the conclusion that the failure to give the defendant notice as demanded had the effect of depriving it of a substantial right. A party's right to be present in person or by counsel when a witness offered by his opponent is to be examined and to cross-examine the witness orally is of obvious importance to him for the maintenance of his claim or defense. What has been said above is enough to show that the defendant had that right, and the proceedings above mentioned show that it was deprived of that right by the action of the court in overruling the motion to suppress the deposition. The motion was well taken on both of the grounds assigned in support of it.

[2] Based upon the fact that the defendant's written demand of notice of the time and place of taking the deposition of the witness Lenfestey was addressed "to Mrs. C. C. Jordan and to Messrs. Howard, Sinnott & Keene, her attorneys," it is suggested that the notice was not given in this case, but in a case brought by the plaintiff's wife against the same defendant. In the light of the facts that the notice was attached to and filed with the cross-interrogatories propounded in this case to the witness mentioned, and that the attorneys for the defendant in this case acted on the demand by giving a notice of the taking in this case of the deposition at a time and place at which it was not taken, it is obvious that the mistake made in the way the demand was addressed was fully corrected by the terms of the demand and the circumstances of the making of it. There is no warrant for finding otherwise than that the demand was made in this case, that it had reference to the taking of the deposition of the witness named on direct and cross-interrogatories to him filed in this case, and that it

was so understood and acted on by the attorneys for the plaintiff in this case.

There is no merit in the suggestion that if the court erred in overruling the motion to suppress the deposition, the error was a nonprejudicial one. At a former term of the court the plaintiff had procured a continuance of the case because the deposition of the witness in question had not then been taken and returned. This showed the estimate of himself or of his counsel of the materiality and importance of that testimony. The witness was a physician, by whom the plaintiff sought to prove that ailments of the plaintiff's wife were attributable to the incident complained of, and the nature and gravity of those ailments, testified by the witness to have been disclosed on an examination made by him a few days after the incident; the testimony of the witness tending to prove that those ailments had not made their appearance prior to the incident in question. There is no support for the contention that the case as it was presented to the jury would have been practically the same if the deposition in question had not been admitted. Plainly that deposition was an important feature of the plaintiff's case as it was presented to the jury. The plaintiff in error, in insisting that the judgment should be reversed because of the error committed in overruling its motion to suppress the deposition, is not complaining of something which apparently could not have affected the result of the trial. On the contrary, the conclusion is well warranted that the testimony improperly admitted probably contributed materially to the plaintiff's success in the trial. It follows that the error of the court in that regard must be held to have been one calling for a reversal of the judgment.

Other questions presented for review are such that they are not likely to arise in another trial, and it is not deemed necessary to make mention of them.

For the error above pointed out, the judgment is reversed and the case is remanded for a new trial.

UNIVERSAL FILM MFG. CO. v. COPPERMAN et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 77.

1. LITERARY PROPERTY (§§ 3, 5*)—SCENARIO—PHOTOPLAY.

Where complainants' assignor, a Danish corporation, composed a written scenario of a play, and then composed a photoplay by actual performance of the scenario recorded by a moving picture camera, from which it took positive films and sold one or more of them in England, where neither the scenario nor the photoplay was copyrighted, it had a common-law right of property in England in the intellectual conception of the play expressed in words, and in the intellectual conception of the photoplay expressed in actions, and could perform the written play itself, and license others to perform it, without prejudice to its common-law ownership, and so could perform or license others to perform the photoplay in the same way.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. §§ 2, 4; Dec. Dig. §§ 3, 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index 218 F.—37

2. LITERARY PROPERTY (§ 6*)—MOVING PICTURES—SALE OF FILM—CONDITIONS.

Where the owner of a scenario and photoplay, neither of which was copyrighted in England, sold a positive film there, the purchaser and his assigns acquired the performing right, and though no one, by virtue of the sale, would acquire the right to re-enact the play and take a negative of it, or make a new negative from the positive film, the seller could not restrict the purchaser's right by a condition that the film should not be resold or hired for use, except in the country in which it was bought, nor sold for exportation.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. § 6.*]

3. COPYRIGHTS (§ 41*)—FOREIGN SCENARIO IN PHOTOPLAY.

Where the foreign owner of a scenario and photoplay took out a United States copyright on the latter separately, as it was authorized to do, it abandoned its common-law property rights therein.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 40, 48; Dec. Dig. § 41.*]

4. LITERARY PROPERTY (§ 6*)—PHOTOPLAY—SALE OF FILMS.

Where the foreign owner of a photoplay sold a positive film in England, where it was not copyrighted, subject to a void condition against resale for export, and later copyrighted the photoplay in the United States, it could not by such copyright avoid rights previously conferred by the sale of the films in England, and hence could not treat the purchaser's assignees in the United States as infringers.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. § 6.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Universal Film Manufacturing Company against S. Copperman, doing business as the Thalia Music Hall, and another. Judgment for defendants (212 Fed. 301), and complainant appeals. Affirmed.

W. G. Morse and J. L. Lotsch, both of New York City, for appellant.

S. F. Frank, of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The Nordisk Film Company, a corporation of Denmark, composed an original written scenario of a play called the "Great Circus Catastrophe," and then composed a photoplay by means of an actual performance of the scenario, recorded by a moving picture camera on a negative photographic film, from which it afterwards took positive films in the customary manner, to be used in performing the play by throwing the pictures upon a screen by means of a moving picture machine. The company copyrighted neither the scenario nor the photoplay in England, as it might have done, but advertised and sold throughout Europe the positive films to any one who chose to buy, stipulating, however, on the bill rendered, that it was a condition of sale that the film should not be resold or hired out for use, except in the country in which it was bought, nor exported, nor sold for export.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

The defendants imported one of these positive films, which they purchased from a dealer in England, having first ascertained that there was no copyright for the photoplay in this country, and without notice of the stipulation that the same was not to be resold for export. This film they exhibited and hired out to others for the purpose of exhibition. Subsequent to the defendants' purchase the Nordisk Company copyrighted the photoplay in this country, receiving from the Copyright Office a certificate of registration as follows:

"This is to certify, in conformity with section 55 of the act to amend and consolidate the acts respecting copyright approved March 4, 1909, as amended by the Copyright Act of August 24, 1912, that the title, a description, and one print taken from each scene or act of the motion-picture photoplay not reproduced in copies for sale named herein, have been deposited in this office under the provisions of the said acts, and that registration for copyright for the first term of 28 years has been duly made in the name of Nordisk Film Co., Copenhagen, Denmark.

"Title of motion-picture photoplay: **The Great Circus Catastrophe. Parts 1, 2, 3.** By Nordisk Film Co.

"Title received Nov. 14, 1912.

"Description received Nov. 14, 1912.

"78 prints received Nov. 14, 1912.

"Entry: Class L. XXc, No. 110."

This copyright the Nordisk Company subsequently assigned to the complainant, which seized the defendants' film under section 25 of the Copyright Act of March 4, 1909 (35 Stat. 1081, c. 320 [Comp. St. 1913, § 9546]).

[1] The title of the Nordisk Company in England was its common-law right of property in the intellectual conception of the scenario of the play expressed in words and in the intellectual conception of the photoplay expressed in actions. It could perform the written play itself, or license others to perform it, without prejudice to its common-law ownership, and so it could itself perform and license others to perform the photoplay in the same way. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, affirmed 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

[2] When it sold a positive film, which was the only means of performing the play, it conferred the performing right on the purchaser and his assigns. No one, by virtue of that sale, would acquire the right to re-enact the play and take a negative of it, or make, if that could be done, a new negative from the positive film. This would be inconsistent with the Nordisk Company's common-law property in the photoplay and with the mere performing right which it had conferred on the owner of the film. But exercise of the performing right by one or by many purchasers of positive films would be entirely consistent with the Nordisk Company's common-law property in the play itself. The attempt, however, to annex a condition as to the use of the film after it was absolutely sold, was vain. Such conditions cannot be made to accompany an article throughout its changes of ownership. *Bobbs-Merrill v. Strauss*, 210 U. S. 340, 28 Sup. Ct. 722, 52 L. Ed. 1086, Dr. *Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup.

Ct. 376, 55 L. Ed. 502; *Waltham Watch Co. v. Keene* (D. C.) 202 Fed. 225, affirmed 209 Fed. 1007, 126 C. C. A. 668.

[3, 4] The Nordisk Company abandoned its common-law property in the United States when it took out the statutory copyright. Our law permitted it to copyright the scenario and the photoplay separately. It secured copyright for the latter under section 11 of the act of 1909, as amended in 1912 (Act Aug. 24, 1912, c. 356, 37 Stat. 488 [Comp. St. 1913, § 9532]) by depositing in the office, not the scenario of the play, but only the title, with a description of it, and two photo prints of parts of each act. Sale of positive films after copyright was as consistent with its statutory ownership as was the sale of films before copyright with its common-law ownership. But neither it nor its assigns as owner of the statutory copyright in this country, could repudiate the license it had given before copyright to the purchaser of the film in England and his assigns. Therefore the defendants cannot be treated as infringers.

We are entirely satisfied with the disposition the District Judge made of the damages and special allowance to counsel resulting from the seizure.¹

The decree is affirmed.

1 NOTE.

The following is the opinion of Hough, District Judge, on the question of damages.

"A decision having been rendered dismissing this bill, the cause was again brought on before me (after notice to the surety on the seizure bond) in order to assess the damages caused to the defendant by the seizure, pursuant to the Copyright Act, of the film or reel containing the photoplay which is the subject of this suit. At the same time the matter of an allowance of a counsel fee to the successful party was laid before the court.

"The following matters of fact must first be decided, viz.: The condition of the film or reel at the time of seizure and at the present time; the nature of the employment of the reel at the time of seizure; the rate of such employment and its probable future employment.

"The reel was produced in court and examined by me. It is obviously in very bad physical condition. The celluloid is brittle and in many places cracked. This is in large part the result of its having been kept for a year without that special attention which is customary among business men. These articles should be kept in a damp and oily atmosphere. This has not been done.

"The reel, however, is otherwise in bad condition, in that it is much torn on the edges. The holes for the sprocket wheels by which the reel is passed before the projecting machine are torn and frayed, and this condition could not be brought about merely by disuse in a dry atmosphere. The condition of the reel at the time of seizure is testified to by Messrs. Spiegelthal, for complainant, and Oes, for defendant. I saw and heard all the witnesses. Having regard to the obvious present physical condition of the film, I am of the opinion that when it was seized, in April, 1913, it was not what Spiegelthal says it was, and was substantially what it is now, and was, therefore, worth no more than \$80.

"There is no evidence to contradict Spiegelthal's testimony that for about two months before seizure he had succeeded in hiring out this film about 40 times at an average of \$10 a day; but this statement must be taken in conjunction with his assertion that the film was a 'feature' and practically a new film. As above pointed out, this I do not believe, and therefore I am of opinion that he could not rely on getting more for such a film than the

reduced rate of \$6 a day to which he testifies as being proper for inferior films.

"Likewise there is no testimony contradicting Spiegelthal's statement that at the time of seizure he had 'bookings' for this film for between two and three weeks. There is no evidence to show any certainty of occupation for the film after the expiration of that time. There is substantial uniformity among the witnesses that in some shape or another a film will last about a year, if (as Samwick says) 'it gets ordinary treatment and ordinary wear and tear.' It is my opinion from the physical appearance of the film that it had expended a good deal more than half its life at the time of seizure, and it was at that time, according to all the evidence in the case, between eight and nine months old.

"The defendants had obtained about 40 days of work for the film in between 2 and 3 months, and if it be permissible to infer future results from past performances, no more than about 50 future days of hiring could be expected for it. It follows that on the principles contended for by defendants, but on figures adopted by me from the evidence, the defendants are entitled to

The value of the reel at the time of seizure..... \$ 80
 Net proceeds (80 per cent. of gross receipts) for 60 days of hiring..... 288
 —with interest from the assumed date when the reel would have been worn out, say July 15, 1913.

"The question of law remains as to whether these damages (assuming them to be proven) are legally recoverable. I feel quite sure that not many years ago any recovery beyond the market value of the film would have been denied. Undoubtedly, however, the tendency of the courts has been to relax the rule regarding recovery of damages.

"The method of relaxation has been to enlarge the rule in *Hadley v. Baxendale*, 9 Exch. 341, and to find, infer, or assume that many things were within the contemplation of the parties which a few years ago would have been thought too remote for any party to have perceived. Naturally these questions of damage arise most frequently in causes of contract, and I can add nothing to the line of modern thought expressed in *Wakeman v. Wheeler*, etc., Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, and *In re Pennsylvania Steel Co.*, 198 Fed. 721, 117 C. C. A. 503. It seems to me that the same line of reasoning is applicable to any method of business preventing. A man gets damages for breach of contract really because he cannot do business along the lines that he intended. He ought to get the same damages, no matter how his business is prevented. It is no greater stretch of imagination to hold that a tort-feasor who prevents one from doing business has in mind the nature and incidents of that business than it is to hold that a contract breaker has in mind the nature and incidents of the business contracted for.

"It follows that the next query is: What kind of business was prevented by the seizure of this film? Reflection has only strengthened the belief that the business was that of giving a show or play. It really makes no difference that the play is mechanically produced. If there is no film, there is no play, and unless the play is projected upon a screen the idle film is worthless. The value of the film depends entirely upon the popularity of the play. Therefore I think the analogy between this case and preventing the giving of a dramatic performance is complete. The only previous decision that I have been able to find relating to damages for preventing dramatic performances is *Schlesinger v. Bedford* (1893) 28 Weekly Notes, 57. Though this decision is by a court of more than respectable authority, there is not much reasoning in it; but the method adopted, both in the trial court and the court of appeal, is, I think, in line with the findings I have made and with what I believe to be the trend of modern authority.

"The defendants may therefore take a decree for damages as hereinabove assessed. The counsel fee provided for in the Copyright Act is merely a revival of old practice. I am not informed that it is known what reasons induced Congress to revive old practice in respect of copyrights only. Having, therefore, nothing but the text of the law to guide me, I do not regard the

congressional provision as punitive, and I assume that the intent of Congress was merely to compensate counsel for professional labors.

"Consequently I inquire, not only into the extent of professional labor known to the court, but the importance of the litigation, both as to the principle involved and the pecuniary magnitude of the case. In my judgment the professional labor in this matter was out of all proportion to the principle or the amount of money involved. Whenever the Legislature makes a new statute on an old subject, it is a hard matter to distinguish between new legislation and laws re-enacted. Therefore, from this standpoint, Mr. Frank's labors have been great.

"On the other hand, if I am right in my interpretation of the Copyright Act, the future importance of this litigation is but small, and the amount of money involved is certainly trivial. Having looked at the matter from these viewpoints, I conclude that it would be wrong for the court to award to defendants' counsel what it believes would be a larger fee than counsel could charge for his services in such a case had Congress not passed the statute in question. Of course this is delicate ground, for the lack of uniformity among lawyers in respect of their professional charges is notorious. But any judge must be guided by his own professional faith, and mine is, as applied to this case, that no lawyer could charge a client for this case alone more than \$250.

"It may well be that some association or commercial union regards this case as important for their common interest, but that should not affect decision. If persons other than the legal parties to a cause are interested in its event, let them pay. The counsel fee awarded is therefore \$250."

GOTFREDSON v. GERMAN COMMERCIAL ACCIDENT CO.

(Circuit Court of Appeals, Sixth Circuit. December 11, 1914.)

No. 2496.

1. INSURANCE (§ 339*)—"OCCUPATION."

The term "occupation," as used in an application for accident insurance, is a very comprehensive one, and compasses the incidental as well as the main requirements of one's vocation, calling, or business, being defined by lexicographers to be that which occupies or engages the time and attention, and the principal business of one's life, vocation, employment, calling, or trade.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 879; Dec. Dig. § 339.*

For other definitions, see Words and Phrases, First and Second Series, Occupation.]

2. INSURANCE (§ 339*)—ACCIDENT POLICY—OCCUPATION—CASUAL ACTS AND EMERGENCIES.

Defendant having grouped its accident risks into five classes and fixed premiums and losses according to risks attending the occupations of the persons insured, decedent, whose occupation was described in his application as "proprietor of a trucking company, no manual labor," was assigned to the first class. The occupation of an elevator conductor was within the fifth class, bearing a relatively higher rate. The policy provided that if assured is injured after having changed his occupation to one more hazardous, or is injured while doing any act pertaining to any more hazardous occupation, the liability for any loss specified shall be such an amount as the premium paid by him will purchase at the rate fixed for the more hazardous occupation. Decedent, to get certain of his goods into a new location after the employes of the building had left for the day, himself started to operate the elevator. On the third trip the cable parted, and decedent received injuries, from which he died. *Held*,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the policy clause must in each instance be interpreted with reference to the particular occupation of the assured, and did not apply to a mere temporary or casual act, and it was error to charge, as a matter of law, that, assured having been injured while performing an act in a more hazardous occupation than that specified in the policy, his administrator could recover only the reduced indemnity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 879; Dec. Dig. § 339.*]

3. INSURANCE (§ 146*)—POLICY—CONSTRUCTION.

Where the language of a policy is susceptible of two or more constructions, the court will construe it most strongly against the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

In Error to the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Action by Benjamin Gottfredson, as administrator of the estate of Carrie B. Reading, against the German Commercial Accident Company. Judgment for plaintiff for less than the relief demanded, and he brings error. Reversed, and new trial granted.

This was an action to recover \$5,000 upon a policy of accident insurance. The policy was to continue for one year from February 7, 1907, and was issued by the Commercial Mutual Accident Company of Philadelphia in the name of Harvey J. Reading and for the benefit of Carrie Reading, his wife. It was kept alive by annual payments of premiums and renewals until February 7, 1910, and, under the last renewal, was in terms continued for the ensuing year; but meanwhile, February 7, 1909, all liability under the policy was assumed by the German Commercial Accident Company, defendant, which received the premiums and made the renewals for the last two years. Both of these companies were corporations organized under the laws of Pennsylvania and maintaining agencies in the city of Detroit, Mich. The present insurance was effected in that city, where Reading was living and engaged in business from the date of the policy until his death. The insured met with an accident June 1, 1910, and died within the next three days; his widow made and delivered proof of the death in July, but died in October; and thereupon Benjamin Gottfredson, plaintiff, was appointed and qualified as administrator of the estate of the beneficiary. The suit was brought in the circuit court of Wayne county, Mich., December 14, 1910, and was removed the following day to the court below, on the ground of diversity of citizenship. An amended petition was filed in April following, and under a plea of the general issue three defenses were noticed: (1) That there had been a breach of warranty as to the condition of health of the assured at the time of the last renewal; (2) that the accident was not the direct cause of the death, but was the result of a diseased condition of the heart; and (3) that recovery, if any, must be limited to \$1,000, because the assured was doing an act outside of the occupation in which he was insured. The verdict was against defendant as to its first and second defenses, and the court charged the jury, as matter of law, that recovery in any event must under the third defense be limited to \$1,000 and interest. The administrator prosecutes error. The parties are alluded to as they stood below.

J. W. Dohany, of Detroit, Mich., for plaintiff in error.

J. E. Moloney, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The controlling feature of the case is whether the limitation placed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

upon the amount of recovery involved merely a question of law for the court or also a question of fact for the jury. It was shown without objection and by undisputed testimony that defendant had grouped its risks into five classes, and fixed premiums and losses according to the risks attending the occupations of the persons insured. Reading's occupation belonged to the first class and bore an annual premium of \$25 and an indemnity of \$5,000, while the occupation of an elevator conductor was in the fifth class and bore a relatively higher, though undisclosed, premium and an indemnity of \$1,000. In addition to the language used in defining Reading's occupation, the fifteenth clause of the policy provided generally that, if an assured should be injured while doing an act "pertaining to any more hazardous occupation," the liability of the insurer should be fixed with reference to the more hazardous occupation. The trial court submitted to the jury the questions arising under the first and second defenses only, and, believing that merely a question of law was involved under the third defense, instructed the jury that it could not in any event find more than \$1,000 under this defense. If error was committed, it was in failing to submit to the jury also the question of fact arising under this defense. Among the representations of fact made by Reading in the application, and in terms warranted to be true at the date of the policy and its last renewal, were these:

"I am a member of the firm H. J. Reading Truck Co., * * * whose business is that of trucking. My occupation and duties are fully described as follows: Proprietor. No manual labor."

The evidence shows that Reading owned the business and conducted it under this firm name; and that the business was extensive—indeed, for a year prior to the accident it included transportation in Detroit for 2 railroads and 150 wholesale houses, and also the storage of general merchandise. A change in location of the offices and storage plant had been going on some two months, when, on the evening of the accident, some of the effects of the old offices were brought to the new place for storage. The evidence tends to show that three loads of such articles arrived at this place as early as 5 o'clock. The removal of two of the loads into the building was not completed until the usual closing hour of 5:30. When the men were ready to discharge the third load, it was discovered that the elevator conductor had gone for the day. Reading's attention was called to this, whereupon he undertook to operate the elevator. The work of removing the articles contained in the third load to and from the elevator, as far as they were so carried, was performed by laborers; Reading doing nothing but run the car. One trip was made with the elevator to the basement and another to a floor above, and the car in both instances was returned in safety; but when the third load reached the fifth floor the cable separated, the car fell, and Reading received the injuries from which he died.

It does not appear that Reading ever ran the elevator before; and the occasion for this act was the fact that the conductor left the building while the men were engaged in removing the articles. In view of the facts and circumstances of the case, was Reading's operation of the car merely a casual act and incident to the occupation in which he

was insured, or was the act to be ascribed to the occupation of the conductor of the elevator and Reading's indemnity reduced accordingly? Defendant's counsel say the act was "manual labor," performed in another and distinct occupation and more hazardous than the one described in the policy; and further that it was but one of a number of kindred acts Reading was accustomed to perform. It appears, for example, that he was in the habit of exercising superintendency over the business, over the change made in locations of the offices and storage plant—in a word, that he "bossed the operations of the business"—and, if we understand counsel, these acts are claimed to give color to the act which resulted in the insured's death. This does not, however, give effect to all the words that were used to define his occupation. He was engaged in the trucking business, and his "occupation" was described as "proprietor, no manual labor."

[1] The company's agent, who solicited and obtained the insurance, in substance testified that these were not the words of Reading, but that they were employed by the agent to describe Reading's occupation. To be sure, according to another portion of the application, Reading warranted these words "to be true and complete"; but aside from the rule that would require the policy to be interpreted strongly against the defendant, associating the words "trucking business" with the words "proprietor, no manual labor," and considering their apparent intent, it would seem that their natural and necessary meaning would include mere casual acts, even though the acts involve temporary manual labor. It must be kept in mind that these words were used to describe the occupation, the regular business, of the applicant. Occupation is a very comprehensive term. It compasses the incidental as well as the main requirements of one's vocation, calling, business. It is defined by lexicographers to be "that which occupies or engages the time and attention; the principal business of one's life; vocation; employment; calling; trade." And see *Everson v. General Accid., etc., Assur. Corp.*, 202 Mass. 169, 175, 88 N. E. 658; *Union Mutual Accident Ass'n v. Frohard*, 134 Ill. 228, 234, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664.

[2] It is not too much to say that the parties here possessed the common knowledge that is derived from observation and experience respecting the occasional and unexpected necessities which exact of men, whose occupations are not regarded as comprising manual labor, the doing of an act which in a literal sense may be called manual labor. It is hardly conceivable that the policy would ever have been written and received upon any other understanding.

These views are re-enforced and made plain, when the assured's method of conducting and supervising his business is considered. His secretary and treasurer testified without contradiction:

"He (Reading) usually went around the city and looked after teams to be loaded at different business houses, hurry them out, getting them unloaded, and looking after the shipping clerks, getting them to get a hustle and get the teams under way. Then he would be called upon to go to the various railroads to look after the general superintendency of getting the business moving."

And in going from place to place to do these things "He drove around with a horse and buggy." Had he precluded himself from driving the horse attached to his buggy? In the event of a driver of one of his trucks having become suddenly ill, would the policy have forbidden the assured to drive the truck to his place of business? What he did here was, in the absence of the conductor, temporarily to drive the elevator at his place of business.

The position of defendant's counsel comes at last to the claim that, in order to have rendered the act in question permissible, the words describing the occupation of the assured, instead of being "proprietor, no manual labor," should have been "proprietor, occasional manual labor"; and, in support of this, resort is had to the fifteenth clause of the policy, which provides:

"If the assured is injured after having changed his occupation to one classified by the company as more hazardous than that herein stated, or is injured while doing any act or thing pertaining to any more hazardous occupation, the liability for any loss specified shall be such an amount as the premium paid by him will purchase at the rate fixed by this company for such more hazardous occupation."

If we are at all right in what we have already said in respect of the words "proprietor, no manual labor," it is clear that counsel's suggested change of one of the words would have wrought no material change in the true meaning of the phrase; and the effect sought to be ascribed to the fifteenth clause would have failed for the same reason. However, independently of this, it must be observed that the fifteenth clause in terms applies to injuries received "while doing any act or thing pertaining to any more hazardous occupation." The fifteenth clause must in each instance be interpreted with reference to the particular occupation of an assured. We have seen that the occupation in question was that of proprietor of a large commercial trucking business, and that it necessarily embraced occasional physical activities. Admittedly the business comprised departments, and consequently occupations subordinate to the occupation of the proprietor. The company had classified occupations and assigned this assured to one of its classes; and now to construe the fifteenth clause so as to preclude the insured from doing an isolated act, such as the one here involved, would in effect be to prevent an assured from incurring such dangers as are essentially incident to the whole business comprised in his occupation. It might well be conceded that in such circumstances an employé in a particular department, say an insured bookkeeper, could not rightfully have operated the elevator even in an emergency; but it would by no means follow that the managing proprietor could not have done so. Counsel concede, and rightly, that this clause is not applicable to an act done outside of the business, as, for example, on a hunting excursion resulting in an accident (*Union Mutual Accident Ass'n v. Frohard*, *supra*; *Stone's Adm'r v. United States Casualty Co.*, 34 N. J. Law, 371, 373; *N. A. Life & Accident Ins. Co. v. Burroughs*, 69 Pa. 43, 53, 8 Am. Rep. 212; *Nat. Accident Society of City of New York v. Taylor*, 42 Ill. App. 97, 100, 102; *Taylor v. Illinois Commercial Men's Ass'n*, 84 Neb. 799, 802, 122 N. W. 41; *Johnson v. London Guarantee & Accident Co.*, 115 Mich. 86, 90, 72 N. W. 1115, 40 L. R. A. 440,

69 Am. St. Rep. 549; Hess v. Masonic Mut. Accident Ass'n, 112 Mich. 196, 199, 70 N. W. 460, 40 L. R. A. 444); but the contention is that, where the act done pertains to the business of the assured and to a more hazardous occupation therein, the indemnity must be reduced accordingly. We are not impressed with this difference. It does not amount to a valid distinction (see Standard Life & Accident Ins. Co. v. Fraser, 76 Fed. 705, 708, 709, 22 C. C. A. 499 [C. C. A. 9th Cir.], where the occupation described in the application was: "Proprietor of a bar and billiard room, not tending bar"; Neafie v. Man'f'rs' Accident Indemnity Co., 55 Hun, 111, 113, 8 N. Y. Supp. 202; Fox v. Masons' Fraternal Acc. Ass'n of America, 96 Wis. 390, 397, 71 N. W. 363; Hall v. American Masonic Accident Ass'n, 86 Wis. 518, 524, 57 N. W. 366).

[3] It results that unless the policy is open to the interpretation we have indicated, it is contradictory in itself; at least its language, when taken as a whole, is ambiguous in the sense that it is susceptible of two or more constructions; and it is settled that the rule of interpretation in respect of policies of this character is to "construe all language used to limit the liability of the company strongly against the company." Manufacturers Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 956, 7 C. C. A. 581, 22 L. R. A. 620 (C. C. A. 6th Cir.); Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 761, 762, 24 C. C. A. 305 (C. C. A. 6th Cir.); Accident Ins. Co. v. Crandal, 120 U. S. 527, 533, 7 Sup. Ct. 685, 30 L. Ed. 740; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308; Burkheiser v. Mutual Accid. Ass'n, 61 Fed. 816, 818, 10 C. C. A. 94, 26 L. R. A. 112 (C. C. A. 7th Cir.) and citations.

However, we think the evidence gives rise to questions of fact, which should have been submitted under appropriate instructions to the jury. There was error in assuming, as matter of law, that the mere performance of the act of temporarily running the elevator justified the practical assignment of the assured to a more hazardous occupation and the reduction of his indemnity accordingly. The facts and circumstances under which the act was brought about would naturally characterize it, and so open the case to legitimate inference as to the existence or not, for example, of an unforeseen necessity or emergency under which the elevator was operated. Indeed, the ultimate issue of fact might fairly be resolved under an inquiry whether the operation of the elevator by the assured was casual or habitual. If the former, the indemnity should be allowed as it was written; if the latter, the indemnity should be limited to that of a conductor of an elevator. The usual course is to submit such questions to the jury. Standard Life & Acc. Ins. Co. v. Fraser, supra, 76 Fed. 709, 22 C. C. A. 499 (C. C. A. 9th Cir.); Eggenberger v. Guarantee Mut. Accident Ass'n (C. C.) 41 Fed. 172, 173; Fox v. Masons' Fraternal Accident Association of America, supra, 96 Wis. 396, 71 N. W. 363; Everson v. General Accid., etc., Assur. Corp., supra, 202 Mass. 174, 175, 88 N. E. 658; Simmons v. Western Travelers' Accident Ass'n, 79 Neb. 20, 26, 112 N. W. 365; Taylor v. Illinois Commercial Men's Ass'n, supra, 84 Neb. 805, 122 N. W. 41.

The judgment must be reversed, with costs, and a new trial awarded.

EATON v. SHIAWASSEE COUNTY.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1914.)

No. 2503.

1. COUNTIES (§ 153*)—BORROWED MONEY—ILLEGALITY—LIABILITY.

A county may be compelled to return money loaned when the purpose of the loan was lawful and the creation of the debt not prohibited by law, though the procedure was illegal, but is not liable if it never received the benefit of the money, or the loan itself was in excess of the county's authority to create a debt.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 214; Dec. Dig. § 153.*]

2. COUNTIES (§ 113*)—FISCAL MANAGEMENT—BORROWING MONEY—AUTHORITY—LIABILITY—QUASI CONTRACT.

Const. Mich. art. 10, § 6, provides that the powers of a county board of supervisors shall be those prescribed by law, and article 10, § 9 authorizes them to borrow or raise by tax a thousand dollars for constructing public buildings, etc., but no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of the county voting thereon. *Held*, that where the voters authorized a board to borrow and issue county bonds for \$75,000 to construct a courthouse, but efforts to get the voters to authorize a further loan failed, the board was without power to borrow \$30,000 more to be used in the construction of the courthouse without a vote of the electors, and hence the lender could not recover against the county as for money received.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

3. COUNTIES (§ 113*)—BOARD OF SUPERVISORS—BORROWING MONEY—CURRENT EXPENSES.

The board was also without constitutional power to borrow the money for current expenses, and hence the lender could not recover on the theory that the money borrowed was used for that purpose.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

4. COURTS (§ 366*)—FEDERAL COURTS—STATE CONSTITUTION—CONSTRUCTION—STATE DECISIONS.

Where there had never been any settled construction by any court, state or federal, in Michigan of the Michigan Constitution with reference to powers of boards of supervisors to borrow money when plaintiff made certain loans to defendant county, the federal court would follow a decision of the Michigan Supreme Court on the subject, though rendered subsequent to the loan.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Hugh McCurdy Eaton against the County of Shiawassee. Judgment for defendant, and plaintiff brings error. Affirmed.

In 1903 the county of Shiawassee, Mich., needed a new courthouse, and the voters of the county, at an election duly held, authorized the board of super-

visors to issue county bonds and borrow \$75,000 for that purpose. This was done, the contract let, and the courthouse built; the construction running over a period of two years. By reason of additions and changes authorized by the board, but not by the voters, the total cost was more than \$125,000. In 1904 and 1905 the board borrowed from Hugh McCurdy \$30,000. Certainly a part, and perhaps all, of this loan was directly or indirectly devoted to meeting the deficiency in the courthouse transaction. Such parts, if any, of the loan as were not so used were employed to pay current county expenses. Efforts to induce the voters to authorize a further bond issue to meet this and other loans having failed, and the county being either unwilling or unable to make payment, Mr. McCurdy's administrator brought this suit against the county. It was not based upon the contract, but was an action for the recovery of plaintiff's money had and received by defendant and used for its benefit. The three \$10,000 notes which had been given to Mr. McCurdy were exhibited with the declaration, not as contracts, but as evidence of the amounts received. Upon the trial, a verdict for defendant was directed, and the administrator brings this writ of error.

The Michigan Constitution of 1850, in force until 1909, provided as follows: "Each organized county shall be a body corporate, with such powers and immunities as shall be established by law." Article 10, § 1.

"A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law." Article 10, § 6.

"The board of supervisors of any county may borrow or raise by tax \$1,000 for constructing or repairing public buildings, highways or bridges; but no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon." Article 10, § 9.

The Michigan statutes regarding counties and boards of supervisors, after imposing upon the counties the duty of providing suitable courthouses and keeping the same in repair, confer upon boards of supervisors the following powers, among others:

"Sixth. To cause to be erected the necessary buildings for poorhouses, jails, clerks' offices, and other county buildings, and to prescribe the time and manner of erecting the same."

"Seventh. To borrow or raise by tax upon such county any sums of money necessary for any of the purposes mentioned in this act: Provided, that no greater sum than one thousand dollars shall be borrowed or raised by tax in any one year, for the purpose of constructing or repairing public buildings, highways, or bridges, unless authorized by a majority of the electors of such county voting therefor as hereinafter provided." Section 2484, C. L. Mich. 1897.

B. B. Selling, of Detroit, Mich., for plaintiff in error.

B. P. Hicks, of Durand, Mich., and J. H. Collins, of Corunna, Mich., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and HOL-LISTER, District Judge.

DENISON, Circuit Judge. 1. If it is assumed that the entire \$30,000 borrowed is sufficiently traced to an investment in the courthouse building, we meet the question whether it is possible for the lender to recover his money upon the theory of an implied liability or quasi contract or equitable liability, or whatever it may be called, when he cannot recover upon the contract which he actually made, because that contract was forbidden by law. Plaintiff concedes there could be no recovery on the contract. His position is that where a municipal corporation has received plaintiff's money and retains it or its benefits,

and had inherent power to borrow the money from plaintiff, but only failed in some statutory step, the municipality will not be permitted to keep the benefit and refuse to pay the money. This proposition is essentially based on the difference between cases where the borrowing was ultra vires because the corporation was without power, and cases where it was ultra vires because the active agents of the corporation were without power.

[1] In support of a right to recover in this case, plaintiff relies on Supreme Court decisions, of which *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, is the leading case, and on the decision of this court in *Chelsea Bank v. Ironwood*, 130 Fed. 410, 412, 66 C. C. A. 230, 232. In the opinion in the latter case, by Judge Richards, the principle of distinction is very clearly put. He says:

"This is a case for the application of the settled rule that a city may be compelled to pay back money which it has received for bonds illegally issued, when the purpose of the loan was lawful, and the creation of the debt not prohibited by law (*Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Logan County Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Aldrich v. Chemical National Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611), and does not come within the exception exempting a city from liability where it has never received the benefit of the money, or the loan itself was in excess of its authority to create a debt (*Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044). This court has applied both the rule and the exception—the former in the cases of *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61, and *Andrews v. Youngstown*, 86 Fed. 585, 596, 30 C. C. A. 293, and the latter in the case of *Travelers' Ins. Co. v. Johnson City*, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123. In the last case mentioned there is a careful review of the authorities up to that time."

[2] Further study of the very numerous decisions now reviewed in the briefs of counsel suggests no occasion to modify this statement; and it only remains to determine whether the present case is within the rule or within the exception as stated by Judge Richards. We may properly assume, also, for the purposes of this opinion, that plaintiff's suggested distinction is a correct one, and that we may not say that "the loan itself was one in excess of its authority to create a debt," unless the lack of authority pertains to the inherent powers of the municipal corporation itself, as distinguished from the delegated powers of its officers and agents. This distinction will reconcile some of the seeming conflict in the cases; some, it will not; but, unless it exists and is properly here applicable, plaintiff confessedly has no case. Plaintiff says that since the county had the right to make this loan, if authorized by vote, the lack of a vote presents a defect of the second class; the power existed, but a prescribed step in its execution has been omitted. This theory will not reach such a constitutional limitation as that herein involved. The county of Shiwasssee is a municipal corporation—a corporate entity. It is erroneous to say that this corporation has the power to make such a loan if only it proceeds in the right

way, viz., by vote of the people. The electors are a body of individuals distinct from the corporation.¹ The county, as an entity, has no power to compel a favorable vote of the people. The obtaining by the corporation of the right to such borrowing rests upon the discretion—even upon the caprice—of another body, the electors. Until that approval has been given, the county is as much without power as if the electors had no right to confer it. This view of the real source of power seems to us clearly to meet the position upon which alone plaintiff's case might otherwise perhaps stand. To accept the contrary view is to say that because a municipality may, on application, be granted additional, but now nonexistent, power, it shall now be deemed to have that power, though it has not applied and though its application, if made, might have been refused. It is clear to us that if plaintiff may recover indirectly, by an action for money had and received, money which the plaintiff has loaned in the face of such a constitutional provision, the substantial force of the prohibition is destroyed. Whether the money has been honestly expended for the real benefit of the county cannot be controlling, as the present case illustrates. The electors decided that the county should have and should become indebted for a \$75,000 courthouse only. The board of supervisors thought that the county ought to have and ought to borrow therefor \$125,000. If good faith and actual honest expenditures make the criterion, the control which the Constitution reserves to the voters is destroyed. We must conclude that this indebtedness "was in excess of [the county's] authority to create a debt," and that the action, as one for money received and expended on the courthouse, cannot be maintained.

So far as there is herein superficial conflict with the county's moral duty to repay money which it has borrowed and expended for its benefit, that conflict may disappear when we remember that neither the county officers, for the time being, nor the courts have the right to say that it was really for the county's benefit to expend an extra \$50,000 on this courthouse. The electors thought it was not, and they may have been right; at any rate, they had the arbitrary discretion to decide.

In the cases relied upon by plaintiff, we find nothing (with one exception) inconsistent with the view that such a constitutional prohibition cannot be thus evaded—as, for example, in *Louisiana v. Wood*, supra, the result expressly depended upon the existing power of the city to make the loan; the trouble was with the details of the bond issue. "The city could lawfully borrow. The objection goes only to the way it was done." 102 U. S. 298, 26 L. Ed. 153. A review and discussion of these cases in detail seems unnecessary. We find no one of them in which a money recovery was permitted, where borrowing had been affirmatively forbidden by Constitution or statute. The exception is *Bank v. Goodhue*, 120 Minn. 362, 139 N. W. 599, 43 L. R. A. (N. S.) 84. This seems, in the respect now under consideration, to be parallel to the present case, and the moral obligation was allowed to prevail over the legal prohibition; but we must consider this decision

¹ See *Stanly Co. v. Coler*, 190 U. S. 437, 446, 23 Sup. Ct. 811, 47 L. Ed. 1126.

as in conflict with *Litchfield v. Ballou*, in which Mr. Justice Miller stated the controlling principle in these words (114 U. S. at page 193, 5 Sup. Ct. at page 822, 29 L. Ed. 132): "If this prohibition is worth anything it is as effectual against the implied as the express promise." We cannot follow the distinction sought to be made between that implied promise to which these words refer and that duty to repay money received for defendant's benefit upon which the instant action is based.

We hardly need to say that we are not now considering a case of rescission or of liability in analogy to the theory of rescission, where the municipality is shown either to have in its possession plaintiff's money unlawfully received and identifiable in fact or by due presumption or to have the proceeds of that money—traceable and separable. See *Litchfield v. Ballou*, supra, 114 U. S. 195, 5 Sup. Ct. 820, 29 L. Ed. 132; *Lee v. Board of Commissioners of Monroe County* (C. C. 6) 114 Fed. 744, 52 C. C. A. 376.

We do not overlook the difference between the right to contract indebtedness and the right to issue negotiable securities, which was pointed out by the Supreme Court in *Claiborne Co. v. Brooks*, 111 U. S. 400, 406, 4 Sup. Ct. 489, 28 L. Ed. 470, and recognized by this court in *Ohio Co. v. Baird*, 181 Fed. 49, 53, 104 C. C. A. 63. No such distinction is here involved. The prohibition here is against either borrowing money or raising by tax and as these two are the only possible methods by which an indebtedness which is contracted (beyond the amount of the funds on hand) can ever be discharged, forbidding both of them necessarily forbids the contracting of the debt. If there were any doubt as to the necessity of this implication, it would be removed by the decision of the Michigan Supreme Court hereafter mentioned; but this seems to us the clear result of the language employed. Perhaps it may be said the contracting of the debt is not so wholly forbidden as to make its subsequent voluntary payment unlawful, if the county comes to have funds subject to such use; but we are, at present, concerned with the power to contract a collectible or enforceable debt; and we think, as to that, the prohibition is absolute.

[3] 2. If we adopt plaintiff's alternative theory that the money should be treated as having been borrowed to pay running expenses, then we are met with a decision of the Supreme Court of Michigan in *McCurdy v. Shiawassee County*, 154 Mich. 550, 118 N. W. 625. This case involved another loan made at about the same period, of money to meet current expenses, and the Supreme Court of Michigan held that the county and the board were wholly without constitutional power to borrow the money, and that the county was not liable either on the theory of implied promise or on the theory of equitable liability for money had and received. Since this decision determines the extent and character of the power of one of the political subdivisions of Michigan, and so is a construction of the Michigan Constitution, it is authoritative in this court. *Claiborne Co. v. Brooks*, supra. It is true this decision was made after the date of the loans here involved, but that is not controlling. The case is not one where there has been a settled rule in state or federal court regarding the construction of state Constitution or laws, where rights have been acquired in re-

liance on such construction, and where, therefore, the Supreme Court refuses to follow a later state decision inconsistent with that rule. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

[4] In the present case, when Mr. McCurdy made these loans, there had never been any settled construction by the federal courts in Michigan or by any court of the Michigan Constitution in this respect. The question was at best one unsettled in Michigan, and one untouched by the federal court. There is an entire absence of that analogy to equitable estoppel, which alone would justify us in declaring that, as against plaintiff's rights, the Michigan Constitution does not mean what the Michigan Supreme Court says it means.

Although there was power to borrow in each year \$1,000 for construction and \$500 for repairs of courthouses and without any popular vote, no claim based on that power is now presented.

It follows that the judgment below was right; and it is affirmed, with costs.

UNION PAC. R. CO. v. BRERETON.†

(Circuit Court of Appeals, Eighth Circuit. November 5, 1914.)

No. 4065.

1. MASTER AND SERVANT (§ 89*)—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT.

Where plaintiff, a yard foreman at defendant's shop grounds, was employed to do clerical work, but for 32 years had been moving things out of the way to prevent damage to defendant's property when material was being moved, etc., and was injured during the movement of certain engine tires by a failure of those holding the tire to keep it upright until plaintiff had moved a truck from where it was intended to drop the tire, plaintiff was within the scope of his employment in moving the truck, and was therefore entitled to the degree of care applicable to a servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 153-156; Dec. Dig. § 89.*]

2. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT—QUESTION FOR COURT AND JURY.

Where plaintiff's evidence was all the evidence introduced on the subject of the scope of his authority, and this showed that he was acting within the scope of his authority when injured, the court did not err in omitting to submit such question to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.*]

3. MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—RAILROADS—"REPAIR WORK"—FELLOW SERVANT RULE—STATUTES.

Where it was the custom of defendant railroad company to take engine tires to its O. shops, there dress and ship them to other shops, to be placed on engines, and plaintiff, a yard foreman at the O. shops, was injured while handling tires for such purposes, he was engaged in "repair work," within Rev. St. Neb. 1913, § 6053, providing that the fellow-servant rule shall not apply to railroad employes engaged in repair work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*]

Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—38

† Rehearing denied January 11, 1915.

In Error to the District Court of the United States for the District of Nebraska; Wm. H. Munger, Judge.

Action by George T. Brereton against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alfred G. Ellick, of Omaha, Neb. (Edson Rich and B. W. Scandrett, both of Omaha, Neb., on the brief), for plaintiff in error.

James E. Rait, of Omaha, Neb. (John J. Sullivan, of Omaha, Neb., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The Union Pacific Railroad Company, hereafter called the defendant, kept at Omaha in its shop grounds a yard at which were kept all sorts of material for repairing and building engines and cars at the shops all over the system. In charge of all this material and its disposition was Otto Nelson, who was called general foreman of the store department. George T. Brereton, hereafter called the plaintiff, was employed under him as yard foreman. There were other subordinate foremen, among them Mr. Chris P. Peterson. In the yard were several platforms, adjacent to railroad tracks, on which were stored castings and the like. On October 17, 1911, the plaintiff was instructed to have two engine tires taken to the store for shipment. These tires weighed from 900 to 1,000 pounds. They had been brought to Omaha and there dressed down to the size required, and were then to be taken to some other shop further west to be put upon engines. The plaintiff testified that the general foreman told him to have two of these tires brought over to the store; that he went out and saw Chris Peterson, and told him what the general foreman wanted, and he said he had to go over to the car shop, and for the plaintiff to go and see Patterson, and tell him to bring his men with him and take the tires over to the store. Patterson and his men went and got a truck, and then went to the platform where the tires were, and where the plaintiff had preceded them. There the plaintiff pointed out the tires desired.

It appears that, these being very heavy, it was the custom to wheel them back from the edge of the platform far enough so that they would fall on the platform and then push them off onto the truck. When the men had rolled one of the tires as far back as they could, in view of the other material on the platform, they decided that there was not room enough to drop it on the platform, and Patterson suggested that if they dropped the tire it would fall on the truck and crush it. The plaintiff said: "Hold it, Pat, until I get it out of the way for you." He then took hold of the truck and commenced to back away from the platform. Down to this point there is no substantial conflict in the testimony. The plaintiff testifies that, without waiting for any notice from him, but when they presumptively thought he had the truck far enough away, they let go of the tire and it struck the edge of the platform, and then went on over, striking the truck,

causing the handle to strike him in the chest and fly up, striking him in the face and knocking him over an embankment and into a cinder pit, several feet below the surface.

[1] The first point made is that the plaintiff was not injured in the line of his duty and that he was injured while beyond the scope of his agency. It is, of course, conceded that, if he voluntarily was doing some work not in the scope of his employment, while so doing he cannot recover, unless a trespasser or licensee could recover. The company did not specially plead this in defense, and offered no evidence as to the scope of the plaintiff's employment, but relied entirely upon his testimony given on cross-examination. The defendant in its brief says:

"He was employed to do clerical work, such as checking, weighing, and keeping track of the material of a part of the storage yards, and was not employed to do manual labor of any kind, nor of the kind he was doing at time of his injury."

The question turns, as stated, wholly upon the plaintiff's own evidence. In his testimony is the following:

"Q. But your duties did not consist of doing any of the physical work with reference to the loading of those tires upon any truck of any kind, as I understand it? A. No. Q. And if you took part in any of the loading, that was a voluntary duty on your part, was it? A. I didn't have to take any part in loading them. I merely showed them the tires and they did the loading. Of course, there were times, if I could assist by moving anything out of the way, why I would do that, or to prevent any damage to the company by anything getting broken, if I should move it out of the way, why I did so. Q. And that day you took part in the loading or unloading of this tire? A. No, sir. Q. Didn't you take hold of this truck for the purpose of pulling it out of the way? A. Yes; but they held the tire."

He had been working for the company 32 years in the same capacity. If during all these years he had been moving things out of the way, and preventing damage to the company by anything getting broken, then that must be regarded as voluntarily accepted and acquiesced in by the company, as within the scope of his agency. There was no one present to move the truck, except the plaintiff. All the other employes were engaged in handling the tire. It is not to be presumed that, if a block or other obstacle had to be moved, it was the plaintiff's duty not to move it, but to leave four employes holding the tire and go in search of some one to move the obstacle. But it was not the fact that he was moving the truck that caused his injury. He was properly present at the scene in pursuance of his manifest duties, and if some one else had stood at one side of the handle drawing it back, and the plaintiff had stood there in discharge of his admitted duties, he would have been hurt in the same way he was.

We have examined all the cases cited upon the subject, and a multitude of others, but none of them seem to have involved facts like these. In many of the cases where the rule has been applied, the employe has voluntarily gone from an occupation where he was employed to some other duty, and was injured by reason of the fact.

[2] The defendant, after contending that this point was raised by its motion at the close of all the evidence that the jury be directed

to return a verdict for the defendant, then insists that, if this motion should not have been sustained upon that ground, the following instruction should have been given to the jury:

"You are instructed that, if you find that it was no part of Brereton's duties to help move the truck in the manner in which he was moving same at the time of his injury, then your verdict must be for the defendant, Union Pacific Railroad Company."

The defendant in argument says:

"While it is not evident how it could be considered that the evidence was contradictory upon the question of the plaintiff's duties, yet, if it could be so considered, the court should have submitted it to the jury."

As before stated, there is no evidence at all upon this subject, except by the plaintiff, and no such conflict is found in it as to have required the submission of this instruction to the jury.

[3] It is next insisted that the plaintiff was injured through the negligence of fellow servants. It is not claimed that he was engaged in interstate commerce, and his right of recovery was therefore governed by the Nebraska laws. Section 6053 of the Revised Statutes of Nebraska provides that:

"Every railway company operating a railway engine, car or train in the state of Nebraska shall be held to any of its employes, who at the time of injury are engaged in construction or repair work or in the use and operation of any engine, car or train for such company, or, in the case of his death, to his personal representatives, for the benefit of his widow and children, if any, if none, then to his parents, if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employes, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, ways or works."

This statute substantially abolishes the rule of fellow servants, if the plaintiff was at the time of the injury engaged in construction or repair work. It may be assumed that engines, when newly equipped, have the tires on the wheels; but if it was the practice of the company to take tires to the Omaha shops, and there dress them down and ship them out to other shops, to be put upon engines, any one engaged in handling tires for such purposes was engaged in repair work. *Swoboda v. Union Pacific R. Co.*, 87 Neb. 207, 127 N. W. 215, 138 Am. St. Rep. 483; *Metz v. C., B. & Q. Ry. Co.*, 88 Neb. 459, 129 N. W. 994.

It follows that the doctrine as to fellow servants does not apply, and the judgment of the District Court must be and is affirmed.

JOHN HANCOCK MUT. LIFE INS. CO. v. McCLURE

(Circuit Court of Appeals, Third Circuit. December 29, 1914.)

No. 1886.

INSURANCE (§ 136*)—LIFE POLICIES—DELIVERY.

An application for certain life policies provided that any policy that might be issued thereon should take effect only in case it should be delivered and the first premium or installment thereof actually paid during the lifetime of insured, which delivery and payment should constitute an acceptance of the policy and of all of its conditions. Policies, having been issued, were sent to the soliciting agent for delivery; but, insured at that time having contracted pneumonia, the agent, in accordance with standing instructions, did not deliver the policies, informing insured's wife that he would wait, and ascertain the result of his illness, and, insured having died within a few days, the policies were never actually delivered, nor the premium paid. *Held*, that the policies never took effect as contracts of insurance binding the insurer, and this without reference to whether the agent had undertaken to deliver the policies at once, on his receipt thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; William H. Hunt, Judge.

Action by Elizabeth Gertrude McClure against the John Hancock Mutual Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed, and venire de novo awarded.

John M. Freeman, of Pittsburgh, Pa., for plaintiff in error.

W. Clyde Grubbs, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This suit was brought by Elizabeth McClure of Pittsburgh, Pa., the widow of Harry McClure, and the beneficiary under two policies of life insurance, of \$2,000 and \$3,000, respectively. The policies were applied for by her husband, and were executed by the John Hancock Mutual Life Insurance Company at the home office in Boston and transmitted to the company's general agent in Pittsburgh. They were never delivered to the deceased, who died a few days after they reached Pittsburgh, and the plaintiff's position is that the company was bound to deliver, and therefore could not affect her right by refusing. The facts are as follows:

About the middle of March, 1912, Arthur Stroyd, who was merely a soliciting agent of the company, without authority to make contracts, approached the deceased on the subject of insuring his life. After some preliminary talk the agent called at the house of the deceased on March 18th or 19th with various papers relating to the matter, among them an application and a sample policy. These were discussed and explained, and the sample policy was left with the deceased. There is some dispute concerning the conversation that took place, but there is no doubt that the interview resulted in the signing of the application.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It asks for two ordinary life policies in favor of the plaintiff, in \$2,000 and \$3,000, and contains the agreement:

"That any policy which may be issued hereon shall take effect only in case it shall be delivered and the first premium or installment thereof actually paid during my lifetime, and that such delivery and payment shall constitute an acceptance of the policy and of all its conditions."

The sample policy contained the following provisions, inter alia:

"In consideration of the representations in the application hereof, which is copied hereon and hereby made a part hereof, and of the premium," etc., "the John Hancock Mutual Life Insurance Company hereby insures the life of Harry A. McClure, * * * subject to the conditions and provisions hereinafter recited," etc.

"When in Effect. This policy shall not take effect until the first premium or regular installment as herein provided shall be actually paid during the lifetime of the insured.

"Policy and Application Entire Contract. This policy and the application herefor constitute the entire contract between the parties hereto. * * *

"Alteration and Indorsement. No modification or alteration hereof or indorsement hereon will be valid unless made by the president, a vice president, the secretary, or an assistant secretary, and no other person is authorized on behalf of the company to make, alter, or discharge this contract or to waive forfeiture. Agents are not authorized to modify or waive any of the terms and conditions of this policy, nor to extend the time for payment of premiums or other moneys due to the company, or to bind the company by making any promise or by accepting any representation or information not contained in the application for this policy."

The application is dated March 19th, the medical examination took place on March 20th, and the policies were executed in Boston on March 23d. They were mailed immediately to the general agent in Pittsburgh, and arrived there on the morning of March 25th. During the same day they were handed to Mr. Stroyd for the purpose of delivery and collection of the premium. Meanwhile, however, the deceased had taken sick, and had consulted a physician on March 24th for what then appeared to be a severe cold. From that time forward he was continuously at home, and nearly all the time in bed, under medical treatment, until his death from pneumonia on March 31st. On March 25th, therefore, when Mr. Stroyd called up the deceased's home on the telephone and asked to see him, he was sick, and was so reported by the plaintiff in reply to the call. Thereupon the agent said that he would wait a few days before delivering the policies, in order to see what the result of the sickness might be. The plaintiff rejoined, telling the agent to deliver the policies at once and get the premium; but this was not done, and the plaintiff took no further steps until the end of August, when the present suit was brought. Stroyd was acting under the following standing instructions from the company:

"Delivery of Policies. 'Delivery' of a policy means the act of placing it in the insured's hands in exchange for the initial premium.

"(a) Policies may be delivered within thirty-one days from the date of issue without the requirement of a health certificate, provided the agent sees the insured and finds him to be in good health at the time. If there be any reason to suspect that the insured is not in good health, the policy must be returned to the company, with a statement of the facts."

There was some dispute about what happened when the application was signed. The plaintiff testified that the agent agreed to deliver

the policies on March 22d; but, even if he undertook to do so, he was obviously promising what he could not be sure of performing, for (as the parties knew) the medical examination had to take place, and the application had to go from Pittsburgh to the home office in Boston for consideration and action there, so that the time of its return to Pittsburgh was necessarily uncertain. But, in any event, such an undertaking by the agent was immaterial. The important point is that no part of the premium was paid when the application was signed, and that nothing was to be paid until the application was accepted and the policies were delivered. The contract was not to be complete until delivery and payment, or their equivalent, should take place.

And this brings us to a decisive point in the case. The contract being incomplete until delivery of the policies and payment of the premium, we think it clear that upon the uncontradicted evidence the plaintiff had no right to recover. The following quotation from the charge—the italics being ours—will show the theory upon which the case was put to the jury:

"Now, I believe it to be true that Mr. Stroyd had the authority to deliver those policies under such an arrangement as she testifies was entered into, provided, of course, it was that he was to deliver the policies and receive the money, and that the insurance would be good, *without relation to any condition of health that the assured might have been found in at the time of the delivery of the policies.* But whether he entered into that arrangement is the vital point in the case. Mr. Stroyd says that there was no absolute agreement whatsoever to deliver; that he told Mr. McClure that he would get the policies, and that he endeavored to have him enter into a binder contract—a binder contract being where there is an arrangement made whereunder the contract becomes effective the moment the binder is signed and the company at the home office accepts the risk.

"Now in this case the home office did, so far as devolves upon it, apparently accept the risk. They returned the policies to Pittsburgh, there to be entrusted to the agents, to be delivered apparently pursuant to any arrangement that the agents had entered into with the assured. So we come right back to the vital question, gentlemen, what was the arrangement? If Mr. Stroyd is correct, Mr. McClure positively declined to agree to take any insurance, and said he would not bind himself to take any, but would wait until the policies came, and then determine whether he wanted any insurance or not. And, of course, if that was the arrangement, then there was no valid contract upon which this lady can recover. But if it was as she says, that Mr. Stroyd made a promise of delivery upon payment of the premium when the policies were received, and that he notified her that he had them, and she said, 'The money is here; bring them over'—if he had agreed to do that, and she offered the money over the telephone, she can recover."

In our opinion, the foregoing paragraph proceeds upon an erroneous theory. The company was not bound to deliver the policies after the applicant had contracted the illness referred to, for this fact materially changed the condition of the subject to be insured. The application asked for insurance upon the life of a man declared to be in good health, and it was this proposal that the company accepted. As the applicant had ceased to be in good health, he was no longer able to furnish the insurable subject proposed; and, as the contract by its very terms was not to be complete until the policies should be delivered and the premium paid, it seems plain to us that the company was not bound to perform, at least until the original situation should be restored. Certainly (in the absence of an express agreement so to do) a fire in-

insurance company could not be called upon to issue a policy upon a house already attacked or dangerously threatened by fire, although the company might have been willing to accept an application that had been made before the danger arose. The present situation seems to be closely analogous. We think ample authority for the conclusion we have reached will be found in the following cases: *Giddings v. Insurance Co.*, 102 U. S. 111, 26 L. Ed. 92; *Insurance Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Insurance Co. v. McElroy* (C. C. A. 8th Cir.) 83 Fed. 631, 28 C. C. A. 365; *Kohen v. Life Ass'n* (C. C.) 28 Fed. 705; *Misselhorn v. Life Ass'n* (C. C.) 30 Fed. 545; *Ray v. Insurance Co.*, 126 N. C. 166, 35 S. E. 246; *McCully v. Insurance Co.*, 18 W. Va. 782; *Schwartz v. Insurance Co.*, 18 Minn. 448 (Gil. 404). The jury should have been instructed to find for the defendant.

The judgment is reversed, and a new venire is awarded.

ELIOT NAT. BANK v. GILL.

(Circuit Court of Appeals, First Circuit. December 21, 1914.)

No. 1058.

1. INTERNAL REVENUE (§ 9*)—CORPORATION TAXES—DEDUCTION—"TAXES IMPOSED."

Corporation Tax Law Aug. 5, 1909, c. 6, § 38, par. 2, 36 Stat. 112 (Comp. St. 1913, § 6301), imposes a tax on the net income of corporations, but authorizes deduction from the gross amount of income of all sums paid by the corporation within the year for taxes imposed under the authority of the United States or of any state. *Held*, that the term "taxes imposed" must be construed to mean taxes imposed on a corporation which it was compelled to pay out of its own assets, and did not include taxes imposed on the corporation's capital stock against the stockholders, though the corporation is required to pay the taxes in the first instance, being authorized to charge the amount so paid against the stock.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

2. INTERNAL REVENUE (§ 25*) — CORPORATIONS — EXCISE TAX — RETURN — "FALSE"—COMMISSIONERS' POWER TO AMEND.

Corporation Tax Law Aug. 5, 1909, c. 6, § 38, par. 5, 36 Stat. 112 (Comp. St. 1913, § 6304), providing for the collection of a corporation excise tax, authorizes the Commissioner of Internal Revenue, in case a return is false or fraudulent, to amend the same at any time within three years, and assess and collect the correct amount of the tax. *Held*, that the word "false," as so used, did not include only returns fraudulently made, or with intent to defraud, but should be construed as including all erroneous or incorrect returns, and to authorize the correction of an incorrect return within the three-year period, though made under a mistake of law, and though the tax under the return had been paid.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 72, 73; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, First and Second Series, False.]

In Error to the District Court of the United States for the District of Massachusetts; Geo. H. Bingham, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the Eliot National Bank against James D. Gill, Internal Revenue Collector. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 210 Fed. 933.

Edwin H. Abbot, Jr., of Boston, Mass., for plaintiff in error.

James S. Allen, Jr., of Boston, Mass. (Asa P. French, of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

DODGE, District Judge. The facts in this case were agreed, and are fully stated in the opinion below (210 Fed. 933).

[1] The plaintiff bank, in making its returns of taxable net income required by the Corporation Tax Law, was entitled by the provisions of that act to deduct from its gross income "all sums paid by it within the year for taxes imposed under the authority * * * of any state." It deducted, in each of the three years here in question, the taxes assessed upon the shares of its capital stock under the authority of provisions of the Massachusetts statutes then in force, and thereafter paid by it to the city of Boston, as required by the provisions referred to. If it had the right under the Corporation Tax Law to make these deductions, it is now entitled to recover them from the defendant collector. The Commissioner of Internal Revenue disallowed them, and assessed them to the bank upon a return by him of their amount. The additional assessment thus made has been paid under protest.

The Massachusetts statutes provided, in substance, that all shares of stock in banks within the state should be assessed to the owner, whether resident or nonresident, in the municipality wherein the bank was located; that persons appearing from the books at a stated time to be owners should be deemed the owners of the shares; that every bank should pay the tax so assessed, or be liable for it, with 12 per cent. interest; that the shares should be subject to the tax paid by the bank; and that the bank should have a lien for such payment upon the shares and all the shareholders' rights and property in the corporate property. There were other provisions requiring the taxes thus collected from the bank to be credited by the state tax commissioner to the respective municipalities wherein the shareholders resided, and making any claims to exemption in respect thereof by a shareholder, if valid, recoverable from the municipality to which he belonged.

The Corporation Tax Law permits the deduction from gross income of certain payments of other kinds made within the year by the corporation. All these, however, as they are described in that statute, are payments by the corporation in diminution of its corporate income as such, being payments to discharge liabilities incurred solely on its own account, and not to discharge liabilities for which others would be ultimately responsible. But the payment which the laws of Massachusetts require a bank to make as above is of taxes plainly not assessed upon it or its property; and besides giving it a lien for the amount paid upon the shares in respect of which the taxes are assessed, the

provisions of the Massachusetts laws are such as result in making the respective shareholders liable to the bank for the amount of taxes paid in respect of their shares. We agree with the District Court that such payments made by the bank in compliance with the laws of Massachusetts would have been recoverable from the respective shareholders, because made for their benefit, upon the contract necessarily implied from the circumstances of the payments. The above lien and right of recovery distinguish such payments in their nature from the other payments which the Corporation Tax Law allows to be deducted in ascertaining taxable net income. They also, in connection with the provisions in the state laws for assessment to the shareholders, for credit to the municipalities whereof they are residents, and for settlement of any questions of exemption with the respective municipalities, make it impossible to say that the tax is one imposed upon the bank. Though payment of such taxes is a duty imposed upon the bank, it cannot be said that the taxes are imposed either upon it or its property. The taxes are imposed upon the shareholders and their property, and the payment is by the bank only as their representative.

We fully agree with the District Court that the Corporation Tax Law, in permitting the deduction of "taxes imposed" from the gross income of a corporation, must be understood to mean taxes imposed upon the corporation. We cannot so interpret the language as to make it include taxes imposed upon the shareholders as above, even though the corporation is required to make the payment on their behalf.

[2] It is contended on the bank's behalf that, even if the deductions made were not authorized by the Corporation Tax Law, the Commissioner was without power on March 1, 1913, to make, as he did, the additional assessments for the amount of those deductions which it has paid under protest and now seeks to recover back from the collector.

There is no claim that the deductions made by the bank in its returns for 1909, 1910, and 1911 were dishonestly made. That they were honest is undisputed, although, as we hold, they were incorrect. They were not fraudulent, though false in the sense of being incorrect; nor were they false in any other sense. They have not been so treated by the Commissioner, who, in making his additional assessments, did not add the penalties directed by the act in case of returns fraudulently false.

The Commissioner's discovery of the facts regarding these deductions was made within three years after March 1, 1910, the year wherein the first of the three returns, afterward found erroneous, namely, that for 1909, was due, and his assessment of the amount of the deductions was made March 1, 1913. In the case of "false or fraudulent" returns, the fifth subdivision of section 38 of the act gives the Commissioner power "upon the discovery thereof, at any time within three years after said return is due," to make an additional assessment. We agree with the District Court that this language does not prevent the making of the assessment after, if the discovery has been within, the three years, and that in any case March 1, 1913, was within the three years.

The question whether the Commissioner ever had power to make additional assessments in such a case as this depends upon the question whether "false or fraudulent," in that clause of the fifth subdivision which authorizes the assessment of additional taxes upon discovery within three years after the original return, is to be taken as meaning only such returns as are fraudulently false, or as including also such returns as are false only in the sense of being incorrect.

It is true that "false or fraudulent" is used but four times in all the Corporation Tax Law, and may be taken on each of the other three occasions to mean "false and fraudulent." The first instance is in the fifth subdivision of section 38, where the language is:

"And in case of any return made with false or fraudulent intent, he [the Commissioner] shall add one hundred per centum of such tax."

The next instance is later in the same subdivision, and occurs in the clause with which we are immediately concerned, providing that assessments are to be made and the several corporations notified on or before June 1st in each successive year, and payment made on or before June 30th "except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns," in which cases the Commissioner is to make the additional assessment upon discovery within three years.

The remaining two instances are both in the eighth subdivision, which provides a penalty if any corporation subject to the act shall refuse or neglect to make a timely return, "or shall make a false or fraudulent return," and also makes guilty of a punishable misdemeanor any person authorized to make, render, or sign any return, who makes "any false or fraudulent return, with intent to defeat or evade the assessment required," etc.

Where, as in the first of the above instances, "false or fraudulent" is used to describe an intent, it is clear that a false intent must necessarily be a fraudulent intent. Where, as in the last two instances, "false or fraudulent" occurs in provisions imposing a penalty or creating an offense, "false" must mean willfully and intentionally false, because of the presumption against a construction which would subject an honest mistake to a penalty, and still more against a construction which would punish such a mistake as a misdemeanor. But, within the clause whose meaning is to be determined, there is nothing which necessarily requires "false or fraudulent" to mean exactly what it means as used in the different connections above considered. The purpose of this clause is only to prescribe the Commissioner's powers and duties when he discovers a return which needs correction. If "false" by itself often means fraudulently false, it is also often used to mean no more than "incorrect," and the cases in which circumstances indicate the former meaning as the proper one cannot be said to have any decisive predominance over those wherein the other is plainly required.

In the fourth subdivision, and in so much of the fifth as precedes the words now in question, the Commissioner's duties are prescribed in the cases of "incorrect" returns, failure to make any returns, and returns made with "false or fraudulent intent." The provisions im-

mediately follow which fix the time for assessments upon returns generally. They are to be made on or before the 1st and paid on or before the 30th of the June following their date, except in the cases of refusal or neglect and in the cases of "false or fraudulent" returns. These may be corrected within three years. Unless returns merely "incorrect" are here included within the class here called "false or fraudulent," the Commissioner is left without any power to correct them after having once assessed upon them. The meaning here must be determined according to the intent of the act, so far as it can be gathered from all the provisions made regarding the same subject-matter. In view of all the provisions of the fourth and fifth subdivisions taken together, we find it more reasonable to believe "false" used in the clause under construction in a sense more inclusive than that which the context would permit in the other places where it appears in the act with "fraudulent," and in a sense broad enough to include returns honestly incorrect, than to regard the provisions as intended to leave the Commissioner wholly without power to make any corrections in the latter class of cases. We are unable to believe that the elaborate provisions of the fourth subdivision for investigation, and a new return with a new assessment, or an amended return, in all cases of error, whether false, fraudulent, or merely incorrect, can have been intended to lead to no efficient result in the case of a return merely "incorrect," like this, as would be the case if the position of the plaintiff in error were correct. If there could be no reassessment under the circumstances of this case within the prescribed period of three years, there could be none whatever, and the provisions above referred to would have to be regarded as wholly ineffective in such cases, unless availed of by the Commissioner before he had made the assessments he is required to make on or before June 1st. We agree with the District Court that, had this been the result intended, it would have been more unmistakably expressed.

The judgment of the District Court is therefore affirmed, and the defendant in error recovers his costs of appeal.

STEPANOVICH v. PITTSBURGH & BALTIMORE COAL CO.

(Circuit Court of Appeals, Third Circuit. January 8, 1915.)

No. 1889, Oct. Term, 1914.

1. MASTER AND SERVANT (§ 265*)—ACTIONS FOR INJURIES—EVIDENCE—RES IPSA LOQUITUR.

In an employé's action for injuries, claimed to have been caused by the employer's failure to provide a reasonably safe brake for use on a coal-pit car which he was required to handle, the happening of the accident was not proof of negligence on the part of the employer, and the burden was on the employé to prove that the employer's negligence caused the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

Application of doctrine of res ipsa loquitur in actions for injuries to servant, see note to Carnegie Steel Co. v. Byers, 82 C. C. A. 121.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 278*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an employé's action for injuries, claimed to have been due to the employer's failure to provide a reasonably safe brake on a coal-pit car which the employé was required to handle and to its failure to provide a proper car inspection system, evidence *held* insufficient to support a recovery in that it failed to show how the accident happened, that there was any defect in the brake, or, if so, that it could have been discovered by inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 278*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an employé's action for injuries, evidence as to the employer's failure to inspect was not sufficient proof of negligence, in the absence of any showing that there was any defect in an appliance, since the purpose of an inspection is to discover defects and the failure to make an inspection merely charges the employer with notice and knowledge of what due inspection would have shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Wm. H. Hunt, Judge.

Action by John Stepanovich, by his father and next friend, Marko Stepanovich, against the Pittsburgh & Baltimore Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Geo. C. Bradshaw, of Pittsburgh, Pa., for plaintiff in error.

Charles B. Prichard, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Marko Stepanovich, a subject of the King of Hungary, brought suit in his own behalf and as father and next friend of his minor son John, against the Pittsburgh & Baltimore Coal Company, a corporation of Pennsylvania. The action was for damages inflicted on said John through the alleged negligence of the coal company. On the trial defendant asked for binding instructions, on the ground that there was no proof of negligence on its part. The court refused the request and submitted the case to the jury. It found a verdict for the plaintiff. On entry of judgment thereon defendant sued out this writ.

[1] The liability of the defendant to the plaintiff here declared on is that the coal company failed to furnish young Stepanovich, its employé, with a reasonably safe brake for him to use on the coal-pit car which injured him, and that the coal company had no proper car inspection system in the mine. In a case like this, an accident is not proof of an employer's negligence, but the employé must go further and prove the employer's negligence caused the accident. The principle on which this case must be determined is laid down by the Supreme Court of the United States in *Looney v. Metropolitan Co.*, 200 U. S. 486, 26 Sup. Ct. 305, 50 L. Ed. 564, where that court said:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect, or some omission of duty in regard to it, must be shown."

The happening of the accident to young Stepanovich was not therefore proof of negligence on the part of the coal company, and it is our duty to examine the evidence and see whether it shows any substantive proof of negligence, or what is the same thing, lack of due care on the part of the coal company in regard to this brake, whether it had any knowledge of such brake being defective, or whether it has omitted some duty in regard to it.

[2, 3] To make out the required proof of the coal company's negligence, the plaintiff showed that on March 11, 1910, his son was employed as a switch boy by the coal company, and that it was his duty to receive, from a passing motor train, a certain pit car loaded with slate and place it on the switch which he attended. This, he says, his son attempted to do, but by reason of the company furnishing an improper brake he was thrown under the car and injured. At this point it will be noted that there is no charge that the brake on the car was not originally of proper construction, but the charge is that the coal company failed to keep it in proper order. The car and brake were of the usual kind. The former was about three feet high and some four feet across the top. Pivoted at a central point at the bottom of its front end was an iron brake handle. This handle extended above the top of the car, so that, while one was going alongside of the car, he could push or pull the brake handle toward or away from him as far as an encircling iron rod or keeper, fastened on the end of the car, would allow the brake handle to travel. Inside this rod, and fastened to the car end, was a notched iron bar, the teeth of which engaged and held the handle as the brake engaged the wheels. What happened is best told in young Stepanovich's own testimony, which was:

"Q. When you attempted to stop this car this morning, what happened? A. I went straight with the brake. Q. Did the brake stop? A. It didn't stop; it went straight on. Q. What happened to you? A. When I put my weight on it I went straight with the brake. Q. How far did the brake go? A. It went clean on the other end of this thing. Q. How much farther than ordinarily? A. If it would be in good order, it might catch pretty close to the center. When it is wore out, the brake or anything, it goes clean over. Q. That is what happened that morning? A. Yes, sir. Q. What effect did that have on you? A. The car didn't stop when I was putting that brake on, as I went straight with it. Q. Where did you go? A. It threw me right in under."

This comprises the entire testimony of the plaintiff as to the accident. It shows the brake handle did not catch in the notches and went to the full limit of the keeper, and that by reason thereof the boy fell under the car. As to what was wrong with the brake, there was no proof. Whether a brake shoe had come off or been broken; whether a connecting rod had parted; whether the brake handle had given way; or whether whatever had happened was some patent thing which inspection would have shown, or was some latent defect which no inspection or inspections would have disclosed—all are matters left to

conjecture instead of being proven by evidence. Measuring this proof by the standards the Supreme Court has set—and very wisely so, as reflection will show—it is clear to us that the plaintiff has not proved any negligence on the part of this coal company, and therefore a wrong was done the defendant when a jury was allowed to subject it to liability for an accident, for the happening of which no fault or negligence on its part was shown. There being such lack of proof as to the cause of the accident, it is manifest that to say the company's negligence is established by lack of inspection is to lose sight of the purpose of inspection. The making of an inspection is to discover defects and thus avoid accidents. The failure to make inspection serves to charge defendant with notice and knowledge of what due inspection would have shown. But where the proof fails to show any defect which inspection would have disclosed, it is clear that no basis of defect is proved to have existed with which to charge the defendant with notice by reason of noninspection. We do not mean to say that cases of other appliances, and other circumstances, may not arise in which noninspection for a long time may be evidence of negligence, but the present is not such a case.

From what has thus been said it is clear we are warranted in deciding this case on the lack of sufficient testimony as above outlined. In view, however, of the long and unexplained delay in bringing this suit, the grave contradictions of the boy's testimony by two disinterested witnesses, and the affirmative proof of the prior condition of this brake by the uncontradicted proof of another, we deem it proper to refer at length to the proofs in this case to show that the application of the rule of law as to the burden of proof, as established by the Supreme Court, works no injustice. Turning, first, to the uncontradicted proof given by the defendant, we note that Chester Hackison was then working for the company. He has since left its employ, and his testimony is not contradicted. He assembled this particular draft of cars just before, and identified the slate car after, the accident. He testified that in making up the train he took it down a grade; that he used the brake on the slate car; that it was then good; that it "spragged" (that is, stopped absolutely) both car wheels. This was from 5 to 10 minutes before the accident. Hackison's testimony is not contradicted and shows that if the brake was out of order 10 minutes later it must have been by reason of something that happened in the meantime. We have accepted, as we are bound to do, since the jury must have so found, that the accident happened as young Stepanovich's account above quoted shows, and have decided the case on that basis, but the testimony of Hackison as to the brake being in working order this short time before the accident gives weighty credence to the account of the accident given by two other witnesses. One of these was George Ragovich, who was the rear brakeman on the train. He testified that as the train approached the switch he pulled the coupling that held the slate car and applied the slate car brake and slowed the car. He then said:

"As soon as I cut the wagon off and put the brake on, the boy jumped on the front of the slate wagon and it knocked him down"

He also says the boy was not trying to set the brake. Ragovich was a disinterested witness; no fault of his was charged as causing the accident; he was, when he gave his testimony, no longer employed by the coal company. This version of the accident was the one given to John P. McElhaney, the mine foreman, by young Stepanovich himself. McElhaney testified that immediately after the accident and while the physician was dressing his wound—

"he told me that when George set the brake on the car, he went to jump on the front end of the car, and he missed his foot by slipping on the bumper, and the car knocked him down and it ran up on his leg."

It will also be noted, as corroborative of this version of the accident, that no complaint of the brake's condition was then made by the injured boy, nor was the brake examined by any one after the accident, a step which would naturally have been taken by some one, had the blame of the accident been then attributed to it. Passing by these proofs, however, and limiting ourselves to that adduced by the plaintiff, we are of opinion such latter proof failed to show negligence on the part of the defendant. The judgment below is therefore reversed, and the cause remanded for further action.

UNITED STATES v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 70.

1. APPEAL AND ERROR (§ 999*)—VERDICT—REVIEW.

Where issues were fully reviewed, and the contentions of both parties carefully submitted to the jury by a charge to which no exception was taken by the government, the verdict was conclusive as to the facts on the government's writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.*]

2. MASTER AND SERVANT (§ 17*)—RAILROADS—HOURS OF SERVICE LAW—CASUALTY—QUESTION FOR JURY.

Where, in an action against an interstate carrier for violation of the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677-8680]), it claimed immunity under section 3, on the ground that the delay was the result of unavoidable casualty, but the evidence, in relation to important elements to be considered in determining whether the casualty existed, depended entirely on testimony of the carrier's employes, the government was entitled to have the question submitted to a jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

Hours of service of employes, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the Western District of New York.

The complaint embodies 15 causes of action against defendant for alleged violation of the act of Congress limiting hours of service on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

railroad, approved March, 1907. 34 Stat. 1415. The 15 causes of action are concerned with the crews, 5 men in each, of 3 trains.

W. Palmer, Asst. U. S. Atty.

Evan Hollister, of Buffalo, N. Y., for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. There is no dispute that each of the 15 men were in fact kept on duty beyond the 16 hours specified in the act. The only provision of the act which need be referred to is that part of the third section which reads as follows:

"That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided further, that the provisions of the act shall not apply to the crews of wrecking or relief trains."

As to the last 5 causes of action verdict was directed for the defendant. As to the other 10 causes of action, the cause was sent to the jury, which brought in a verdict for defendant. These 10 will be first considered. They involve the overtime of the crews of two trains, Nos. 1201 and 787. The facts are these:

Some time between 5 and 5:45 p. m. a train was derailed 20 miles west of Elmira and 125 miles from Buffalo at the crossing of the main line of the Delaware, Lackawanna & Western (two tracks) and the Rochester Division of the Erie (one track). Seven cars, wheat laden, were derailed, five lay across both tracks of the Delaware, Lackawanna & Western, and one across the Erie track. The wheat was spilled. There being no steam derrick at Elmira, one was borrowed from New York Central Railroad at Corning. It was slower in arriving than the Central people expected, but was at the wreck 8:50 p. m. Chief Dispatcher O'Day was in Buffalo; the two trains were in Elmira bound west. 1201 was a coal train; 787 was only an engine and caboose intended to take the place of similar parts of coal train 753, abandoned and lying on the Corning siding.

O'Day went on duty at 8 p. m. and was informed of existing conditions. At the wreck they made progress after the arrival of the derrick, and at 11:50 p. m. the trainmaster there in charge phoned to O'Day that it looked as if they would have the east-bound track open about 1 a. m., when they could begin weaving east and west the accumulated trains. O'Day then called the crew of 1201 for duty at 2:45 a. m. and the crew of 787 for 3:45 a. m. At the wreck they did get the east-bound track clear about 1 a. m. and began rebuilding the track. About 3 a. m. the derrick, which was at the time moving on this cleared east-bound track to reach a car blocking the Erie track, was itself derailed. Ordinarily it would take 20 to 25 minutes to rerail it, but the road had been so torn up and was so soft that it was not rerailed until 5:50 a. m., and it took it half an hour's more work on the east-bound track handling the car on the Erie track before the east-bound track was open for regular trains. O'Day held the two trains in

Elmira till after the actual rerailment—one leaving at 5:40 a. m.; the other at 6:53 a. m.

There was abundant time for both to make the run through to destination within the 16 hours of the statute, even though there might be some further delay in weaving through east-bound trains on the single track then opened. But the chapter of accidents was not yet ended. At 8 a. m. west-bound train 1212 blew out a cylinder head when 4 miles east of the wreck. This complicated and delayed the movements of trains both ways. Train 787 was also further delayed an hour and a half by the breaking of the knuckle of a drawhead. There was testimony that there was a flaw in the broken knuckle—four or five large sand holes where it broke—which could not be seen from the outside and could not have been discovered by inspection. There was also testimony by an inspector that he had inspected draft gearing, trucks, and couplers the afternoon before the train started. Another inspector testified to inspection of the engine of 1212, which blew out a cylinder head, the same afternoon. The testimony as to the movements of trains and the effect upon them of those several accidents was very full and detailed.

The contention of the government is that the trial judge should have held as a matter of law that defendant had not shown that the conceded overtime was within the language of the proviso of the statute. The cases cited by him do not sustain this contention. In *United States v. Kansas City Southern Ry.*, 202 Fed. 828, 121 C. C. A. 136, the trouble was caused by leaky flues and a defective shaker rod; it did not appear when the leaking began, and there were two reports (prior to the accident) that the shaker rod was defective and should be repaired. The trial judge held that the facts brought the case within the proviso and directed a verdict for the defendant. The Court of Appeals held that this was error and that the—

"case should have been submitted to the jury, under appropriate instructions, to determine whether defendant had taken sufficient precaution to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by exercise of the necessary diligence and foresight."

In *United States v. Kansas City Southern Ry.* (D. C.) 189 Fed. 471, a verdict had been directed in favor of defendant on the ground (*inter alia*) that delay was caused by a hot box. Motion for a new trial was granted; the judge—not the one who tried the cause—stating that, although science had not yet been able to discover the means of preventing hot boxes entirely, careful examination before starting and at stopping points would reduce such accidents to a minimum. The report does not show whether there was evidence as to such examinations. The case certainly is not authority for the proposition that, when there is evidence of such examination, the question whether the particular accident was or was not unavoidable should not be sent to the jury.

[1] The case at bar was submitted to the jury under a charge which construed the section, stated the issues, reviewed the testimony and the contentions of both sides, and carefully instructed the jury as to what questions they were to decide. The government took no exception to

the charge; it submitted a few requests to charge, which were all complied with. Under these circumstances the verdict is conclusive as to the facts in controversy, and no error is pointed out.

[2] The facts in reference to train 547, as to which the trial judge directed a verdict for defendant are these:

The crew was called for duty at 8:05 a. m. of the morning after the derailment above described; the blowing out of the cylinder head of No. 1212 (above referred to) induced the holding of 547 at Elmira, so as not to increase congestion at the point of blockade. It left Elmira at 10:43, having then a 5-hour running margin to get to Buffalo. There were various delays by reason of waiting for and passing other trains, and finally when it arrived at Genesee Bridge it found the bridge blocked by the breakdown of No. 787, resulting from the break in the knuckle of the drawhead above referred to. This caused a loss of an hour and a half, so that on arrival at Buffalo it was 1 hour and 35 minutes over the 16 hours of the statute.

It will be seen from this statement that elements important to be taken into consideration in determining whether or not casualty was within the terms of the proviso of section 3, *supra*, are the nature of the defect in the knuckle and the examination or inspections had, before the accidents, of knuckle and cylinder head. This testimony came from defendant's employes, and we think the government was entitled to have this cause of action sent to the jury under appropriate instructions.

As to the last five causes of action, judgment is reversed, and new trial ordered. As to the other ten causes of action, the judgment is affirmed.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 78.

MASTER AND SERVANT (§ 13*)—RAILROADS—OPERATION—HOURS OF SERVICE LAW—CASUALTY.

Where a hot box constituted a sufficient excuse for delay of a train, compelling employes to work beyond the term of service prescribed by the Hours of Service Law, the delaying of the train necessitated by waiting for other trains to pass, necessarily resulting from the hot box, should be computed in figuring the time of excused delay.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

Hours of service of employes, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Western District of New York; in favor of defendant in error, which was defendant below. The judgment was entered on the verdict of a jury.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. Palmer, Asst. U. S. Atty.

L. F. Gilbert, of Buffalo, N. Y., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The action is brought to recover penalties for alleged violation of the Hours of Service Act in overworking six employes engaged in moving interstate traffic between Dresden and Corning. It involves the question presented in *United States v. Delaware, Lackawanna & Western Railroad*, 218 Fed. 608, 134 C. C. A. 366, opinion in which case is handed down to-day, viz., whether upon the facts proved defendant is brought within the proviso clauses of the act.

The overtime as to engineer and fireman was 1 hour and 40 minutes; as to conductor and brakeman, 1 hour and 35 minutes. There was evidence that the movement of the train was delayed by a hot box, and that, while so delayed, other trains ran into a block while it was on a siding, thereby causing further delay. The government contends that a hot box is not such a casualty as will come within the proviso of the act, and that the jury should have been instructed to bring in a verdict for the plaintiff.

The court instructed the jury as follows:

"Nothing has been discovered or invented to prevent or overcome the heating of journals in connection with the driving arrangement of a locomotive. I think we may almost take judicial notice of the fact that hot boxes are more or less frequent, and, when they occur, the train must stop, and means must be taken to lubricate the packing, and there is delay in allowing the box or receptacle in which the journal is contained to cool."

The jury was further instructed that:

It "was not enough for the defendant to show that the delay was caused * * * by a hot box or journal, but it must be shown to your satisfaction that the cause of delay could not have been foreseen or prevented by the exercise of such care and diligence as the condition and situation required. The defendant must have had on hand and ready for use proper and sufficient material for packing—must show that there was proper inspection before the train went on its run, or during the course of its run; that reasonable care was exercised to prevent delays to the employes of the character specified in the statute. * * * Evidence was given in detail to show just what was done regarding inspection and the prevention of any delay, and it remains for you to determine as a question of fact whether reasonable care was taken to anticipate such an occurrence."

The charge was not excepted to; but exception was reserved to an instruction, given at defendant's request, that if the delays in waiting for trains to pass were the necessary results of a hot driving box, and the hot box was an excuse sufficient to bring the defendant within the exceptions of the statute, then the delays in passing trains might be computed in figuring the time. It is pointed out that the time actually spent in cooling and repacking the heated box, one hour and a half, is insufficient to account for all the overtime. There is five to ten minutes additional. But it clearly appeared that, by the time the train in question had been put in proper condition to move on out of the siding where the box had been cooled and repacked, other trains had run

into the block into which this siding opened, and progress could not be made until they cleared it. We find no error in giving the cause to the jury under these instructions.

Judgment affirmed.

JEFFRIES v. STUART.

(Circuit Court of Appeals, Third Circuit. December 4, 1914.)

No. 1871.

1. MASTER AND SERVANT (§§ 286, 289*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action by an employé of a building contractor, injured by the tipping of planks resting on beams to form a platform and extending to the wall of the building, to which they appeared to be, but were not, fastened, evidence *held* to make questions for the jury as to defendant's negligence and plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.*]

2. MASTER AND SERVANT (§§ 101, 102, 231*)—LIABILITY FOR INJURIES—DUTY TO FURNISH SAFE PLACE.

It is an employer's duty to take all reasonable and proper care to provide as safe a place for the employé's work as the character of the work permits; and the employé may assume, in the absence of anything to the contrary, that the employer has fulfilled his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192, 675-677; Dec. Dig. §§ 101, 102, 231.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Hunt, Judge.

Action by Frederick Jeffries against James L. Stuart. Judgment for plaintiff, and defendant brings error. Affirmed.

Frederic W. Miller and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for plaintiff in error.

J. Thomas Hoffman and Stone & Stone, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In the court below Frederick Jeffries, the plaintiff, a citizen of Ohio, brought suit against James L. Stuart, a citizen of Pennsylvania, to recover damages for personal injuries sustained by him while working for the defendant, and caused, as he alleged, by the defendant's negligence. The case was tried, and resulted in a verdict for plaintiff. On entry of judgment thereon, defendant sued out this writ. The single assignment of error raises the only question brought here for review, namely, whether the trial judge erred in denying defendant's request that:

"Under all the pleadings and evidence in this case, the verdict must be for the defendant."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The proofs tend to show defendant was contractor for the erection of a ten-story, steel-framed building in Pittsburgh. The plaintiff, who had no experience in structural iron working, entered defendant's employ 16 days before the accident and was set to work as an assistant to his brother Joseph, who was an experienced structural iron worker. On the day of the accident the steel framing of the 10 stories had been substantially completed, but none of the floors had been covered above the fifth. The elevator shafts were in course of construction, and plaintiff, under the directions of his brother, was engaged on the third floor in drilling holes and fastening steel brackets in a brick wall of such shafts. Joseph Jeffries, who had this work in charge, finding he needed some angle irons, and in such event having had orders to get them on whatever floor they were found, directed plaintiff to go after and bring back some such irons. The plaintiff, finding none on the third, fourth, and fifth, went to the sixth, floor, which was not covered. On that floor he found four angle irons, weighing about 50 pounds each, lying on planks laid across the elevator shaft, which the proofs showed was used as a place on which "to run material, etc." In getting the angle irons therefrom the plaintiff was thrown to the foot of the shaft by the tipping of the planks.

The testimony tended to show that the planks covering this elevator shaft extended across two beams outside the elevator shaft, and then across the shaft itself to a wall at the rear, and presented the appearance of such rear end being fastened to and supported by the wall. For some two days there had been a large number of planks piled upon the forward end of these platform planks. They served to weight down the elevator planks and prevent their rear ends from tipping. These weighting-down planks had been removed to an upper floor just before Jeffries' accident, and when they were taken away the rear end of the elevator planks, which had no support from the wall, were of course liable to tip when any one stepped upon them. The testimony of the plaintiff was:

"Q. What instructions, if any, were issued to you, about getting angle iron? Who told you to go and get some angle iron, if anybody? A. Joe, my brother. Q. You were working as a helper for him? A. Yes, sir. Q. And he told you to go and get it? A. Yes, sir. Q. Did he tell you where to go to get it? A. No. He didn't know just where it was, and he told me to go up and look for it. Q. On some of the floors above? A. Yes, sir. Q. And pursuant to that you went up? A. Yes, sir. Q. Did you look on the fourth floor for any? A. Yes, sir. Q. And you didn't find any? A. Didn't find any, and I went up to the fifth. Q. What did you do there? A. I didn't find any, and I then went on up to the sixth and looked around. Q. Did you find any on the fifth? A. No, sir. Q. Then you went on up to the sixth? A. Yes, sir. Q. Was there any up there? A. Yes, sir. Q. With respect to the old wall of the building, where was this angle iron on the sixth floor lying? A. Over next the old wall. Q. Where, with respect to where you saw this angle iron, were the elevator shafts? A. Right in under. Q. When you got on the sixth floor, you saw the angle iron, did you? A. Yes, sir. Q. On what was the angle iron lying, if anything? A. It was lying on these plank. Q. On the plank? A. Yes, sir. Q. Next where were the plank? A. Next the old wall. Q. Do you remember how much of an area immediately surrounding where you saw this angle iron, of the steel work, was covered by the planks? A. It was about 16 feet square. Q. Had the other planking been

removed; that is, the only planking you saw there? A. That is the only plank I saw. Q. Prior to this day that you went up to the sixth floor for this angle iron, how many times had you ever been on the sixth floor? A. That was my first trip up. Q. How did you go up to the sixth floor? A. A ladder. Q. You climbed a ladder? A. Yes. Q. A ladder from the third to the fourth, and fourth to the fifth, and fifth to the sixth? A. Yes, sir. Q. On what did you walk from the place you landed on the sixth floor, at the top of this ladder, to where these planking were? A. Walked on the beams. Q. When you got to the place where the planking was, tell us what you did to look over the planking to see their condition. A. Well, I looked at it, and it looked safe to me, so I stepped out on it until I got the angles, and she just tipped up, and I went down. Q. On what were the planking resting? A. They were not resting on anything that I know of. Q. You mean the end on which you stepped; but what was the other end resting on? A. On the beams. Q. Did you notice whether the planking touched two beams, or just one? A. Two beams. Q. And then ran out toward this wall? A. Yes, sir. Q. What did you do about looking around to see if it was fastened to the wall—the planks? A. It just looked to be safe to me. Q. Did it look to you or not as if they were fastened to the wall? A. They looked as if they were fastened to the wall. * * * Q. Tell us with respect to these I-beams where you first stepped on the plank. Tell us where you first stepped on the planks. A. About middleways. Q. Can you describe that a little closer with respect to the two I-beams on which the planks were resting? A. I don't understand what you mean. Q. As I understand you, the planks were resting one end on an I-beam, then rested on another I-beam, and then reached over to this wall. A. Yes, sir. Q. Now I want you to tell the judge and the jury where you first stepped, whether or not it was between the two I-beams, or between the I-beam and the wall? A. Between the I-beam and the wall. Q. Where was the angle iron? A. It was laying right at the last I-beam. Q. Where was the angle iron with respect to the wall and the I-beams? A. About middleways. Q. Was it between the I-beam and the wall, or between the two I-beams? A. Between the I-beam and the wall. Q. About how far from the I-beam? A. Probably three feet. Q. And when you stepped out on these planks what happened? A. She just went down. Just as I went to pick up the angle iron, she just went down through. Q. How many of them went down, do you know? A. Planks? Q. Yes. A. I don't know. Q. Do you know whether there was more than one? A. There was more than two of them."

Under these proofs, the court would have been in error had it said as a matter of law the plaintiff was not entitled to recover. Under the pleadings and proofs, the right of the plaintiff to recover was a question for the jury, not the court, to determine.

[2] Of the duty of an employer to take all reasonable and proper care to provide as safe a place for the employé's work as the character of the work permits, there can be no question; and the employé's right to assume, in the absence of anything to the contrary, that the employer has fulfilled his duty, is equally plain. In view of these things, was it the exercise of due care, when the defendant removed the planks which held the platform in place, to permit the protruding planks to stand unsupported at their rear ends? But not only were they left unsupported, but the leaving of such heavy weights as these angle irons was not only reason for supposing that such support existed, but the irons themselves might well invite men who needed them to go on the platform to get them. When, therefore, the plaintiff, in pursuance of his duty, went to the sixth floor to get the angle irons, it was a question for the jury to decide whether the defendant had taken all reasonable care for the safety of the employé, and, if not, whether the plaintiff had

been guilty of contributory negligence in failing to take due care for his own safety.

The court below was therefore justified in refusing to take the case from the jury, and the judgment based on such verdict should be affirmed.

BULL et al. v. INSURANCE CO. OF NORTH AMERICA.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 62.

1. INSURANCE (§ 478*)—MARINE INSURANCE—EXCEPTION OF PARTICULAR AVERAGE LESS THAN STATED PER CENT.—AMOUNT OF LOSS.

Under a policy of insurance on the hull of a vessel by which the insurer contracted to pay loss from the perils insured against if amounting to 3 per cent. of the insured value, where the rudder of the vessel was broken and repaired, the owner is not entitled to add to the cost of repairs, to make up the required 3 per cent. of value, an arbitrary sum for superintending the repairs, which was done by a salaried employé, when there is no evidence as to the amount of his salary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230-1238; Dec. Dig. § 478.*]

2. INSURANCE (§ 478*)—MARINE INSURANCE—EXCEPTION OF PARTICULAR AVERAGE LESS THAN STATED PER CENT.—AMOUNT OF LOSS.

A policy of insurance on a vessel provided that the insurer should pay any loss from the perils insured against if amounting to 3 per cent. of the insured value. The ship's rudder was injured and repaired by the owner. Full plates covering most or all of the rudder should have been used, but could not be obtained at once, and to avoid the delay, which was not insured against, the owner used smaller plates which, while making the rudder efficient, somewhat depreciated the value of the vessel. The cost of the repairs as made did not equal 3 per cent. of the insured value. *Held*, that the liability of the insurer was limited to the cost of proper repairs, and there being no evidence to show that such cost would have equaled the required 3 per cent., the owner was not entitled to add the estimated depreciation in the value of the vessel to the cost of the repairs as made to bring the loss within the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230-1238; Dec. Dig. § 478.*]

Appeal from the District Court of the United States for the Southern District of New York.

The following is the opinion of the District Court by Hough, District Judge:

Respondent insured libelants' steamer Dorothy by a policy in which the hull was valued at \$72,534, and it was agreed to pay loss by perils insured against "if amounting to three per cent.," or \$2,176.02.

The Dorothy's rudder received injury, it was repaired, and the sole question presented is whether the libelants' loss amounts to \$2,176.02.

"Loss" means that which has been wasted. Its signification is perhaps best tested by considering it as opposed to "gain."

When, however, loss is to be translated into dollars and cents, and the process of so doing has been matter of litigation for centuries, custom and precedent introduce rules that must be observed, however plain mere word definition seems.

The cost of replacing that which has been wasted cannot always be the measure of loss under an insurance policy, for on the one hand the actual

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cost may have been unnecessary or extravagant, and on the other it may be impossible to replace or wholly repair that which has been lost.

Therefore both the amount of loss, and the reasonable cost of replacement, are properly questions of fact, to be proven in part by opinion evidence, or testimony as to custom—which is at bottom matter of opinion. The burden of proof is on the assured.

What gives rise to litigation here is that the amount of money actually expended by libelants on the rudder cannot be claimed on their own evidence to amount to \$2,176.02, wherefore they add \$300 for permanent depreciation, and sue accordingly.

The facts are that it was undoubtedly desirable to repair the rudder with large plates covering most if not all its surface; but such plates were not in stock, much delay would have resulted if repairs had halted while they were being made, time was valuable, and not insured. Consequently libelants, with the approbation of Lloyds' surveyor, put on small plates, thereby increasing rivets, shortening the life of the rebuilt rudder, and affecting the sale price of the Dorothy by a sum variously estimated at from \$300 to \$800.

It is not found necessary to discuss or decide whether such a proceeding as this, voluntary, and unnecessary, can be said to amount to that permanent depreciation, for which recovery can be had, under such cases as *Giles v. Eagle Ins. Co.*, 2 Metc. (Mass.) 140. Let it be assumed that some basis for recovery exists, yet it remains true that the measure of damages is not the lessening of sale price, but what it would have cost to make thorough repairs when the partial or imperfect job was done. This case is not one of inability to repair or replace, but of a voluntarily imperfect piece of work; it bears no resemblance to that hogging or deformation of hull, which is present in all the decisions relating to "permanent depreciation."

Applying these principles, libelants cannot claim more for actual payments than their own witness Mr. Congdon declared to be justified, viz.:

Towage	\$ 30 00
Repair bill.....	1,946 98
Superintending repairs.....	82 00
Telegrams by owners in connection with repairs.....	20 00
Total	<u>\$2,079 98</u>

This witness did not, and could not, testify as to what was paid; he only stated the items proper in kind. It was still incumbent on libelants to show that their loss included what they claim.

I can find in the evidence nothing to show that \$20 was expended in telegrams relating to repairs, and experience leads me to think the amount excessive.

It is in my judgment shown that \$70 of the superintendence fee is mere bookkeeping. Mr. Graham did superintend, and if he had been specially employed for this job his reasonable charge would be collectable; but if the Dorothy had not been injured libelants would have paid Mr. Graham just the same, he being in their regular employ. Consequently, what they would have paid, at all events, cannot have been lost by the Dorothy's injury.

Libelants' loss therefore, as expressed by payments made and proven, is no more than \$1,988.98, or \$187.04 less than the agreed upon 3 per cent.

The final inquiry, therefore, is how much more would have been the cost of putting on large plates, when the rudder was repaired with small ones?

Mr. Graham is the only man who, from personal observation, testifies on this point. His statements are largely guesswork, but it is plain that there is no evidence showing that the additional cost would have been as much as \$187.04.

It follows that libelants on their own evidence and their own legal theory have not shown a loss amounting to \$2,176.02.

Label dismissed, with costs.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel. The action

was brought to recover on a policy of marine insurance on the steamship Dorothy against underwriters on the hull. The claim is under the clause of the policy, which provides for "particular average payable on each valuation separately, or on the whole, if amounting to three per cent.," etc.

W. U. Taylor, of New York City, for appellants.

D. R. Englar, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The only question in the case is whether the loss amounts to the 3 per cent. stipulated in the policy; such 3 per cent. is \$2,176.02. The claim presented is for:

Repair damage	\$1,946 98
Towage	30 00
Superintending repairs	82 00
Telegrams	20 00
Surveys	30 00
Protest charges	6 00
Adjuster's charges	64 00
	<hr/>
	\$2,178 98

[1] The last three items, however, are a proper charge against underwriters only if the loss amounts to 3 per cent.; they may not be availed of to increase the loss to 3 per cent. This reduces the claim to \$2,078.98. The item for superintending repairs includes \$70 paid for services of the insured's own salaried employé. Judge Hough rejected this, and we concur in the rejection because it was not shown what his salary was, so there was no way to ascertain what would be the pro rata for the time he was employed on this job (the \$70 is an arbitrary charge). The claim is thus reduced to \$2,008.98.

[2] The injury was to the rudder; it was not repaired so as to put it in the condition it was in before. Instead of having new full plates, the bottom half of the old plate was cut off and new half plates riveted on below what was left. This was because new full plates could not be got at the time the vessel was put on dry dock for these repairs, the insured preferred not to lose the time waiting for them. But the underwriter does not insure loss by delay and was in no way interested in it. It fulfills its contract if it pays the cost of proper repairs made at the time of the accident. It is only when the insured makes temporary repairs for the interest of all concerned that they can be collected from underwriters; as, for example, to postpone permanent repairs until the vessel arrives at a port where they can be made more reasonably. Gow on Marine Insurance, p. 214. This patchwork sort of repair, while making the rudder efficient, did to some extent, as the evidence indicates, depreciate the value of the vessel. The amount of such depreciation is asserted to be from \$300 to \$500. Under the authorities (McArthur on Marine Insurance [2d Ed.] p. 228; Gow on Marine Insurance, pp. 216, 217) when repairs are made with this result the shipowner is entitled to add to the cost of repairs something for the diminution in the value of the vessel. This proposition, however, ac-

cording to the same authorities, is coupled with the proviso that the combined amount shall not be in excess of the estimated cost of effecting complete repairs, less the usual deductions for improvements.

The real question then is: What additional sum would it have cost when repairs were made to put on full plates instead of half ones? Libellant's witness on his direct estimated this at \$150 to \$200, but on cross he would not swear it could not have been done for \$100 extra. A witness called for respondent testified that the difference in cost of repair would be about \$60, \$40 for materials, \$20 for labor. Upon this state of the proof, we cannot say that it would have cost the \$167.04 necessary to bring the admitted cost, \$2,008.98, up to 3 per cent., or \$2,176.02.

Decree affirmed, with costs.

In re LOUGHRAN.

LOUGHRAN v. HAZLETON MERCANTILE CO.

(Circuit Court of Appeals, Third Circuit. December 24, 1914.)

No. 1853.

BANKRUPTCY (§ 410*)—DISCHARGE—APPLICATION—TIME—NEW PROCEEDING—PROCEEDINGS.

Where a bankrupt made no application for discharge within the time specified, such failure constituted a bar to his right to a discharge from the debts scheduled in that proceeding; and hence he could not obtain a discharge from such debts by beginning a new proceeding and scheduling the same debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of bankruptcy proceedings of John Loughran. From an order (215 Fed. 271) denying the bankrupt's petition for discharge on objections of the Hazleton Mercantile Company, the bankrupt appeals. Affirmed.

R. W. Archbald, of Scranton, Pa., for appellant.

R. L. Bigelow, of Hazleton, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. We are advised by the appellant's counsel that in case of an adverse decision by this court he desires to appeal to the Supreme Court, and for this reason he requests us to make the finding of facts required by paragraph 3 of General Order 36 (89 Fed. xiv, 32 C. C. A. xxxvi). We therefore find the facts to be as follows:

On February 20, 1911, the appellant, John Loughran, was adjudicated a voluntary bankrupt by the District Court for the Middle Dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trict of Pennsylvania. The number of the case is 1845 on the bankruptcy docket. On December 16, 1911, the referee certified that the case was closed. Loughran filed no petition for discharge, but on November 11, 1912 (more than 18 months from the date of adjudication), he asked the court for leave to file a petition for discharge *nunc pro tunc*. Objection was made by the Hazleton Mercantile Company, a scheduled creditor holding a provable debt, and on February 21, 1913, the bankrupt asked, and the District Court granted, leave to withdraw the petition of November 11th; the attorney for the bankrupt declaring his intention "to begin bankrupt's petition anew, being convinced that after 18 months have expired the court would have no power to entertain the present [petition for] leave to file." A few days afterwards, on February 24, 1913, a second voluntary petition was filed—whose number is 2410 on the bankruptcy docket—scheduling the same creditors and the same indebtedness as in the former petition. He scheduled no assets in either petition. On March 20, 1913, the referee certified that the case was closed, and on April 5th the bankrupt petitioned for his discharge. In due season the Hazleton Mercantile Company objected on the ground:

"That, having opposed successfully a discharge of the bankrupt in a former proceeding, No. 1845 in bankruptcy, the bankrupt cannot now receive a discharge in this proceeding, which would discharge the claim of the Hazleton Mercantile Company; the claim of the said company being the same in both proceedings."

A special master was appointed, who heard the parties and recommended that the discharge be denied, whereupon the District Judge (whose opinion is reported in 215 Fed. at page 271) entered an order refusing the discharge on the ground that the proceedings under the petition of February 20, 1911, barred a discharge under the petition of February 24, 1913.

These are the facts, and the appellant concedes that on the question thereby raised the decided cases are against him. They are collected by Judge Grubb in *Bacon v. Storage Co.*, 193 Fed. 34, 113 C. C. A. 358 (C. C. A., 5th Cir.) 27 Am. Bankr. Rep. 736, and need not be cited again. That decision follows the rulings of several District Courts and of the Courts of Appeals in the First, Second, and Eighth Circuits, whose conclusions are all in accord, although their reasoning is not identical. In substance the reasons are two, and these are closely related: First, that a failure to apply within the statutory period is equivalent to a judgment by default, and establishes conclusively (so far as the creditors then scheduled are concerned) that the bankrupt is not entitled to a discharge; and, second, that where the discharge has been actually applied for within the period, and has been refused for any reason, the matter is definitely *res judicata* in favor of such creditors. The appellant attacks these reasons on the ground that by so arguing the courts have read into the Bankruptcy Act a new objection to the granting of a discharge, insisting that this cannot be done, and that the present situation is *casus omissus*, which Congress alone can correct, if correction should be desirable.

We express no opinion upon the soundness of the reasoning thus attacked, for we think the conclusion reached by the various courts

referred to can be satisfactorily defended on another ground. With much deference to the tribunals that have considered these questions, we are inclined to believe that the precise situation may not have been stated, and that the supposed difficulties may disappear when this is done. As it seems to us, there are two stages in a proceeding for discharge. The first stage is before the bankrupt begins the proceeding, and the second stage is after the proceeding has actually begun. In our opinion Congress has imposed a condition precedent to the right to file a petition for discharge at all—that is, to the right even to begin the proceeding—and this condition is that the petition must be presented within 18 months at the farthest, “but not after.” This provision works automatically, and requires no action of any kind by the District Court. It gives the bankrupt notice that he himself must act within a specified period, under penalty of losing the privilege of release from his debts if he fails to take the initial step. The statute, and not the court, forecloses him if he lets the time go by without action. Therefore, unless the bankrupt complies with this condition, he can never even ask to be discharged, and in that event the second stage can never be reached, and he can never obtain a discharge from the debts then scheduled. It is not strictly accurate, we think, to say that in such a situation the bankrupt is refused a discharge. The precise fact is that the act does not allow him to apply for it.

It is only after the second stage has been reached—that is, after a petition for discharge has been filed within the statutory period—that the right of the bankrupt to be relieved from his debts is open to attack by his creditors, and it is only during this stage that the statutory objections come to be considered. For the purposes of this case we may concede that a court cannot add to these objections; but we think it clear that no such addition is made by the court’s refusal to allow a petition for discharge to be filed on the ground that the statutory condition precedent as to time has not been complied with.

In the present case the bankrupt did not apply within the proper period. Probably his petition for leave to apply *nunc pro tunc* would have been dismissed if he had pressed it to a decision, but (recognizing that he could hardly hope to succeed) he withdrew that petition altogether. He had therefore never come before the court with a petition for discharge from the debts scheduled under the first petition, and he was barred by the act and by his own laches from ever presenting such a petition. We repeat that it is the mere lapse of time under the act, and not the court, that bars him from making such an application; and, if this position be sound, it seems elementary to say that he cannot evade the act simply by varying the form of his approach to the court, for what he now calls a new application for discharge is precisely the old application in every essential particular. As both proceedings were in the same district, we see no reason why the court might not take judicial notice of its own records and act upon the facts there disclosed; but, aside from this, all the foregoing facts were directly proved, and indeed are not denied.

The appellant concedes that the case of *Bluthenthal v. Jones*, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390, is not in point, and we need

not discuss it. What was decided there is correctly stated in the syllabus:

"Courts are not bound to search the records of other courts and give effect to their judgments, and one who relies upon a former adjudication in another court must properly present it to the court in which he seeks to enforce it.

"While an adjudication in bankruptcy, refusing a discharge, finally determines for all time and in all courts, as between the parties and their privies, the facts upon which the refusal is based, it must be proved in a second proceeding brought by the bankrupt in another district, and of which the creditor has notice, in order to bar the bankrupt's discharge therefrom, if the debt is provable under the statute as amended at the time of the second proceeding, although it may not have been [provable] under the statute at the time of the first proceeding."

Our conclusion of law therefore is that as the same debts owed by John Loughran were scheduled under both proceedings, and as he had not seasonably availed himself of his right to apply for a discharge therefrom, the right was lost, and he was not entitled to ask for such discharge on April 5, 1913.

In strictness, the order of the District Court should have dismissed the petition; but in substance it is right, and is therefore affirmed.

WENDELL & EVANS CO. v. KENNICOTT CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 25.

SALES (§ 279*)—WARRANTY BY MANUFACTURER OF FITNESS FOR PURPOSE INTENDED—CONSTRUCTION.

Plaintiff contracted to furnish and install for defendant at its laundry a water-softening apparatus; the understanding of the parties being that it was to be used for treating water from a well which had been sunk by defendant. A sample of the water was furnished to and analyzed by plaintiff, and its hardness found to be what is technically called 35 degrees. Plaintiff then wrote into the contract a guaranty that the water, as per its analysis, "when properly treated in this softener, will be satisfactory for laundry purposes." Water taken from the well some months afterward, on analysis, showed a hardness of 79 degrees, and, while the apparatus would soften it, so much chemical was required as to render it unsatisfactory for laundry purposes. *Held*, that the warranty applied only to water of substantially the same degree of hardness as that previously analyzed, and not to any water which might come from the same well, and that the failure of the apparatus to satisfactorily soften water of 79 degrees of hardness was not a breach thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 783-792; Dec. Dig. § 279.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error who was plaintiff below. Verdict was directed by the court in favor of plaintiff and dismissing defendant's counter-claims.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. Aaron, of New York City, for plaintiff in error.

C. W. Atwater, of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff is a corporation engaged in the business of manufacturing and selling machines for purifying and softening water. Defendant is a corporation engaged in the laundry business in the city of Brooklyn. Prior to the making of the contract sued upon it had been using water supplied by the city of Brooklyn, which, although originally suitable, had become very hard, because of certain new sources from which it was being taken. The result was that it increased the laundry's soap cost twice as much as it had been. Defendant therefore drove a well on its premises, and when water was obtainable therefrom it entered into the contract sued upon; such contract being evidenced by two written papers, a proposal (May 20, 1910) and an acceptance (June 4, 1910). Under the contract plaintiff agreed to furnish and install its patented Type K water-softening apparatus, of an hourly softening capacity of 8,000 gallons. As there is no dispute about the capacity of the apparatus furnished—so far as number of gallons is concerned—nor as to the apparatus supplied and the price, it will be necessary to quote from the contract only certain guaranties incorporated therein. The proposal, which by acceptance became a contract, is on plaintiff's usual printed form. The guaranty included in the form reads as follows:

"We guarantee that the softener, when operated in accordance with our instructions (given without charge), will *soften water* so that it will not give rise to scale in boilers; that the calcium and magnesium salts will be reduced to five (5) grains per U. S. gallon or less; and that, where the hardness of the raw water exceeds ten grains per gallon, the soap required to produce a permanent lather will be over 50 per cent. less in the treated water than in the raw water, the percentage of reduction increasing as the hardness of the raw water increases."

Defendant, before entering into the contract, asked for a further guaranty, specifically referring to the business in which it was engaged, and before execution the following written clause was inserted:

"It is further guaranteed that the water per analysis #5680, made by us, when treated properly in this softener, will be satisfactory for laundry purposes. If it cannot be made so satisfactory, we agree to remove same without expense to you."

Prior to making the contract defendant had drawn samples from its well, and had sent one to plaintiff and also to two other concerns which were trying to get it to install their apparatus. The sample sent to plaintiff was analyzed by its chemist, and such analysis is the 5680 referred to in the above quotation.

The apparatus apparently was installed with the understanding by both sides that it was intended to operate on the water of the driven well. It contains a clause, presumably written in (the original document is not before us), which states:

"This contract is based upon *your well* supplying 8,000 gallons of water an hour. In the event that this is not obtained, it shall be optional with you

(the laundry company) to cancel this contract within three weeks from date of contract."

There is nothing in the record to indicate that the apparatus and process could not deal satisfactorily with the water furnished by the city; indeed, before the apparatus was fully installed the city ceased supplying water from the particular sources of supply which had made it hard. The trouble arose wholly from the driven-well water.

The water originally flowing from the well, from which sample No. 5680 was taken, showed that its hardness was what is technically called 35 degrees. It took upwards of three months to install the apparatus, and thereafter it was repeatedly tested, operating with water from the well. The result of these tests was that, although it softened the water, so large an amount of chemicals had to be used in the process that the resulting water was not satisfactory for laundry purposes, because it interfered with the bluing process, which is very necessary in laundry work.

The contract was closed in June, 1910, the apparatus installed in September, 1910, and for some time afterwards water from the well was treated with the result above indicated. Payments on account were made from time to time. A sample of water from the well was taken in January, 1911. There was testimony showing that an analysis of this sample showed that the character of the water coming from the well had materially changed since the sample was taken prior to the making of the contract. Its hardness has increased to 79 degrees. This testimony is uncontradicted.

On March 17, 1911, plaintiff wrote to defendant as follows:

"Your kind attention is called to balance due for the sale of water softener to you. We have complied with all of the guaranties in our contract, and trust you will favor us by sending us New York or Chicago exchange in payment."

To which defendant replied on March 20th as follows:

"In reply to yours of the 17th inst., I beg to say, before making final settlement, I believe there are a few small matters to be adjusted. First, the tank never was properly painted; second, we were put to an unnecessary expense for about \$200 worth of chemicals wasted by an incompetent man you sent first. Kindly have some one call in reference to said adjustment."

The fundamental question in the case is what construction should be given to the inserted written clause, above quoted, when read in connection with the ordinary printed guaranty clause in the contract.

The testimony does not indicate that the apparatus failed to soften the water; the trouble was that, in softening it, so much lime had to be used that the softened water acquired a degree of alkalinity which interfered with bluing. The only guaranty that the product of plaintiff's process should be satisfactory for laundry purposes is found in the written clause. Defendant contends that it should be construed as a guaranty that the water coming out of that well should be treated so as to produce results satisfactory for laundry purposes, no matter what the character of the raw water might be. We concur, however, with the trial judge in the conclusion that the guaranty covers only water from that well (or elsewhere) which may be substantially of the

same degree of hardness as the sample analyzed before the contract was made. It would be a very strained construction to hold that the guaranty covered water of more than double the degree of hardness, merely because it came out of the same well. The witness Ellis, an expert chemist, testified that the apparatus installed would soften water substantially like sample 5680 satisfactorily for laundry purposes, and there was no evidence to contradict him.

It seems unnecessary to discuss the other points in the case. We find the argument in their support unpersuasive.

Judgment affirmed.

BOSTON & M. R. R. v. BROWN.

(Circuit Court of Appeals, First Circuit. December 17, 1914.)

No. 1070.

1. MASTER AND SERVANT (§ 113*) — DEATH OF SERVANT — RAILROADS — LOW BRIDGE—TELLTALES.

Where decedent, a railroad brakeman, while sitting on the edge of a freight car, was swept off by a low bridge, and the telltale, erected at a proper distance from the bridge, covered a sweep of not quite 8 feet, while the car on which decedent was sitting was either 9 feet 5½ inches or 9 feet 7¾ inches wide, the fact that the telltale was of the standard form mentioned in the regulations of the Massachusetts Railroad Commission did not establish defendant's freedom from negligence; there being nothing to show that the commissioners had ever specially approved the particular telltale, or had fixed the length of the bar and sweep of the ropes at 8 feet.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224-227; Dec. Dig. § 113.*]

2. MASTER AND SERVANT (§ 219*) — DEATH OF SERVANT — BRAKEMAN — LOW BRIDGE—ASSUMED RISK.

Where decedent, a railroad brakeman, was swept from the top of a car by a low bridge, and there was nothing to show that he had ever passed under it on the top of a freight car, or had his attention directed to the width of the telltale erected before the bridge, he did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. MASTER AND SERVANT (§ 106*) — DEATH OF SERVANT — RAILROADS — LOW BRIDGE—OWNERSHIP BY CITY.

Where a railroad company operated its line under a low bridge, and decedent, a brakeman, was swept from the top of a freight car, by striking the bridge, and killed, the railroad company was not relieved from liability for negligently operating its road underneath the bridge by the fact that it was maintained by a city, and not by the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by Dana J. Brown, as administrator of the estate of John H. Weymouth, against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
218 F.—40

Edward K. Woodworth, of Concord, N. H. (Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., on the brief), for plaintiff in error.

Alexander Murchie, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., and Fred H. Brown, of Somersworth, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The defendant in error (hereinafter called plaintiff) has recovered a judgment against the plaintiff in error (hereinafter called defendant) under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), for conscious suffering and death of his intestate, John H. Weymouth, who, being at the time a brakeman in the defendant's employ, was knocked off the top of a moving freight car, upon which he was sitting, by an overhead bridge, near Lawrence, Mass. The defendant seeks here to reverse the judgment, upon the refusal of the court to direct a verdict in its favor, and upon alleged improper instructions given to the jury.

[1] 1. The defendant had provided a rope telltale bridge guard to warn brakemen on the tops of cars that they were nearing this bridge. There was uncontradicted evidence that regulations prescribed by the Massachusetts Railroad Commissioners, acting under statutory authority, on July 1, 1897, and ever since in force, had approved "the standard form of pendant, or whip cord, and of horizontal bar bridge guards, or telltales, now in common use on the leading railroads of this state"; also that this bridge guard was of the standard form referred to, and was sufficiently far from the bridge to comply with the other provisions of the regulations.

There was evidence that the horizontal bar of this bridge guard, from which its rope pendants hung, was 8 feet long, while the car was either 9 feet $5\frac{7}{8}$ inches or 9 feet $7\frac{3}{8}$ inches wide. There would thus be left several inches of the car roof on each side over which there could be no rope pendant to give warning. The outside ropes of the telltale were not quite 8 feet apart, not being attached to the bar quite at its extreme ends. And there was evidence that Weymouth was sitting, when he struck the bridge, on one side of the car, facing outward, in a crouched position, with his feet hanging over the edge. Assuming, not only that the bridge guard was of the standard form mentioned in the regulations, but also that the length of the bars used in such bridge guards when the regulations were issued, and ever since, appeared, without contradiction, to have been 8 feet long, there was still no evidence that the commissioners had ever specially approved this particular bridge guard in this particular place; and we are unable to hold that its sufficiency, under all the circumstances shown, was conclusively established merely by the fact that it complied with the regulations, so far as its form was concerned.

Without regard to evidence claimed to indicate that the pole carrying the arm from which this bar hung leaned so as to carry the whole telltale arrangement still further away from that side of the car

whereon Weymouth was sitting when he struck the bridge, there was evidence from which the jury might have found that, since 1897, the average width of freight cars used in making up such trains as passed beneath the bridge had increased, and that a bridge guard not exceeding 8 feet in length would not be enough to secure sufficient warning in the case of cars such as that upon which Weymouth was riding while approaching such a bridge as this, under all the circumstances as they might have been found from the evidence. The commissioners' regulations, and the fact that they were complied with in respect to the form of the bridge guard, if competent for the jury to consider, cannot be regarded as having finally settled in advance what length of bar was sufficient, or what should constitute ordinary care or reasonable prudence on the part of the railroad company, in every case involving the sufficiency of such a guard which might thereafter arise. When they prescribed the form, the commissioners did not prescribe the length of bar, nor can it reasonably be supposed that they intended to do so. These questions were properly for the jury to determine under all the circumstances shown.

[2] This is enough to justify the refusal to direct a verdict for the defendant. The only other ground for asking such a direction was that Weymouth was conclusively shown to have known and appreciated, or to have been bound to know and appreciate, the danger which caused his accident. But, even if the case was one in which he might have been found to have assumed the risk of a danger existing because of the defendant's negligence, the evidence tending to show his experience in railroading, and his opportunities for ascertaining the facts regarding this guard and bridge, did not go far enough to warrant the court in ruling as a matter of law that he had assumed the risk of every danger which the jury might have found involved in passing under them on the top of this car. However often trains upon which he had acted as brakeman had been under the bridge, or however long he had worked as flagman near it, there was nothing to show that he had ever passed under it on the top of a freight car, or had his attention directed to the width of the guard.

[3] 2. Although, according to the evidence, this bridge was unusually low, and maintained, not by the defendant, but by the city of Lawrence, this did not entitle the defendant to the requested instructions that the railroad could not be held negligent with respect to its height. If the passage beneath it was not reasonably safe under all the circumstances, the railroad might still be negligent in continuing to permit the passage of trains beneath it while in such condition.

As to the remaining instructions refused, the assignments of error are either disposed of by what has been said, or the instructions requested were given in substance to the extent that the defendant had the right to require them at all. Two of the requests for instructions related to the question of assumption of risk. We find no error in the instructions given upon this point.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers his costs on appeal.

WESTERN UNION TELEGRAPH CO. OF ILLINOIS et al. v. LOUISVILLE
& N. R. CO.

(Circuit Court of Appeals, Seventh Circuit. October 26, 1914.)

No. 2117.

COURTS (§ 508*)—FEDERAL COURTS—INJUNCTION—ORDER OR DECREE OF STATE COURT.

A telegraph company having instituted proceedings to condemn a right of way for its telegraph line along defendant railroad company's right of way, the latter company instituted a suit in the federal court to restrain the telegraph company from prosecuting its condemnation proceedings in the state court and from entering on the right of way. A preliminary injunction having been granted, the condemnation proceedings were removed to the federal court, and later, on review, were remanded to the state court, as involving no right arising under the Constitution and laws of the United States, whereupon complainant moved to dissolve the preliminary injunction. *Held* that, while such injunction was not directly against the proceeding in the state court, it was nevertheless an order restraining the telegraph company from entering on the railroad right of way in accordance with any judgment or writ of the state court, and was therefore violative of Judicial Code (Act March 3, 1911, c. 231) § 265, 36 Stat. 1162 (Comp. St. 1913, § 1242), providing that injunction shall not be granted by any court to stay proceedings in a state court, except where such injunction is authorized by any law relating to proceedings in bankruptcy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

Appeal from the District Court of the United States for the Eastern District of Illinois.

Suit by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company of Illinois, the Western Union Telegraph Company, and the Southeast & St. Louis Railway Company. From an order denying a motion to vacate an injunction forbidding defendants to enter on complainant's right of way to construct a telegraph line, they appeal. Reversed, with directions to dissolve.

Percy B. Eckhart, of Chicago, Ill., for appellants.

J. M. Hamill, of Belleville, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. On February 3, 1912, the appellant, Western Union Telegraph Company of Illinois, filed in the county court of St. Clair county, Ill., its petition to condemn a right of way for a telegraph line upon and along the railroad right of way of the appellee across the state of Illinois, under an Illinois statute which professes to authorize such condemnation proceedings. A few weeks thereafter appellee began the present suit to enjoin appellants from prosecuting the condemnation proceeding in the state court and from entering upon the railroad right of way. In April, 1912, a preliminary injunction was issued forbidding appellants to enter upon the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right of way. This injunctive order is set out in full in *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 201 Fed. 919, 120 C. C. A. 257, which was an appeal from the injunctive order. In that case we affirmed the decree awarding a preliminary injunction on two grounds: First, inasmuch as the condemnation proceeding, before an appeal was taken from the injunctive order, had been removed into the federal District Court where this injunction suit was pending, the question of the legality of an injunctive order which restrained proceedings in a state court had become moot; second, inasmuch as all of the matters were pending in the federal District Court, there was no abuse of discretion in postponing the condemnation proceeding.

In the condemnation proceeding the trial in the District Court resulted in a judgment adverse to the petitioner. On review of the condemnation proceeding on writ of error we reversed the judgment with the direction to the District Court to remand the cause to the state court. This ruling was placed on the ground that the petition for condemnation was based wholly upon a right asserted under a state statute, and involved no right arising under the Constitution or laws of the United States. *Western Union Telegraph Co. of Illinois v. Southeast & St. L. Ry. Co. et al.*, 208 Fed. 266, 125 C. C. A. 466.

After the condemnation case was reinstated in the state tribunal, appellant, on that indisputable fact, based a motion that the injunctive order be dissolved. From a denial of this motion the present appeal is prosecuted. So the question which was moot when formerly presented has now become vital.

Section 265 of the Judicial Code (old section 720 of the Revised Statutes) provides that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

When direct attempts have been made to stay proceedings in a state court, the clear prohibition of the statute has always been upheld. *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987.

In the present injunctive order, however, the prohibition is not directly against the proceeding in the state court. By reference to the decree set out in 201 Federal Reporter it will be observed that the District Court recognized that it was "prohibited by law from granting the writ of injunction to stay proceedings in a state court." But appellant is enjoined from entering upon any part of the railroad right of way. Inasmuch as no averments in the bill and no proofs in the case show any threat on the part of appellant to enter upon the railroad right of way, except under and in pursuance of the judgment of condemnation which might be obtained in the proceeding in the state court, the injunctive order now on review must necessarily be interpreted as prohibiting appellant from entering upon the railroad right of way in accordance with any judgment or writ of the state

court. While appellant is not violating the injunction by prosecuting its case in the state court, it would be liable to contempt proceedings the moment it undertook to take the benefits of the judgment and writ of the state court. And under the authorities, which we deem it unnecessary to review, this effect is a substantial stay of the proceeding in the state court, and is therefore within the prohibition of section 265 of the Judicial Code. *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Watson v. Jones*, 13 Wall. 679, 719, 20 L. Ed. 666; *Rensselaer & S. R. Co. v. Bennington & R. R. Co.* (C. C.) 18 Fed. 617; *Dillon v. Kansas City S. B. Ry. Co.* (C. C.) 43 Fed. 109, 112; *American Ass'n v. Hurst*, 59 Fed. 1, 7 C. C. A. 598; *Louisville Trust Co. v. City of Cincinnati* (C. C.) 73 Fed. 716; *Leathe v. Thomas*, 97 Fed. 136, 38 C. C. A. 75; *Copeland v. Bruning*, 127 Fed. 550, 63 C. C. A. 435; *Missouri, K. & T. Ry. Co. v. Chappell* (D. C.) 206 Fed. 688.

The decree is reversed, with the direction to dissolve the injunction.

VAUGHAN v. MAGEE.

(Circuit Court of Appeals, Third Circuit. December 31, 1914.)

No. 1846.

TRIAL (§§ 115, 133*)—MISCONDUCT OF COUNSEL—AMOUNT SUED FOR—DISCLOSURE TO JURY.

The ruling of the state courts that whereon a court in its charge, or counsel in addressing a jury, have brought to a jury's notice that a plaintiff claimed a fixed sum, it will be adjudged a mistrial, restated as applicable to the federal courts in the Third circuit.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 279-283, 295, 298, 316; Dec. Dig. §§ 115, 133.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action at law by Mary Magee against Ira Vaughan. From a judgment for plaintiff, defendant brings error. Reversed.

For opinion of District Court denying motion for new trial, see 212 Fed. 278.

Ruby R. Vale, of Philadelphia, Pa., for plaintiff in error.

John W. Brock, Jr., of Philadelphia, Pa., and John C. Robinson, of New York City, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Miss Mary Magee, the plaintiff, a citizen of New York, brought suit against Ira Vaughan, a citizen of Pennsylvania, to recover damages for injuries sustained by her through his alleged negligence. Such alleged negligence consisted in an automobile, for which it was contended Vaughan was responsible, striking a carriage in which Miss Magee was riding. The jury found a verdict for the plaintiff, and, judgment having been entered for the damages found, defendant sued out this writ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

After careful consideration of the case, we are of opinion there was a mistrial below, and the judgment must be reversed. We regret this controversy could not have ended with this trial; but the question here involved reaches beyond the present case and parties, and affects the proper trial of that large and growing number of cases for personal injuries now finding their way to federal courts.

In the ordinary suit on a bond, note, contract, or account, the amount in suit can be stated, goes in evidence, and affords the jury a money basis on which the rights of the parties can be determined. In damage cases there is no fixed sum in controversy. The amount of damages a party recovers is ascertained by the jury from evidence regularly offered and admitted by the court of such pertinent facts as will enable the jury to itself fix the money value of the injury sustained. While among those facts may, at times, be certain definite amounts in the way of medical, surgical, and nursing expenses, and other items capable of exact fixation, yet, when it comes to determining the amount of the damages to be awarded, this is the province of the jury alone, and of a jury uninfluenced by the figures or estimates of any other person as to the amount thereof. The law, therefore, permits no estimate to be given by either party to the jury, even under oath, of the money amount of such damages, and to get the same character of estimates before a jury by indirect methods is a reprehensible practice.

Whatever may be the practice in other jurisdictions, the courts of Pennsylvania have been stern and unyielding in that regard. Wherever a court, in its charge, or counsel, in addressing a jury, have brought to a jury's notice that a plaintiff claimed a fixed sum for damages, it has been adjudged a mistrial. *Carothers v. Pittsburgh Railways Co.*, 229 Pa. 560, 79 Atl. 134; *Reese v. Hershey*, 163 Pa. 253, 30 Atl. 907, 43 Am. St. Rep. 795; *Quinn v. Phila. Rapid Transit Co.*, 224 Pa. 162, 73 Atl. 319; *Dougherty v. Pittsburgh Railways Co.*, 213 Pa. 346, 62 Atl. 926; *Hollinger v. York Railway Co.*, 225 Pa. 419, 74 Atl. 344, 17 Ann. Cas. 571. The bar of the state has loyally supported this view, and this seems a fitting case for this court to emphasize and restate, as applicable to the federal courts of this circuit, the ruling of those cases.

Without detailing the facts in the present case, it suffices to say plaintiff's counsel, while cross-examining defendant, called express attention to the fact of the sum of money claimed in the plaintiff's statement—a sum, we may add, much in excess of any damage shown by the proofs to have been sustained. Thereupon the defendant's counsel asked that a juror be withdrawn and the case continued. The court ruled out the objectionable reference, but refused to continue the case, which refusal was duly excepted to. Thereupon plaintiff's counsel repeated the objectionable statement. It is due to the counsel, who was not a member of the Pennsylvania bar, to here note his statement that he did not know of the Pennsylvania rule, that he did not at once grasp the significance of the court's ruling, and that he had no intention of violating such ruling by repeating the objectionable statement. It is also due the court to say that the trial judge in his charge earnestly sought to have the jury disregard the statement.

We will not enter into a speculative analysis of what effect the statement and its repetition to the jury had. It suffices to say the jury improperly had before it substantial statements of matters which were not only not in evidence, but which on no principle of law could have been admitted in evidence. The possibility of the verdicts of juries being based on that which is not evidence goes to the very foundation of that fair and impartial trial for which courts exist. Whether the objectionable statements did or did not influence the jury in this particular case is not the test, for this court cannot permit any such practice to obtain even a foothold in this circuit. If enforcement of this rule necessitates retrial, such result can be avoided by the observance by counsel, when practicing in the courts of Pennsylvania, whether federal or state, of this wholesome practice, which has long obtained in this commonwealth.

The judgment below is reversed, and the case remanded for retrial.

THE FRED E. RICHARDS.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 57.

TOWAGE (§ 15*)—STRANDING OF TOW—LIABILITY OF TUG.

Evidence considered, and *held* insufficient to establish the claim that the stranding of the last one of three barges in a 3,400-foot tow on a shoal to the leeward of the South Channel in entering Boston Harbor in a high wind was due to the fault of the tug in navigating negligently before entering the channel.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 30-38; Dec. Dig. § 15.*]

Appeal from the District Court of the United States for the Southern District of New York.

D. R. Englar, of New York City, for appellants.

E. E. Blodgett, of Boston, Mass., for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. March 3, 1913, the tug Richards set out from New York, bound for Boston, with a tandem tow of three barges, Luzon, Rockland Co. No. 1, and Whitman, in the order named. At 8:30 p. m. of the 6th she passed the light on the Graves Shoal off Boston Harbor, the wind blowing a gale from west-northwest, and shaped her course to enter by the channel called on the chart South Channel and by the witnesses Broad Sound Channel. It is nearly a quarter of a mile wide, runs about northeast and southwest and is defined by red buoys on the western and black buoys on the eastern side, which are lighted at night, mid-channel being indicated by the Lovell Island range lights.

The total length of the tug and tow was about 3,400 feet. At about 10:15 p. m., while going up the South Channel, the barge Whitman

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fetched up on a shoal called the Devil's Back, which lies to the eastward of and close to the channel, and nearly midway between two black buoys, which are about a mile apart. One of the Whitman's hawsers parted and the other pulled out the towing bitt. The tug proceeded with the balance of the tow to the quarantine ground, and then returned, taking off the crew of the Whitman, which with her cargo became a total loss. The owner of the cargo filed this libel against the tug.

The charge of negligence chiefly relied on, and the only one we need consider, is that the tug navigated negligently before entering South Channel. To enter properly it was necessary for her, after rounding the Graves Shoal, to swing about eight points from north-west to southwest. The libellant's experts say, what is manifestly true, that to do so with so long a tow in a gale from west-northwest it would be necessary, notwithstanding that the last of the flood tide helped the tow to stand up against the wind, for the tug to hold her course to the northward and westward past the line of the Lovell Island ranges before turning southward for the South Channel, so as to allow for the drift of the tow to leeward. It is argued that a failure to do this brought the tow broadside across the channel and so stranded the Whitman.

Captain Miller of the tug marked the course he followed on the chart, and if his diagram be taken literally the disaster is quite consistent with this theory of negligence. The difficulty of adopting it is that, as the tow was making but 2 to 2½ knots an hour, the lights of the barges would have shown to all concerned the dangerous drift to leeward for nearly an hour before the stranding, yet no one noticed it. The evidence for the tug is that she kept well to the windward of the Lovell Island range next to the line of the buoys on the starboard and westward side of the channel, all the barges keeping to the windward of the buoys on the port side. Indeed, Captain Loux of the Whitman admits that he entered South Channel to the windward of the first black buoy, and passed to windward of the second, and that, although a little to the leeward of the range, he apprehended no danger whatever before the barge fetched up. We think this inconsistent with the libellant's theory of a great drift to leeward before entering South Channel. What happened is consistent with a sheer caused by bad steering, or by a sudden gust of wind, or by the tug's changing her course to starboard to enter the President's Channel. The captain of the barge attributed the accident to the latter cause. But neither of these causes would depend upon any negligence of the tug in making the turn into the South Channel.

Judge Mayer, in the court below, thought all the witnesses to be honest and intelligent. In this situation, although no confident conclusion can be reached on the testimony, we think there is quite enough to sustain his finding that there is no sufficient proof of negligence upon the part of the tug.

The decree is affirmed.

THE COLUMBIA.

(Circuit Court of Appeals, Third Circuit. November 10, 1914.)

No. 1874.

SHIPPING (§ 166*)—LIABILITY FOR INJURY TO PASSENGER—NEGLIGENCE OF MEMBER OF CREW.

A finding by the trial court that an injury to libellant, while a passenger on respondent steamboat, was caused by the negligence of a deck hand, in drawing a hawser across her foot and causing her to fall, while, in obedience to his orders, she was, with other passengers, passing into the cabin from the deck, where they had been rightfully sitting, *held* supported by the evidence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538-552; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in admiralty by Mary E. Fries against the steamboat Columbia; the Delaware River Transportation Company, owner. Decree for libellant, and the owner appeals. Affirmed.

Gill & Linn, of Philadelphia, Pa., for appellant.

Andrew B. McGinnis, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Mary E. Fries, who had been injured while a passenger on the excursion steamer Columbia, filed a libel against that vessel, charging that such injury was caused by the negligence of certain of the vessel's crew. The libel alleged that, while the vessel was nearing a landing:

"Certain deck hands, servants, agents, and employes of said steamboat Columbia, called to the libellant and a number of other passengers, who were lawfully sitting on chairs belonging to said steamboat outside of the cabin on the main deck of said steamboat, in a place where she was entitled to be, to move inside the cabin of said steamboat; that thereupon the libellant arose, and while moving toward the cabin door, and before she had an opportunity to get safely within the cabin, one of the aforesaid deck hands suddenly and violently pulled a hawser, which was lying upon the deck of said vessel, across the foot of the libellant, throwing her with great force and violence to the deck, and causing her to suffer a fracture and break of the thigh bone of her right leg, and severely injuring her about the body and also injuring her internally."

The answer admits libellant was lawfully sitting where she alleged, and that she was directed to move from there and go into the cabin, but denied:

"That any of its deck hands suddenly or violently, or otherwise, pulled a hawser which was lying on the deck of the vessel and across the foot of the libellant, throwing her with great force and violence to the deck, and causing her to suffer a fracture and break of the thigh bone of her right leg, or severely injuring her about the body, and also injuring her internally. It is informed and believes that from some cause to it unknown, but not connected with any act, matter, or thing done by its employes, or for which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said ship was responsible, the libelant stumbled and fell, thereby causing such injury as she may have suffered, whatever the same may be."

It will thus be seen the issue between the parties was one of fact. On that issue proofs were taken by both sides, and after hearing the trial judge filed an opinion wherein the evidence was discussed at length and wherein it was held:

"The conclusion from the evidence is that the libelant, through the permission of the respondent's employes, was prior to the accident in a position upon the deck where she had a right to be, that her injuries were caused by the negligence of the deck hand of the respondent in pulling the rope while the libelant was with due care proceeding under his orders from the deck to the cabin, and that there was no circumstance to establish contributory negligence on the part of the libelant."

In his opinion the judge fully discussed the evidence, the manner in which the injury to the libelant happened, the nature of her injury, and the consequent damage. From a decree awarding her damages for the injury sustained this appeal was taken.

It will thus be seen no question of law is here involved, and our province is simply to re-examine the questions of fact at issue. This we have done, and we concur in the conclusion reached. By adopting the opinion below as expressive of our own, we avoid a needless repetition of facts.

The decree is therefore affirmed, with costs here and below.

WARNER BROS. CO. v. WIENER.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 271.

TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—USE OF SURNAME AS TRADE-MARK.

Where a registered trade-mark consists of a surname, under Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725, as amended by Act Feb. 18, 1911, c. 113, 36 Stat. 918 (Comp. St. 1913, § 9490), it is to be treated as an arbitrary word, and is protected, not only against literal, but against colorable, imitations; and under such rule the word "Wiener," used alone to designate a corset, although it is the surname of the person using it, is an infringement of the trade-mark "Warner."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 101, 102; Dec. Dig. § 59.*]

Right to use one's own name as trade-mark or trade-name, see notes to *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 579; *Kathreiner's Malz Kaffie Fab. v. Pastor Kneipp Med. Co.*, 27 C. C. A. 357; *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 121 C. C. A. 205.]

On rehearing.

For former opinion, see 214 Fed. 30, 130 C. C. A. 424.

Seabury C. Mastick, of New York City (Henry J. Lucke, of New York City, of counsel), for appellant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. Since our decision affirming the order in this case the Supreme Court has handed down an opinion in the case of *Thaddeus Davids Co. v. Davids Manufacturing Co.*, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046. A majority of the court understand it to hold that the trade-mark granted in a surname under the fourth proviso of section 5 of the Trade-Mark Act of 1905 is in the name itself, irrespective of the way in which it is printed or displayed. The name in such a case is to be treated as if it were an arbitrary word, and is to be protected, not only against literal, but against colorable, imitation. So regarded, the word "Wiener," standing alone, is, in our opinion a colorable imitation of the word "Warner," and the defendant must be enjoined, although it is his own surname, from using it in the corset business alone, or in any manner amounting to a colorable imitation of the word "Warner."

Order modified.

THE TRANSFER NO. 21.

(Circuit Court of Appeals, Second Circuit. November 13, 1914.)

No. 147.

ADMIRALTY (§ 103*)—APPEAL—APPEALABLE ORDERS—"FINAL DECISION."

An order entered in a proceeding for limitation of liability, denying a motion to dismiss the petition and vacate an order restraining the prosecution of actions in a state court, is not a "final decision," and is not appealable.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 712-719; Dec. Dig. § 103.*]

For other definitions, see Words and Phrases, First and Second Series, Final Decision.

Appealable orders and decrees in admiralty, see note to *In re Oceanic Steam Navigation Co.*, 124 C. C. A. 348.]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the petition of the New York, New Haven & Hartford Railroad Company, as owner of the steam tug *Transfer No. 21*, for limitation of liability. Otto Schmuck and others, damage claimants, appeal from an order denying a motion to dismiss the proceedings. On motion to dismiss appeal. Motion granted.

Charles M. Sheafe, Jr., of New York City (James T. Kilbreth, of New York City, of counsel), for petitioner.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The order of the District Court does not finally dispose of the claimant's rights, as its contentions can be asserted on appeal from the final decree, and therefore is not such a final decision as to be appealable. Section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1913, § 1121]) applies only to equity proceedings and shows that the granting or refusing of an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

interlocutory injunction is not a final decision, because it required the statute to make such orders appealable. Most of the claimant's reasoning would apply to an order remanding or refusing to remand a cause to the state court because of the citizenship of the parties, but a writ of error cannot be taken to either order. *Chicago & St. Paul R. R. Co. v. Roberts*, 141 U. S. 693, 12 Sup. Ct. 123, 35 L. Ed. 905; *Bender v. Penna. Co.*, 148 U. S. 502, 13 Sup. Ct. 640, 37 L. Ed. 537. Motion granted.

WALKER v. GILES et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 56.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ICE CREAM DISHER.

The Olmstead patent, No. 819,373, for an ice cream disher, discloses invention and is valid; also construed, and *held* infringed.

2. APPEAL AND ERROR (§ 671*)—REVIEW—DISCRETIONARY ORDERS.

A discretionary order cannot be reviewed, unless the record contains the evidence on which it was based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

Appeal from the District Court of the United States for the Northern District of New York.

This cause comes here upon appeal from a decree of the District Court, Northern District of New York, holding that defendant had infringed United States patent No. 819,373, issued May 1, 1906, to Albert P. Olmstead, for an ice cream disher. Judge Ray's opinion very fully discusses the questions raised in the cause. It is reported in 207 Fed. 825.

F. Gerlach, of Chicago, Ill., for appellants.

F. C. Curtis, of Troy, N. Y., and J. H. Griffin, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The main point raised in the case is as to the construction to be given to the first claim, which is the only one involved. It reads as follows:

"A dipper for plastic material comprising in combination a handle and bowl provided with a hub-bearing at the inner end of, and open to, the bowl; a toothed scraper-hub rotatively mounted in said hub-bearing and insertible and removable through the bowl, said hub having a peripheral flange overhanging on the inner side the teeth thereon; a scraper fixed upon said hub; and a hand lever mounted upon the handle and having a gear-rack engageable with the teeth on the hub on the outer side of said overhanging flange."

The contention is that this should be so narrowly construed as to do away with all equivalents and confine it to the precise combination of parts set forth in the claim.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendants, as we think, attach too much importance to an amendment of this claim made while the application was pending in the Patent Office.

The specification, which was at no time amended, after describing the hub with its gear-teeth and the intermeshing gear-teeth on the rack at the end of the lever, states that:

"The hub is formed with a peripheral flange, overhanging the gear-teeth thereon (that is, on the hub) and adapted in the normal position of the lever to overhang the teeth on the gear-rack (of the lever) whereby said gear-rack serves as a means for locking the hub within its bearing as well as a means for rotating said hub and scraper."

The original application contained four claims, of which No. 2 (now No. 1 of the issued patent) read as follows:

"A dipper for plastic material comprising in combination a handle and bowl provided with a hub-bearing at the inner end of the bowl; a toothed scraper-hub rotatively mounted in said hub-bearing, said hub having a peripheral flange overhanging the teeth thereon; a scraper fixed upon said hub; and a hand lever mounted upon the handle and having a gear-rack engageable with the teeth on the hub beneath said overhanging flange."

The Patent Office rejected claim 1 (with which we need not concern ourselves) on prior art. As to claim 2, *supra*, its only criticism was "the utility of the flange is not made apparent as the matter is stated," and rejected that also. It was manifest from the specifications just what was the utility of the flange, viz., by co-operating with the teeth on the gear-rack to lock the hub within its bearing. The incorporation of that simple statement of function would presumably have met the criticism; but the applicant recast his claim, so as to read as it now stands in the patent.

This was merely a statement of what his original specification showed—a flange on the hub supported by the teeth of the gear-rack so as to lock the hub in place. No prior art was cited against his device, and he avoided no prior art by the change he made. There was no estoppel created. The situation is the same as if his original application had consisted of the unchanged specification and the claim in its present phraseology.

There is nothing in the record to show that applicant amended this claim in order to avoid an interference with the later application of Nielsen, or even that he knew Nielsen had an application pending or what it contained.

The only change of organization which defendant has made is the placing of the flange, which acts to hold the hub in place, on the gear-rack, instead of on the hub. In the one case the flange rests on the teeth of the gear-rack; in the other, the teeth of the hub rest on the flange. This is a mere reversal of parts, and under well-settled principles will not avoid infringement.

[2] It may be that the order denying the motion to amend the answer by alleging champerty is brought here by appeal from the final decree which was subsequently entered; but we certainly cannot investigate the propriety of Judge Ray's decision in that regard, which was largely discretionary, without having in the record the testimony and documents on which he based his decision—and they are not here.

Moreover, as to the merits of such defense, it is sufficient to refer to Matter of Clark, 184 N. Y. 227, 77 N. E. 1.

In all other points in the case we concur with the District Judge.
Decree affirmed, with costs.

GENERAL ELECTRIC CO. v. INDEPENDENT ELECTRICAL SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 69.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC LAMP SOCKET.

The Sargent patent, No. 665,582, for an electric lamp socket, was not anticipated and discloses patentable invention; also *held* infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal by defendant below from a decree of the District Court for the Southern District of New York holding valid and infringed claims 1, 11, and 15 of United States letters patent No. 665,582, for certain new and useful improvements in lamp sockets, granted to Howard R. Sargent, of Schenectady, N. Y., assignor to the General Electric Company, on January 8, 1901.

Robert B. Killgore, of New York City, and David P. Wolhaupter, of Washington, D. C., for appellant.

Samuel Owen Edmonds, of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and VEEDER, District Judge.

VEEDER, District Judge. The patent in suit was before this court last term on the complaint of the present complainant against the American Brass & Copper Company (214 Fed. 380, 131 C. C. A. 282), where the claims then and now in issue are set forth. The same claims were sustained by Judge Cross in the District of New Jersey (190 Fed. 34), and on appeal (191 Fed. 168, 111 C. C. A. 646), in an action against the E. H. Freeman Electric Company, also the makers of the article complained of in the present suit.

The patent relates to the insulation of the cap of an electric lamp socket to prevent the electric current from flowing through the metallic cap. This is commonly effected by interposing insulating material in the cap of the shell. The difficulty lies in securing the insulating lining in position, owing to the fact that ordinary securing means would pass through the cap and lining and thus defeat the very object for which the lining is interposed. The patent in suit aims to overcome this difficulty by the combination, with a cap having interior retaining means or projections, of a yieldable insulating lining which can be forced or sprung or fitted over such retaining means or projections and held thereby. In the former action this court held that the patent was valid, but that the claims in issue were not infringed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by a cap having exterior retaining means or projections. In this action the defendant again questions the validity of the patent in suit, upon additional proof of the prior art, and also denies infringement.

With respect to patentable invention, the new facts submitted do not affect the conclusion heretofore reached. In the Bergmann patent, No. 484,580, the metal screws employed as the retaining means pass through a flat metallic cap into the interior of the socket, thereby furnishing a ready path of conductivity for the current to the metallic cap in the event of a short circuit within the socket. The Taylor British patent of 1897, upon which the defendant mainly relies, shows a construction quite different from that of the patent in suit. It is not concerned with the insulation of small, compact lamp sockets, but of large electrical devices, such as enclosures of electrical switches. While the patent states the insulation to be "of 'vitreous' or other non-electricity-conducting material," the material particularly described is vitreous; i. e., earthenware, porcelain, stoneware, or the like. The suggestion of the patent is that this porcelain lining be fitted within the interior of a metallic shell, and secured therein by rolling or turning the bottom edge of the shell over a beading on the porcelain. The difficulty in manufacturing such a structure is obvious. In the exhibit introduced as a commercial embodiment of the invention the porcelain block of insulation is many times the mass of the insulation shown in the patent, and fills up the space between socket and cap. If practicable at all, the fragility of such rigid insulation would preclude its commercial use. The patent discloses no interior retaining means, no projections extending in the interior of the cap. And the metal of the enveloping shell is led into the cap at the very point where the wires enter, with consequent danger of contact.

The proof of infringement is equally plain. In the socket complained of in the Freeman Case the cap was first provided with the interior retaining means by punching in the projections from the outside, and then the lining was sprung past such projections. In the defendant's socket here involved the lining is first positioned within the cap, and the projections punched afterward. The difference is one of method or shop practice, not of structure. The elements of the claims in suit are unmistakably present in the defendant's present structure after the insulating lining is secured in place. They are not all present before the lining is in place, because the defendant does not punch the projections until after the lining has been inserted. The sequence of operations is, however, unimportant, in view of the fact that the claims are drawn, not upon a method of production, but upon the article produced. We agree with Judge Hough in his conclusion that the defendant's socket—

"has 'interior retaining means'; a 'yieldable lining'; the lining can still be 'forced over the retaining means,' though it is no longer desirable to do so, except when repairing; his projections still hold the lining within the cap, and while it is desirable in his last model that the interior projection should register with the indentation of the lining, it is not necessary."

The decree is affirmed.

FRANKEL v. LEVIN.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 60.

PATENTS (§ 328*)—INFRINGEMENT—GARMENT FORM.

The Frankel patent, No. 886,490, for a garment form, *held not infringed*.

Appeal from the District Court of the United States for the Southern District of New York.

O. Ellery Edwards, Jr., and Benedict S. Wise, both of New York City, for appellant.

F. Warren Wright and Maurice Block, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The validity of the patent is not disputed, the only question debated being that of infringement. The Frankel patent in suit is for a dress shield which is supported by an adjustable set screw on a rod. The defendant has a shield portion but it is not adjusted by a set screw. It is held in place by elastic bands attached to the bust portion by means of a plate above the waist line. The elastic bands pull up and hold in position the shield portion. Defendant has a rod, but its only function is to support the form. The idea of holding the shield in place so as to display the garment to advantage was not boardly new with either of the parties. Shields made of resilient material were used long before the shields in question. The material was tucked up into the hollow space above the waist line and the girdle was moved up to hold it in position, producing the same effect upon the eye of the beholder as the devices of the complainant and defendant. If there be any advantage in the set screw arrangement the complainant is entitled to it, but we do not think he is entitled to all equivalent means; for such a ruling, while it would hold the defendant as an infringer, would invalidate the patent by reason of the presence of the resilient girdle in the prior art. If the defendant's device infringes, the girdle anticipates. The claims, in view of the prior art, must have a narrow construction. An element of both claims is a "shield conforming to the outline of the body portion and adjustable on said support." This the defendant does not have; his adjustment is not on the support and his elastic bands would perform their function if the support were entirely removed.

The decree is affirmed with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—41

TRUSTEES OF MASONIC HALL AND ASYLUM FUND v. FOUNTAIN
ELECTRICAL FLOOR BOX CORPORATION.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 46.

1. PATENTS (§ 276*)—ACTIONS FOR INFRINGEMENT—QUESTIONS FOR JURY.

In an action at law for infringement of a patent, the questions of invention and infringement are in general both questions of fact, which may properly be submitted to the jury under proper instructions.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432-434; Dec. Dig. § 276.*]

2. PATENTS (§§ 274, 276*)—VALIDITY AND INFRINGEMENT—FLOOR BOX FOR ELECTRIC CONDUCTORS.

The verdict of a jury, finding that the Krantz patent, No. 738,688, for a floor box for electric conductors, was not anticipated, disclosed invention, and was valid and infringed, *held* rendered under proper instructions and sustained by the evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 419-421, 432-434; Dec. Dig. §§ 274, 276.*]

In Error to the District Court of the United States for the Southern District of New York.

On writ of error to the District Court for the Southern District of New York to review a judgment for 75 cents and costs, entered in favor of the plaintiff for damages for the infringement of the third claim of letters patent No. 738,688, granted to Hubert Krantz, September 8, 1903, for floor boxes for electric conductors.

For opinion below, see 210 Fed. 169.

Paul Goodrich, of New York City, and John H. Roney, of Pittsburgh, Pa., for plaintiff in error.

Samuel E. Darby and Fred Francis Weiss, both of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] This was an action at law to recover damages for the infringement of a patent granted to Hubert Krantz for an improved floor box into which the main conductors of an electric circuit enter from conduits and in which means are provided for attaching wires for the supply current for lamps, motors or the like. Two questions are presented: First, did the plaintiff's assignor (Krantz) make an invention? and second, does the defendant infringe? These were both questions of fact. The defendant below moved that the court take these questions from the jury and instruct them to find for the defendant. We think the jury were entitled to pass upon these questions and it was entirely proper for the judge, if indeed it was not his duty, to send them to the jury. The damages were only nominal and the verdict was, of course, based upon the facts here in evidence. It does not prevent a different result from being reached upon different facts relating to invention and infringement. The issue was a comparatively simple one. The questions of infringe-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment and invention upon which the jury passed were carefully explained to them by the trial judge upon proper instructions and their verdict was fully sustained by the proof. The construction of the claim by the court that it was not limited to a sleeve secured to the floor box in the precise method shown in the specification and drawings was not open to criticism.

[2] We have examined the supplemental brief submitted by the plaintiff in error but find nothing therein to induce us to change our opinion that the cause was properly tried. The Krantz patent No. 726,945 was carefully considered by the trial judge in his charge to the jury and in his opinion on the motion to set aside the verdict. The question of abandonment was left to the jury upon instructions carefully explaining the issue, and their verdict should not be disturbed, even if the question were properly presented by exception.

We have not been able to discover any exception to the charge which presents the question now argued. The defense of abandonment was fully explained to the jury and the last words of the judge to the jury were:

"Gentlemen, you will take this case, and if you find that this was invention, and it was not anticipated, *and it was not abandoned*, and if you find that the defendant's structure here infringes, and that the plaintiff is entitled to damages, then you will find a verdict for 75 cents for the plaintiff."

Nothing need be added to the opinion of the District Judge in denying the motion for a new trial.

The judgment is affirmed with costs.

REED v. CROPP CONCRETE MACHINERY CO. et al.

(District Court, N. D. Illinois, E. D. November 25, 1914. On Application for Rehearing, February 8, 1915.)

No. 30742.

PATENTS (§ 328*)—INFRINGEMENT—CONCRETE MIXER.

The Reed patent, No. 981,111, for parts of a concrete mixer, *held* not infringed by the device of a patent for which an earlier application was made.

In Equity. Suit by Matthew Howard Reed against the Cropp Concrete Machinery Company and Andrew J. Cropp. On final hearing. Decree for defendants.

Charles M. Clarke, of Pittsburgh, Pa. (Percival H. Truman, of Chicago, Ill., of counsel), for plaintiff.

Glenn S. Noble, of Chicago, Ill., for defendants.

SANBORN, District Judge. Infringement suit on patent No. 981,111, issued to plaintiff January 10, 1911, applied for September 28, 1908, covering part of a concrete mixer.

The prominent feature of the patent is the so-called "low charge," enabling the raw material to be charged by a wheelbarrow into the lower front portion of the drum over the edge of the narrow front annular

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

flange into the front ends of the charging pockets. This enables the workman to wheel the raw material up to the machine and dump it thereinto, or into the charging chute leading inwardly to the front end of the machine, avoiding the necessity of high, steep inclined platforms, or of supplemental skip hoists, or other old arrangements for lifting the material and depositing it in the machine.

Two forms of the low-charge arrangement are illustrated and described in the patent, one utilizing an inner transverse head or disk set inwardly from the front end of the machine, having a plurality of peripheral openings and diagonally arranged blades extending forwardly and back therefrom, forming overlapping walls, contacting with the edges of the inner head, so that, as the drum rotates, the material will be automatically fed into the interior mixing compartment by the forwardly projecting diagonal blades, and also at the same time be prevented from returning to the front, by reason of the wiping or fending action of the rear blades. The other, a more simple construction, employs a series of diagonally arranged overlapping blades extending angularly backward from the front annular flange or head of the drum, forming a series of pockets surrounding a central opening, and constituting a continuous series of walls spaced backwardly from the front centrally open head. Defendants do not use or sell the first form.

The machine in each case is provided in its interior with additional mixing or lifting blades which operate to commingle and mix the material. It is also provided with discharge mechanism adapted to be opened and closed from time to time, to discharge portions of the mixed material. The claims declared on, and the feature of defendants' machines alleged to infringe the patent, relate only to the low-charge construction, embodying the diagonally arranged overlapping blades, and not to the discharge feature.

The gist of both the Reed and Cropp constructions is the overlapping blades which carry the material into the mixing chamber. Mr. Reed testifies that the special feature of his invention is the low-charging arrangement, through the use of the overlapping blades and their connections, and that he finds the same construction in the cuts shown in defendants' catalogues. It is also testified by Mr. Cropp that what he invented was blades having their front portion of substantially the same width as the disk, and their back portions widened, and that claim 9 in the Cropp patent contains the whole secret of his invention. That claim follows:

"9. The rotary mixing receptacle having at its receiving end a charging device consisting of a centrally apertured disk secured to the receptacle, and a series of blades extended at their outer ends from the disk inwardly and diagonally with respect to the receptacle for a short distance from the disk for the purpose of directing the material into the receptacle, said blades having their portions adjacent to the disk of substantially the same width as said disk from the opening therein to its periphery and their inner portions widened."

Cropp applied for his patent August 8, 1908, and Reed for his September 28, 1908. An earlier application was that of Morton F. Sanborn, and all three were thrown into interference in respect to a single claim. Cropp disclaimed, and Reed bought out Sanborn, whereupon

Reed was adjudged the first inventor, and the interference claim was awarded to him as claim No. 1. Patents were issued to all three of the parties to the interference. In the Reed and Cropp patents the claims relating to the low-charging feature are quite similar. This is apparent from a comparison of Reed's claim 7 and Cropp's claim 15, which follow:

Reed claim 7: "A concrete mixer consisting of a rotatable drum having means therein to agitate and mix the material and a front annular inwardly extending retaining flange, a continuous series of circularly arranged charging pockets extending backwardly from said retaining flange having inlets opening toward the axis of the drum and adapted to deliver material to the interior of the drum, and means to introduce material to the inlets of the pockets from outside the drum."

Cropp claim 15: "In a mixer, in combination, a revoluble drum having an apertured disk at its receiving end, means within the drum to agitate and mix the material, a continuous series of circularly arranged charging pockets located at one end of the drum within its cylindrical wall and closed at their outer ends and having their outer portions of substantially the same width as the said disk from the opening therein to its periphery and their inner portions widened, and means to introduce material to the inlets of the pockets."

The apertured disk of Cropp is the same as the inwardly extending flange of Reed, and the only difference in the circularly arranged charging pockets is that Cropp describes the width and shape of the overlapping blades. Both claims read on the machine made and sold by each of the parties. Cropp being earlier than Reed, and the devices being so much alike (as well as the claims in each patent), it is difficult to see how there was much left for Reed which was novel. Cropp's disclaimer covered an element not found in his machine, and he did right to disavow all interest in the claim put in interference.

There is nothing worthy of attention in the testimony tending to show any date of the inventions earlier than the respective applications.

No infringement appearing, the bill should be dismissed, with costs.

On Application for Rehearing.

Complainant moved for a rehearing on a number of grounds, chiefly that when the Patent Office, having issued one patent, grants another for the same invention, "this latter grant is a deliberate adjudication that the second applicant is the true first inventor, and raises a prima facie presumption that the later patent is valid rather than the first." On the contrary, the true and only presumption is that the patents are different. If they cover the same patentable field, the last is void. Thus in *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 196, 14 Sup. Ct. 310, 314 (38 L. Ed. 121), Justice Jackson says:

"The drawings in each of the patents are identical, and the specification in each is substantially the same. Under these circumstances, can it be held that the second patent has any validity, or must it be treated as having been anticipated by the grant of the 1879 patent? If, upon a proper construction of the two patents—which presents a question of law to be determined by the court (*Heald v. Rice*, 104 U. S. 737, 749 [26 L. Ed. 910]), and which does not seem to have been passed upon and decided by the court below—they should be considered as covering the same invention, then the later must be declared void, under the well-settled rule that two valid patents for the same invention cannot be granted either to the same or to a different party."

This case was approved in the copyright case of *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 189, 30 Sup. Ct. 38, 40, 54 L. Ed. 150, 152, where it is said:

"The first patent exhausts the statutory right secured by the act of Congress."

These rulings would seem to govern this case in all its respects. The only possibility of a different conclusion arises from the fact that there was an interference proceeding, as shown in the foregoing opinion, followed by Cropp's disclaimer and Reed's purchase of Sanborn's rights, thus leaving Reed entitled to the interference issue. No actual decision as to priority was made by the examiner of interferences or any other officer or board in the Patent Office as a matter of judicial action, but only by reason of the disclaimer and settlement. The matter all comes down to the effect of Cropp's disclaimer, which I think has already been correctly disposed of. A decision on interferences is not *res judicata* in the courts, although it is final on a later proceeding in the Patent Office. The peculiar character of such a decision will appear from three cases presenting different aspects of the question: *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; *Blackford v. Wilder*, 28 App. D. C. 535; *Id.*, 127 O. G. 1255; *Westinghouse v. Hien*, 159 Fed. 936, 87 C. C. A. 142, 24 L. R. A. (N. S.) 948 (Seventh Circuit). In this particular case the decision awarding priority to Reed was at the most a judicial action by consent, and not by the judgment of the examiner. *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005. Even in the Patent Office an award of priority is not an estoppel as between broad and narrow claims covering the same invention. *Corry & Trout v. McDermott*, 110 O. G. 306.

The motion for retrial should be denied.

WESTINGHOUSE ELECTRIC MFG. CO. v. WAGNER ELECTRIC MFG. CO.

(District Court, E. D. Missouri, E. D. December 5, 1914.)

No. 4457.

1. PATENTS (§ 322*)—SUIT FOR INFRINGEMENT—ACCOUNTING.

Where, on reversal of a decree in an infringement suit awarding damages to complainant, the cause was remanded, with directions to recommit to a master for a new hearing "on the evidence already submitted and such additional testimony as may be offered," it was competent for defendant, on the recommitment, to introduce testimony showing that mistakes were made by the witnesses at the former hearing as to the number of infringing articles made and sold by it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. § 322.*]

2. PATENTS (§ 328*)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.

An award made to complainant for profits realized by defendant from infringement of the Westinghouse patent, No. 366,362, for an electric converter, based on the evidence taken by a master.

In Equity. Suit by the Westinghouse Electric Manufacturing Company against the Wagner Electric Manufacturing Company. On ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceptions to report of special master. Exceptions sustained, and decree for complainant. See, also, 129 Fed. 604; 173 Fed. 361, 97 C. C. A. 621; and 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653.

Paul Bakewell, of St. Louis, Mo., and Kerr, Page, Cooper & Hayward, of New York City, for complainants.

E. E. Huffman, of St. Louis, Mo., and Melville Church, of Washington, D. C., for defendants.

DYER, District Judge. On the 16th of February, 1904, in this court, Judge Adams presiding (129 Fed. 604), a decree was entered in this cause, which among other things recited:

"It is ordered, adjudged, and decreed as follows: That letters patent of the United States issued to George Westinghouse, Jr., for electrical converter, dated July 12, 1887, and numbered 366,362, and duly assigned to the complainant, Westinghouse Electric & Manufacturing Company, are good and valid in law, particularly as to the fourth claim thereof, and that complainant, Westinghouse Electric & Manufacturing Company, is the owner of said letters patent and all rights thereunder. That George Westinghouse, Jr., was the first, true, and original inventor of the inventions and improvements described and claimed in claim 4 of said letters patent. That the defendant herein, Wagner Electric Manufacturing Company, has infringed the fourth claim of said letters patent, and upon the exclusive rights of the complainant under the same, by making, using and selling electric converters or transformers embodying in their construction and principle of operation the combination, substantially as described in said Westinghouse patent, of an electric converter or transformer constructed with open spaces in its core, an inclosing case, and a nonconducting fluid in said case adapted to circulate through said spaces and about the converter or transformer. That complainant do recover of the defendant the profits, gains, and advantages which the said defendant had derived, received, or made by reason of said infringement by said defendant of claim 4 of the said Westinghouse patent, No. 366,362, and that the complainant do recover of the said defendant any and all damages which the complainant has sustained by reason of said infringement by said defendant in the manufacture, use, or sale of electrical transformers or converters found to be in infringement of claim 4 of said Westinghouse patent, No. 366,362, as hereinbefore specified, or any electrical converters or transformers which embody in their construction and principle of operation the combination, substantially as described in said Westinghouse patent, of an electrical converter or transformer constructed in its core, an inclosing case, and nonconducting fluid or gas in said case adapted to circulate through the spaces and about the converter. And this cause is hereby referred to Henry H. Denison, Esq., as special master, to take and state an account of said gains, profits, and advantages, to assess such damages, and to report thereon with all convenient speed."

In pursuance of this decree the special master proceeded to make inquiry, and thereafter made report to the court of what in his opinion had been the gains, profits, and advantages to the defendant in the manufacture, use, or sale of electrical transformers or converters found to be in infringement of claim 4 of said Westinghouse patent, No. 366,362, or any electrical converters or transformers which embody in their construction and principle of operation * * * an electrical converter or transformer constructed with open spaces in its core, etc. The master found the plaintiff's damages amounted to the

sum of \$132,433.35, for which amount he recommended that judgment be entered.

Exceptions were filed to this report by the defendant, and after a full hearing was had this court, among other things, said:

"The order of the court made by Judge Adams limited the recovery to the profits, gains, and advantages which the defendant made by reason of infringement of claim 4 of complainant's patent No. 366,362. The burden of proof was upon the complainant to show by competent evidence that the defendant had realized profits and advantages by reason of the infringement of claim 4. The master recommends a judgment against the defendant for all the profits derived by it from the sale of all the transformers made and sold by the defendant within a certain period regardless of what per cent., if any, the patented device (claim 4) bore to the whole. This in my judgment was beyond the scope of inquiry contained in the order of reference and cannot be upheld. The demurrer of the defendant at the close of complainant's case should have been sustained. The master's report will be disapproved and set aside, and a judgment will be entered in favor of the complainant for nominal damages (one dollar) only and the costs of this proceeding."

From this decision an appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit. That court, 173 Fed. 361, 97 C. C. A. 621, affirmed the decision of this court, and said:

"We are unable to concur in the master's findings. We think claim 4 is a limited detailed claim—open spaces in the core being one of its chief or distinguishing features. This was the view entertained by Judge Amidon upon an application for a temporary injunction, and by Judge Adams at the hearing upon which the case was referred to the master. (C. C.) 129 Fed. 604. See, also, *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.*, 117 Fed. 495 [55 C. C. A. 230]; *Westinghouse Electric & Mfg. Co. v. American Transformer Co.* (C. C.) 121 Fed. 560; *Id.* (C. C.) 130 Fed. 550."

The Supreme Court of the United States considered the case on certiorari. 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. [N. S.] 653.

This court and the Court of Appeals, as I understand it, held that the burden of proof was on the complainant, and not on the defendant, to show what profits the defendant had made from the sale of transformers which embodied the invention of claim 4 of the patent in suit. The Supreme Court took a different view, and held that the burden of proof was on the defendant, as will be seen by the following taken from the opinion of that court:

"Other questions of law and fact involved in the accounting were not considered. Neither the court nor the master discussed the question of apportionment and the record does not afford satisfactory data for entering a final decree. This no doubt arises from the fact that both parties relied entirely upon their theory that the burden was on the other, that facts were not proved that might otherwise have been established."

The court gave the following directions:

That "the case be recommitted to a master for a new hearing on all the questions involved in the original reference, and on evidence already submitted and such additional testimony as may be offered, for further proceedings not inconsistent with this opinion."

For the reason above stated, and for that reason alone, I take it, the Supreme Court reversed the Court of Appeals. The case was to be

heard by the master "on all the questions involved in the original reference, and on evidence already submitted *and such additional testimony as may be offered.*"

The complainant offered no evidence whatever at the second hearing. The defendant, in obedience to the decision of the Supreme Court assumed the burden of showing the "apportionment," which the Supreme Court held had not been discussed either by the court or the master. Judge Adams held, and the Court of Appeals held:

"That claim 4 is of a limited, detailed nature, and that the defendant had the right at all times to make transformers which had no spaces in the core."

The Supreme Court did not hold to the contrary, and therefore the decision of the Court of Appeals in this particular is the law of the case.

The real question for consideration presented by the evidence—evidence taken at the former hearing, and evidence taken at the present hearing—is this:

"What profits, if any, has the defendant received from the manufacture and sale of transformers?"

The master finds now, as he did in his first report, that the profit or advantage to the defendant from the use of the infringing invention amounts to the sum of \$132,433.35. This result is obtained now, as it was in his first report, by considering *only*, as I take it, the evidence in the original record. All of the testimony taken by the defendant at the present hearing seems to have been ignored by the master. The Supreme Court was evidently of the opinion that the evidence was not sufficient to warrant it in rendering a final decree. If it had been sufficient, there would have been no necessity for again sending the matter to the master.

The evidence taken before the master on the part of the defendant was competent, relevant, and pertinent, and should have been admitted by the master and considered by him. It is not my purpose to discuss the evidence in detail.

[1] It was contended by the plaintiff upon the hearing that the testimony offered by the defendant at the present hearing, tending to prove that mistakes were made by witnesses at the former hearing as to the number of transformers, made and sold by the defendant, that infringed plaintiff's patent, is incompetent, and that the stipulation entered into by counsel in the former record as to the number of infringing transformers cannot now be shown to have been erroneous and incorrect. With this contention the court does not agree. The testimony as to the incorrectness of the number of transformers made and sold by the defendant, that infringed claim 4 of the patent, seems to the court to have been fully sustained by the evidence offered by the defendant at the present hearing.

[2] The defendant claims that the amount which the master finds (\$132,433.35) is erroneous and grossly excessive. It is now insisted by the defendant in the argument of counsel that the finding of the master was based upon the schedule offered at the first hearing and upon the assumption that the defendant made a profit of 25 per cent.

upon the whole of its transformer business. The defendant contends that the master was in error both as to the volume of business and the per cent. thereof to which plaintiff is entitled.

It appears from the evidence that at the present hearing before the master the defendant, for the purpose of ascertaining the result of its business during the accounting period, employed a certified public accountant by the name of Williams to make a complete audit of its books for that period. The result of his examination was that, instead of making a profit, the defendant actually lost \$3,828.30. It appears from his statement that this loss resulted in part from certain unusual losses, aggregating \$67,983. New Record, pp. 47, 262, 263. He finds that, but for what he calls unusual losses, the company would have made a profit of \$64,154.72.

Assuming this to be correct, what part of this profit was earned by the sale of transformers that infringed claim 4 of plaintiff's patent? Witness Fynn prepared an analysis of the schedule made by Williams from the defendant's books. New Record, pp. 414-417. From this analysis it appears that the net amount received from the sale of infringing transformers did not exceed \$308,128.77. New Record, p. 416, and part of Defendant's Exhibits F, A.

This result seems to have been arrived at by deducting from the total amount of transformer sales the amount received for transformers that did not infringe complainant's claim 4, as testified to by Schwedtmann, Selinger, Timmerman, and others. The testimony of all of these witnesses, taken in connection with the exhibits referred to by them, and consisting in part of the evidence, satisfies the court that the master was in error in making the findings he did.

It is difficult, if not impossible, to determine with exactness the amount of profits realized by the defendant from the sale of transformers that were due to the infringement of plaintiff's patent. The amount of such profits can only be approximately estimated. This amount does not, in my judgment, exceed the sum of \$10,000. The evidence in the case now is so full and complete that the court of final resort will be able to enter, if my estimate is found incorrect, such a decree as will put an end to what has been a long, expensive and tedious litigation.

The judgment of this court is that the exceptions to the master's report must be sustained, and a judgment in favor of the plaintiff for the sum of \$10,000 and costs be entered. It is accordingly so ordered.

ROLLMAN MFG. CO. v. UNIVERSAL HARDWARE WORKS.

(District Court, E. D. Pennsylvania. December 14, 1914.)

No. 633.

PATENTS (§ 292*)—SUITS FOR INFRINGEMENT—ACCOUNTING—EXAMINATION OF BOOKS AND PAPERS.

In a suit for infringement of a patent for a cherry seeder, where defendant was required to produce certain books of account before the master, it could not, on producing ex parte affidavits that the seeders sold during a certain period did not include the infringing features, seal certain parts of the books and refuse to permit an examination until plaintiff proved the sale of infringing seeders during that period, as this would preclude plaintiff of an opportunity to trace seeders sold during such period, and determine whether they were infringements, and the master properly ordered an examination, with permission to defendant to cover up the names of the consignees and the prices until it was shown that items related to cherry seeders.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. § 292.*]

In Equity. Suit by the Rollman Manufacturing Company against the Universal Hardware Works. On petition by plaintiff for an order on defendant to produce books and papers. Defendant ordered to comply with the order of the master.

See, also, 207 Fed. 97.

John A. Coyle, of Lancaster, Pa., for plaintiff.

John A. Hipple, of Lancaster, Pa., for defendant.

THOMPSON, District Judge. The defendant has produced before the master, in accordance with his order, certain books of account, but has sealed and refused to permit examination of such parts as pertain to its business since March 1, 1911, and has also refused to produce its invoices from March 1, 1911, for examination. It is conceded that the sealed records of the defendant's business pertain, in part, at least, to its manufacture and sale of cherry seeders.

The defendant in the plaintiff's case has attempted to offer in evidence before the master certain affidavits which purport to show that since March 1, 1911, no cherry seeders have been manufactured or sold by it containing or embodying the inventions or improvements claimed in the claims of the patent held to be valid, and held to be infringed by the defendant's cherry seeder. It is contended by the defendant that the burden is upon the plaintiff to show that cherry seeders made and sold since March 1, 1911, infringed, before it can be compelled to produce its books of account containing entries relating to manufacture and sale since that date. In order to sustain the defendant's contention, the master must accept as prima facie conclusive of the identity of the machines referred to in the books the statements of defendant's counsel and the ex parte affidavits produced by him, or the testimony of the affiants upon examination without examination of the books. It would then be incumbent upon the plaintiff to prove the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contrary, as it is obvious that it would not consent to be bound by the testimony of the witnesses called by the defendant.

It may be that the plaintiff desires, as is its right, to trace the cherry seeders which the defendant has sold since March 1, 1911, to the vendees or consignees, in order to determine whether they are, as stated in defendant's affidavits, different in construction from the cherry seeders held to infringe, or similar thereto. To close the defendant's books to the plaintiff would preclude it from obtaining evidence to contradict the affidavits or testimony of the witnesses produced by the defendant, and its inquiry as to the construction of such cherry seeders would be effectually blocked. The books are the best evidence of their contents, and the plaintiff is entitled to their production for examination, without which the master could not determine the truth of the facts as to manufacture and sale asserted by the defendant. It is entirely in order for the plaintiff to show first by the defendant's books the sales or consignments of cherry seeders by the defendant to various vendees and consignees, and, if necessary, to follow this by proof that the cherry seeders so sold and consigned contain and embody the inventions or improvements of the plaintiff's patent. To sustain the defendant's contention might preclude the plaintiff from obtaining any evidence of the construction of the cherry seeders sold and consigned, except upon the testimony of witnesses called by the defendant.

The master very properly made his order for examination of the books subject to permission to the defendant to cover up the names of the consignees and the prices in the examination of the various items until it is shown that those items relate to cherry seeders, and subject to the condition that the examination must be made always in the presence of the defendant. It is apparent that the order of the master is proper and should be obeyed. This conclusion is not in conflict with the cases cited by the defendant. There is no attempt here to bring before the master books of account which do not tend to show transactions with respect to the sale of articles not covered by the patent, as in *Fuller v. Field*, 82 Fed. 813, 27 C. C. A. 165, and *Caspary v. Carter* (C. C.) 84 Fed. 416, as it is conceded that the accounts which are withheld by the defendant show sales of cherry seeders. It may develop that these cherry seeders do not infringe, but to preclude examination in respect to them would prevent the plaintiff from tracing them for identification.

In *Murray v. Orr & Lockett Hardware Co.*, 153 Fed. 369, 82 C. C. A. 445, it was held—

"better and cleaner-cut practice to require a complainant to set up alleged new infringements in a supplemental bill. Thereupon, if it should be found that the additional types contain only colorable departures from the adjudged infringing type, the decree for an injunction and an accounting and the order of reference could be extended to cover them specifically; or, if the changes should appear to be so radical that the pending suit ought not to be cumbered and delayed by practically a new issue, the supplemental bill could be dismissed, with leave to the complainant to begin an independent suit. We deem this the better practice, because, if an accounting before the master is extended to devices that have not been adjudged by the court to be infringements, a very great and unnecessary consumption of time and burden of costs may be imposed upon the parties."

The present case has not proceeded to a point where it can be held that the accounting is extended to devices not adjudged by the court to be infringements, because until the books are examined it cannot be determined what cherry seeders are included therein.

The case of *Hoe v. Scott* (C. C.) 87 Fed. 220, is cited by the defendant as determining that the master must, before permitting examination of the books, determine whether the article manufactured and sold is an infringement. In that case the court used the following language:

"Whether the particular machines of the defendant in this case embody any of the claims of the complainants' patent adjudged to be infringed by defendant is properly a question to be determined in the first instance by the master."

Defendant's counsel construes the language "to be determined in the first instance by the master" as meaning that there must be a determination by him of the question of infringement prior to receiving evidence from the books of manufacture and sale. In the connection in which the language is used, it clearly means that such question must be determined by the master, and not by the court, in the first instance. Judge Kirkpatrick held, as stated in the syllabus:

"When a cause is referred to a master to take an account of profits or damages, it is his duty to pass upon all the questions of procedure arising before him. His action is subject to review only when he has completed his labors, and filed his report; and the court will not, in the meantime, on the application of a party, give him directions not to take evidence in relation to a particular matter."

It is ordered that the defendant comply with the order of the master.

BOYD v. ATLANTIC COAST LINE R. CO.

(District Court, S. D. Georgia, S. W. D. December 15, 1914.)

JUDGMENT (§ 610*)—CAUSES OF ACTION—SEPARATION—INJURIES TO PERSON AND PROPERTY—SINGLE TORT—RIGHT OF ACTION.

Where plaintiff suffered a personal injury and also the destruction of his automobile in a railroad crossing accident, it was the injury, and not the negligent act alone, which gave rise to the right of action; and hence payment of a judgment recovered in a separate action for the destruction of the automobile was no bar to a subsequent action for plaintiff's personal injuries.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 610.*]

At Law. Action by H. A. Boyd against the Atlantic Coast Line Railroad Company. On motion to strike defendant's plea in bar. Granted.

E. K. Wilcox, of Valdosta, Ga., and A. B. Spence, of Waycross, Ga., for plaintiff.

Bennet, Twitty & Reese, of Brunswick, Ga., for defendant.

SPEER, District Judge. This case was brought in the city court of Waycross, Ga., and was removed to this court by the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

railway company, a corporation and citizen of another state. The action was instituted on account of personal injuries alleged to have been inflicted on the plaintiff at a street crossing of the railway in Waycross. The injuries are alleged to be serious. The plaintiff is a physician, and it is claimed has been, as a result of his injuries, obliged to abandon his profession. The physical injuries are alleged to be painful and permanent, and damages in a large amount are claimed. At the time this action was brought in the state court, another action was there filed to recover for the destruction of the plaintiff's automobile by the same collision. The latter case went to trial, judgment was obtained for the plaintiff, and it has been paid by the defendant.

When this case to recover for the physical injuries of the plaintiff was called to-day, the railway company interposed a plea in bar. This alleged the institution, trial, and termination of the action for the destruction of plaintiff's automobile, and insists that, as the cause of action now set up originated from the same tort, it cannot now be maintained. The plaintiff has filed a motion to strike the plea as bad and insufficient in law, and this motion is now for determination.

In the argument the contending counsel have made it plain that their research among the authorities has been at once careful and industrious. It is mutually conceded that no controlling precedent has been afforded by the Supreme Court. A precedent from a national tribunal somewhat analogous is the *Southern Railway v. King*, 160 Fed. 335, 87 C. C. A. 284, decided for the Circuit Court of Appeals of the Fifth Circuit, by Circuit Judges Pardee and Shelby, and District Judge Burns; Judge Burns pronouncing the opinion. In that case the plaintiff and her husband were crossing the Southern Railway in Habersham county, Ga. The husband was killed by the train and the plaintiff was injured. The plaintiff, Mrs. King, filed her action in the state court for the injury to her person. She obtained a verdict for \$1,000, and the judgment thereon was affirmed by the Supreme Court of the state. *King v. Railway Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544. She and her daughter also brought actions in the Circuit Court of the United States for the Northern District of Georgia. These were consolidated and verdicts rendered for the plaintiffs there, upon which, and the judgments thereon, assignments of error were presented for review. Judge Burns observed:

"The records are identical in both cases, with the exceptions that the railroad company filed in the trial court a plea in bar against the petition of Mrs. King upon the ground that plaintiff, having recovered in the state court for damages to person, is now estopped from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action, and that separate actions will not lie. This contention appears to be seriously made, but in the practice and procedure of the several states it would appear to be a legal novelty, without law or precedent."

Thus the controversy in issue before the court was determined. The learned judge, obiter, continues:

"If it be conceded that the deceased husband was the 'personal property' of the plaintiff herein, then the contention would be supported by the deci-

sions of every state court but one. Where injuries to the person and the physical property of the injured party grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and, as previously suggested, * * * should be presented in a single suit. This is the English view, and the holding is the same in all of the American courts, with one exception. The declaration that the husband is the 'personal property' of the wife has not yet received the sanction of the court or text-writer."

After making these observations in passing, the plea was pronounced bad. In the American Annotated Cases, 1912D, page 258, after quoting the passage above referred to, the editor makes this comment:

"It would seem, however, that in the last-mentioned case the statement of the court as to the English view on the question at issue is not in accord with the decision of *Brunsdon v. Humphreys*, 14 Q. B. D. 141, 148, 150, reversing 14 Q. B. D. 712. There the question was directly raised and passed on; Brett, M. R., and Bowen, L. J., holding in separate opinions that in case of accident caused by the negligent driving, in which both the goods and person of the plaintiff are injured, not merely one cause of action arises, but two causes of action, which are several and distinct. Lord Coleridge, C. J., dissented, however, from the majority opinion."

The annotation continues:

"In other jurisdictions, the rule followed is that adopted in *Brunsdon v. Humphreys*, 14 Q. B. D. 141, referred to in the preceding subdivision of this note, namely, that in such a case different rights give rise to separate causes of action, so that separate actions may be maintained, the one for injury to person and the other for injury to the property"—citing not less than six American cases.

The reported case to which these notes are attached, *Ochs v. Public Service R. Co.*, 81 N. J. Law, 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D, 255, makes the seventh American case from the volume last cited. It is, besides, entitled to great weight because of the high reputation of the New Jersey courts. There the plaintiff, while driving his carriage, was run down by the trolley car of defendant, and the horse, wagon, and person of the plaintiff were injured. The plaintiff recovered in an action for the injury to the horse and carriage, and thereafter brought suit for his personal injuries, in which a motion for nonsuit was made, and refused. The ground of the motion was that the former suit for property damage was a bar to the suit for personal injury. A judgment was rendered for the plaintiff, and appeal was taken to the Supreme Court, an intermediate appellate court, where the judgment below was reversed. The Supreme Court held, as contended for the railroad company here, that a single wrongful act can give rise to but one cause of action, although it may result in different injuries, or injury to different rights, as the cause of action grows out of the act itself, and not out of its results. Then the controversy was taken to the Court of Errors and Appeals, a paramount tribunal in that state. Of the ruling as announced by the Supreme Court, Justice Bergen, for the unanimous Court of Errors and Appeals, declared:

"The rule has the support of authorities entitled to serious consideration; but courts of equal learning and experience have held that there is a distinction to be made, and also that the resultant injury, and not the neg-

ligent act, is the ground of action. As the question is now before this court for the first time, we are at liberty to adopt the rule of law which appears to us to be most logical and reasonable, and we are of the opinion that there is a clear distinction between the two classes of injuries, and that it is the injury, and not alone the negligent act, which gives rise to the right of action, for a negligent act is not in itself actionable, and only becomes the basis of [an action] when it results in injury to another."

The learned judge continues:

"Our Legislature has recognized a distinction between the right to recover for injuries to property and those to the person. This is indicated by its course of legislation, for it has created a different period of limitation within which suits may be brought to recover damages for the respective injuries."

These like other grounds of differentiation cited also clearly appear in the relating statutory enactments in Georgia. See especially sections of the Code of 1910, 4422, 4423, 4424, 4481, 4485, 4496, and 4497. Section 4496 provides that actions for injuries to personalty shall be brought within four years, and section 4497 that actions for injuries to the person shall be brought within two years, except for injuries to reputation, which shall be brought within one year. It is true that section 5521 of the same Code provides that all claims arising *ex contractu* between the same parties may be joined in the same action, and all claims arising *ex delicto* may in like manner be joined, and the defendant may also set up his defense of claims against the plaintiff of a similar nature with the plaintiff's demand. This statute seems, however, merely permissive. Had the Legislature determined to make the joinder obligatory, the word "shall," rather than "may," would doubtless have been used. "*Expressio unius exclusio alterius est.*" In the New Jersey case above quoted the Supreme Court was reversed, and the judgment on the action before the trial court was sustained. So important seems this authority, and so important is this precedent, that it has been accorded extensive comment, not only in American Annotated Cases, *supra*, but also in 36 L. R. A. (N. S.) at page 240 et seq. The annotations and cases cited in the publication last mentioned are particularly full and instructive. It is but just, however, to Judge Burns to point out that this case was decided June 19, 1911, while *Southern Railway Co. v. King*, *supra*, had been previously rendered on March 3, 1908.

The attention of the court has been called by the learned counsel for the railway company to the recent case in Georgia of *Western & A. Railroad Co. v. Atkins*, 141 Ga. 743, 82 S. E. 139, decided by our Supreme Court, May 19, 1914. There the alleged tort was declared to be a single one, the careless striking by a train of the defendant of a wagon which the plaintiff was driving. From this tort several items of damages were alleged to have resulted, including personal injury to the plaintiff and damages to his mule and wagon. The petition was originally brought to recover all three items of damage. This, of course, under the Georgia statute last quoted, may be done; the question here is, Must it be done?

In *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636, opinion rendered February, 1902, by Justice Cullen, and court otherwise composed of Parker, C.

J., and Justices Grey, O'Brien, Martin, Vann, and Werner, the conflict of authority on this question is again referred to.

"The question now before us," said the learned justice, "has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the Court of Appeals, Lord Coleridge, Chief Justice, dissenting, that damages to the person and to the property, though occasioned by the same wrongful act, give rise to different causes of action (*Brunsdan v. Humphreys*, L. R. 14 Q. B. Div. 141); while in Massachusetts, Minnesota, and Missouri the contrary doctrine has been declared (*Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *King v. Chicago, etc., Ry. Co.*, 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238; *Von Fragstein v. Windler*, 2 Mo. App. 598). The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. 'One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person.' [Extract from *Brunsdan v. Humphreys*, supra.]"

Justice Cullen then comments on the essential differences between an injury to the person and injury to the property, that makes it impracticable, or at least, very inconvenient in the administration of justice to blend the two.

"We think," he continues, "there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that for injury to the property not till the lapse of six years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and, if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable, and would survive the death of either party. It may be seized by creditors on a bill in equity * * * and would pass to an assignee in bankruptcy."

Justice Cullen comments upon the history of the common law, which shows that the distinction between torts to the person and torts to property has always obtained, in which connection we may well recall the grand distinction of Mr. Justice Blackstone, in his famous Commentaries, between rights of persons and rights of things.

It is true that the contrary is maintained in quite a number of cases produced by the assiduity of the learned counsel for the defendant. Among these is the notable case of *Mobile & Ohio R. R. Co. v. Matthews*, 115 Tenn. 172, 91 S. W. 194, decided by the Supreme Court of Tennessee, January 29, 1906. There it was held that the injuries sustained to the plaintiff's person and to his property in a single collision with a railroad train give rise to but one cause of action, and damages for both classes of injuries must be recovered in a single suit. But even there the court observed:

"It is not improper to declare on different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is no difference in the measure of damages, and all the damages sustained must be sued for in one suit."

This rule would seem to produce no little inconvenience, and if adhered to, where a number of injuries were sustained, might necessarily demand from the court a variety of rulings upon the measure of damages, with all of the confusion in the minds of the jury which might result. It is not uncommon now for an automobile to be destroyed by a swift-running train. The husband might survive, the wife or the child might perish, and the machine itself be destroyed. In one case the expectation of life, the value of the service of the wife, possibly the service of the child, the mental pain and anguish, the costs of medical attendance, the physical suffering of the plaintiff, would be proper for consideration by the jury. Much must depend upon the enlightened conscience of that body. It would seem highly provocative of difficulty and perhaps rank injustice if such damages might be mitigated or reduced by considerations relating to the actual cost or market value of the automobile or baggage.

In *Coles' Adm'x v. Illinois Central R. R. Co.*, 120 Ky. 686, 87 S. W. 1082, it was held that one action must be brought for killing plaintiff's intestate and intestate's horse and the destruction of his buggy. To the similar effect is *Wheeler Savings Bank v. Tracey*, 141 Mo. 252, 42 S. W. 946; 64 Am. St. Rep. 505. In *Brannenburg v. Indianapolis, Pittsburgh & Cleveland R. R.*, 13 Ind. 103, 74 Am. Dec. 250, it was held that where two horses were killed by the railroad company, at the same time and place, on suit and recovery for the value of one of them, the owner cannot afterwards recover in an action for the value of the other. This would be obvious enough. Perhaps the strongest case cited for the plea, is *King v. Chicago, Milwaukee & St. Paul Ry.*, 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238. It is precisely in point and adopted the dissenting opinion of Mr. Justice Coleridge in *Brunsdon v. Humphrey*, 14 Q. B. 141. It is to be reiterated, however, that the opinion of the majority of the court there, and not the dissenting opinion, forms the English rule. Citations from Cyc. are also relied upon with confidence by the learned counsel for defendant, but Cyc., like the Swiss, will be found with equal valor and weight of attack fighting on both sides.

Reference is made to the declaration of the court in *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276. In that case the bill set forth two distinct and independent causes of action. One was founded upon an agreement as to title between the parties at interest. The other was founded upon a patent of the United States. It was held that the proceedings and decree as to the patent, on which the plaintiffs failed, did not subsequently debar them from setting up title under the agreement. The court in this opinion made certain general remarks, which have been frequently quoted.

"It is undoubtedly a settled principle," said Mr. Justice Field, rendering the opinion, "that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end of litigation if such practice were permissible."

There follows, however, this significant remark:

"But this principle does not require distinct cause of action—that is to say, distinct matters—each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together."

This I think presents the true and persuasive rule on this question. Now the matters under consideration here were distinct. The destruction of the automobile was one thing; the injury to the plaintiff was another and quite different thing. The tort on the part of the railway company, if it existed—that is to say, the violation of the law, if it took place—as it effected the distinct results, was itself the same; but the measure of damages widely differ. The mental processes for the ascertainment of righteous compensation for the separate injuries are widely different. In the one case, it was a duty to estimate the injury to the intricate machinery made by the art and skill of man; in the other, the injury or mutilation alleged to the far more complex and mysterious machinery made by Nature, or by Nature's God. Nor was one action brought when the other had failed; they were brought simultaneously, and there is no contention that they were not brought in entire good faith.

It is, of course, to the interest of the public that there should be an end of litigation; but where the authorities are in palpable and conceded conflict, and where no controlling rule has been announced for the direction of the court, it will hesitate long before denying to a plaintiff the right to a hearing upon his declaration of enduring personal injury, permanent mutilation, and the destruction of his life work, because, forsooth, through the mistake of an attorney, a declaration had been filed at the same time to recover the value of a machine.

For these reasons, with great deference to courts and others who may differ, it must be held that the plea in bar be stricken and the case proceed.

IN RE MAPLECROFT MILLS.

(District Court, W. D. South Carolina. November 23, 1914.)

1. BANKRUPTCY (§ 90*)—ACTS OF BANKRUPTCY—RECEIVERSHIP—EVIDENCE.

Where the act of bankruptcy alleged in an involuntary petition is that prescribed by Bankr. Act July 1, 1898, c. 541, § 3a(4), 30 Stat. 546, as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (Comp. St. 1913, § 9587), that because of insolvency a receiver has been put in charge of the debtor's property under the laws of the state, the issue is not directly that of insolvency, but whether the receiver was appointed on that ground, and if the record of the court making the appointment shows that it was made on that ground, extrinsic evidence of insolvency is not necessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 124; Dec. Dig. § 90.*]

2. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—GROUNDS FOR APPOINTMENT OF RECEIVER.

A court of equity has no power to take possession of and operate by its receiver the business and property of an industrial corporation, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to enjoin creditors from enforcing their legal remedies except as incidental to the granting of some definite and substantive relief, and to conserve the property for the benefit of creditors because of the insolvency of the corporation until it can be sold and the proceeds distributed without undue loss because of piecemeal administration; hence where a receiver for such a corporation is appointed, with power to conduct its business, it must be presumed that the action of the court was based on a finding of insolvency which constitutes an act of bankruptcy under Bankr. Act July 1, 1898, § 3a(4), as amended by Act Feb. 5, 1903, § 2.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

3. BANKRUPTCY (§ 81*)—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER.

Where the act of bankruptcy charged in a petition is that because of insolvency a receiver was put in charge of defendant's property and the order appointing the receiver does not state the grounds therefor, the record on which it was made must be referred to for the purpose of determining the fact.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

4. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—RECEIVERSHIP BECAUSE OF INSOLVENCY.

Where the real and substantial effect of the appointment of a receiver for a corporation by a state court is that the appointment was made because of insolvency, and the further proceedings should logically be to wind up the corporation and distribute its assets, the jurisdiction of a court of bankruptcy to adjudge it a bankrupt on the ground of such appointment cannot be defeated because, in the proceedings or pleadings or orders in the state court, no ground is stated for the receivership, or a ground other than insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

5. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER BECAUSE OF INSOLVENCY—"IMMINENT DANGER OF INSOLVENCY"—"INSOLVENCY."

The appointment of a receiver for a corporation by a state court under Code Civ. Proc. S. C. 1912, § 303, subd. 4, on the ground that it is "in imminent danger of insolvency," which means danger of insolvency from the standpoint of preserving the assets, is within the meaning of Bankr. Act July 1, 1898, § 3a(4), as amended by Act Feb. 5, 1903, § 2, and constitutes an act of bankruptcy thereunder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, First and Second Series, Insolvency.]

6. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER.

Where certain creditors of an industrial corporation, acting in its interest, applied to a state court for the appointment of a receiver, which was made with the consent of the corporation, the fact that the complaint did not allege any ground of equitable jurisdiction to make the appointment, which could have been made only on the ground of insolvency, does not change the effect of the appointment as an act of bankruptcy under Bankr. Act July 1, 1898, § 3a(4), as amended by Act Feb. 5, 1903, § 2.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

7. BANKRUPTCY (§ 20*)—INVOLUNTARY PROCEEDINGS—ASSETS IN POSSESSION OF STATE COURT.

That a state court by its receiver has taken possession of the property of a corporation does not absolve a federal court from the duty of adjudging

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it a bankrupt, where the requisite grounds are alleged and proved by the petitioning creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

8. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—CORPORATION.

The fact that the consent of a corporation to the appointment of a receiver by a state court because of its insolvency was not authorized by formal corporate action does not prevent such appointment from constituting an act of bankruptcy under Bankr. Act July 1, 1898, § 3a(4) as amended by Act Feb. 5, 1903, § 2.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

In Bankruptcy. In the matter of the Maplecroft Mills, alleged bankrupt. On motion by defendant for new trial. Motion denied, and adjudication ordered.

Mayson & Johnson, of Atlanta, Ga., and John H. Earle, of Greenville, S. C., for petitioning creditors.

McCullough, Martin & Blythe, of Greenville, S. C., for Maplecroft Mills.

SMITH, District Judge. This matter came on to be heard upon a petition for involuntary bankruptcy filed against the Maplecroft Mills, on September 10, 1914. This petition alleged that the Maplecroft Mills, a cotton manufacturing corporation, was insolvent, and that it had committed an act of bankruptcy, in that on the 25th of August, 1914, preceding it had allowed a receiver because of its insolvency to be put in charge of its property by the court of common pleas for Pickens county in the state of South Carolina. To this petition the Maplecroft Mills answered, denying insolvency, denying that it had committed the act of bankruptcy alleged in the petition, and requiring that the issues be inquired of by a jury. The cause was thereupon placed upon the docket for the trial of issues by a jury in bankruptcy, and was called at the October, 1914, term at Greenville. Upon the call a jury was impaneled, and for evidence to support their petition the petitioners introduced in evidence the record from the court of common pleas for Pickens county in the case of Carolina Supply Company and William Goldsmith v. Maplecroft Mills. The construction of that written record is for the court, and if in the opinion of the court it appeared upon the face of this record that the property of the Maplecroft Mills was upon the date stated placed in the hands of a receiver by the state court because of insolvency, it was the duty of the court to instruct the jury to find a verdict to that effect. There were other points at issue in the petition and answer; but inasmuch as if in the opinion of the court the construction of the record was as above stated, it determined and ended the cause. The court, therefore, being of the opinion that the proper construction of the record so put in evidence was to the effect that it appeared upon the face thereof that because of insolvency a receiver was, on August 25, 1914, by the court of common pleas for Pickens county placed in charge of the property of the Maplecroft Mills, it thereupon directed a verdict to that effect to be rendered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the jury, which was done. Upon the coming in of the verdict counsel for the respondents moved the court for a new trial upon the following grounds: (1) That it does not appear from the record in the state court nor the evidence that because of insolvency a receiver has been put in charge of the property of respondent corporation by the state court. (2) On the ground that it affirmatively appears from the record that the receiver was put in charge of the property in the state court upon other grounds. (3) That it does not appear from the record in the state court, nor the evidence, upon what ground the receiver was appointed in the state court. (4) That the finding of the state court does not preclude the respondents from introducing evidence in this court upon the issue of insolvency. (5) That the remedy of the petitioner and the creditors with respect to the finding of the state court is in that court. (6) Upon the ground that the respondents are entitled to introduce evidence upon the question as to whether the proceeding in the state court is binding upon the respondents; that is to say, upon whether there was corporate action.

Full argument and consideration has been had upon such argument, and the matter is now before the court for determination. If the conclusion of the court be that it was in error in its ruling as to the construction of the proceedings in the state court, then a new trial should be ordered on any other issues involved in the petition which would justify an adjudication in bankruptcy; if, however, the opinion of the court is finally that it was correct in its construction of that record made at the time of trial, then a new trial would be refused and an adjudication in bankruptcy ordered. The question, therefore, primarily and for the purposes of this present decision entirely depends upon the proper construction to be placed upon the proceedings and the order thereon made in the state court.

[1] This petition in bankruptcy is filed mainly under the third clause of subdivision 4 of section 3 of the Bankrupt Act as amended in 1903, which prescribes that an act of bankruptcy exists where a party made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, or territory, or of the United States. Acts of bankruptcy, therefore, under this subdivision 4 are three: (1) Making a general assignment for the benefit of creditors; (2) being insolvent, applying for a receiver or trustee for his property; (3) because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state or a territory, or the United States. It will be seen by the language of the Bankrupt Act that under this last clause insolvency itself is not made one of the substantial issues to be tried as an issue of fact in the bankrupt court except in so far as the appointment of a receiver or trustee has been because of insolvency. In other words, if the action of the court appointing a receiver was based upon insolvency, that is the only question for determination, and in itself would appear to determine the question of insolvency as adjudicated in the order making the appointment. It is not necessary under this subdivision that, in addition to evidence showing the appoint-

ment of a receiver by the court appointing the receiver because of insolvency, evidence should be additionally produced outside of the action of the court to show that the alleged bankrupt was in fact insolvent. In other words, it is not necessary, upon an application for involuntary bankruptcy under this last clause, to prove both that the alleged bankrupt had had a receiver appointed because of insolvency, and in addition and wholly dehors of this order of appointment the alleged bankrupt was actually insolvent, but to establish only that the receiver was appointed by the court appointing him because of insolvency, which involves and establishes the existence of insolvency. This question is to be determined principally by the inspection of the record of the court appointing the receiver.

"Under the second provision it has been held that where the creditors' petition charges a single act of bankruptcy, viz., 'because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state; the act of bankruptcy is dependent upon the state of facts disclosed upon the record in the case before the court making the appointment of a receiver. In re Douglas Coal & Coke Co. (D. C.) 131 Fed. 769; In re Spalding, 139 Fed. 244 [71 C. C. A. 370]." *Exploration Merc. Co. v. Pacific H. & S. Co.* (C. C. A., 9th Circuit) 177 Fed. 825, 840, 101 C. C. A. 39, 54.

[2] The record in the court of common pleas for Pickens county, which has been put in evidence in this case, consists, so far as the present question is concerned, of the complaint in the state court, with the exhibit attached thereto, the answer of the defendant, the Maplecroft Mills, and the order of the state court appointing a receiver. Upon an inspection of this record it appears that the complaint was dated August 24, 1914; the answer to the complaint was dated August 25, 1914, and the order appointing a receiver was made August 25, 1914, upon the consent of the defendant, the corporation being the only defendant. The question now arises upon the construction of this record: Does it show that a receiver has been appointed in the state court "because of insolvency," within the meaning of the Bankrupt Act? The complaint in the state court upon its face purports to be brought on behalf of all creditors and all stockholders of the corporation. This is a most anomalous characterization at the outset, for as a corporation represents its stockholders, there is no reason why a proceeding should be brought by stockholders on behalf of the corporation unless there is some antagonistic position alleged and shown between the stockholders and the corporation, which is practically impossible in the case of all the stockholders. There may be a difference between a part of the stockholders and a corporation, but it is impossible to conceive of a position where there can be any subject of litigation between all the stockholders and the corporation so long as the rule of law exists that the stockholders collectively are the corporation. The two parties plaintiff are creditors for a relatively small amount, viz., one for \$1,012.09, and the other for \$90.42, a total of \$1,102.51, out of an alleged aggregate indebtedness of \$176,184.23. The complaint alleges that the defendant corporation is indebted to various parties in the sum of near \$175,000. The exhibit attached to the complaint shows its indebtedness to be \$176,184.23. The complaint alleges, further, that a large amount of this is past due, and the rest will fall due

in a very short time; that the corporation is unable to pay that which is past due or that which is to become due; that it is without credit and cannot borrow the money to meet its obligations and continue its business; that the corporation itself admits its inability to pay its debts, and that plaintiffs are advised that many of the creditors will immediately begin suit on the obligations of the defendant, and proceed to collect by judgment and execution, with the result that the mills will be closed and the property of the corporation sacrificed; that under normal conditions the plaintiffs believe the defendant could carry on its business, but that the European war and recent developments in the financial and industrial world render it impossible for the defendant corporation to finance its business, procure credit, and maintain itself as a going concern, although the plant and business of the said corporation is worth much more as a going concern than if it were forced from lack of funds to shut down; that it has a well-organized labor force employed of 125 people, who in case of a shutdown would be thrown out of business and scattered, with great loss to the defendant; that in the present condition of the money market and in the adverse circumstances existing in the industrial and financial world, as plaintiffs are informed and believe, the property of defendant corporation would not at forced sale bring 50 per cent. of its actual value, and that it is entirely to the interest of the creditors and stockholders to conserve the property and business of the defendant corporation; and that to this end it is advisable and necessary that a receiver be appointed for the assets, with full power to operate the plant, manufacture goods, buy cotton and supplies, sell products, and do all other things proper and necessary to continue the business; and that the receiver should be authorized to borrow money in order to carry on the business and to continue the business as a going concern until a reorganization can be effected or a sale of the property be had, or until such time as it will be expedient or possible to make arrangements to meet the demands of its creditors; and that it is necessary, in order to conserve the assets and value of the defendant's business, that all creditors and stockholders be enjoined from bringing legal proceedings except in that action.

An inspection of this complaint in itself would justify the characterization that for a proceeding in equity it is one of a very anomalous kind. There is no distinct equitable ground for the jurisdiction of a court of equity alleged. The proceeding is not brought nominally to liquidate the corporation as insolvent and marshal and distribute its assets. It is not brought to enforce a lien of any kind. It does not expressly and in words purport to be brought because the corporation is insolvent and the assets must be preserved and marshaled and distributed and sold for the benefit of its creditors. It does not allege a single controversy or disputed question to be adjudicated by a court. There appear to be no antagonistic interests or parties. The court is not asked to do anything of a judicial nature. It is brought, according to the theory of counsel, only in order that the court shall do what is styled conserve the property of the corporation and continue its business. In other words, the proposition of plaintiffs in the state court is that the court of equity, where the stock-

holders of the corporation cannot carry it on successfully, shall take possession of its assets and carry on an unsuccessful business, in the meanwhile preventing outside creditors or persons having legal claims from asserting in another proper tribunal their just claims. The court of equity is supposed, under the theory of this complaint in the state court, to act as the King of England was supposed to act in case of charitable corporations as *parens patriæ*. An industrial corporation—not a public service corporation—but an *industrial* corporation, carrying on business in like manner as an individual for the profit and benefit of the corporation and of its stockholders, finds that it cannot carry on business profitably or successfully. The stockholders in charge have been unable to carry on the business successfully; they have a large number of contract obligations which it does not suit them to meet, or which they are unable to meet, but which if the holders are allowed to prosecute or to assert their legal rights will put an end to the corporation carrying on its business. They therefore appeal to a court of equity to do that which they themselves have not been able to do, that is, to carry on the business of the corporation successfully, and further to do that which they themselves have no legal right to do, that is, prevent outside persons having legal claims from enforcing them for an indefinite period, and, to accomplish the purpose of carrying on the corporation's business, that the court of equity should do that which the corporation in no respect had the power to do, viz., create an artificial credit by creating prior liens over existing obligations. That is to say, that a court of equity should allow its receivers to carry on the business and to borrow to the destruction of existing mortgages or other liens or the interests of other existing creditors for the purpose of preserving and conserving for stockholders the business which has proved to have been so unsuccessful.

There is no jurisdiction in the court of equity to perform any such task as this. A court of equity does not exist for the purpose of operating industrial and manufacturing enterprises. It is supposed to exist for the purpose of administering justice by adjudicating disputed questions and by awarding to suitors their rights. Incidentally to its proper jurisdiction to marshal and distribute assets a court of equity has power to take possession of and to preserve property and have its receivers temporarily and for the purposes of preservation only, until a sale can be had, and in certain cases, to accomplish these purposes, to operate the property, and issue receivers' certificates. In the case of industrial corporations, who have no duty to perform to the public, this power is to be very carefully, cautiously, and rarely exercised, and only in ordinary cases for the purpose of actual preservation of the property. There is no known authority or power in a court of equity to take possession of the property not for the purpose of granting and decreeing some definite relief, but for the purpose simply indefinitely, for no fixed purpose, of operating the property and creating liens thereon to the destruction of other interests and in the meanwhile of indefinitely warding or barring or fencing off creditors and others having legal claims from asserting their just

rights against the property. A consideration of this assertion of jurisdiction as existing in courts of equity, carried to its logical conclusion, would show to what monstrous lengths it would lead. It would show in what an unfortunate and false position a chancellor or judge would be placed. In lieu of deciding questions and adjudicating and enforcing rights he would be the operator of large industrial enterprises on a large scale through his appointees, and the dispenser of power and patronage by such appointments to an unlimited amount. No judge should be in such position; the office is not held to be subject to the demoralization and temptations of dispensing power and patronage, but for the purpose of adjudicating questions and dispensing justice. That appeals of the kind made in the complaint in the state court have been made to courts of equity, and unfortunately in too many cases allowed, is true, and it is possible that from the apprehension of results that may follow from such a course that much of the public prejudice against that most salutary power of courts of equity, viz., the appointment of receivers, has been created and continues. The records of the courts show only too many cases where this attempt upon the part of a court of equity to operate industrial enterprises through its receivers has resulted disastrously, and only too many cases where the adoption of the extraordinary but too facile method of raising money on the artificial and compulsory credit of receivers' certificates has displaced existing liens and destroyed what were supposed to be fixed contract rights. Where stockholders have made mortgages whose prior liens they must themselves respect, they are prone to appeal to the extraordinary power of a court of equity for their benefit to displace and destroy the liens they have themselves created so as to raise additional funds for the operation of a business in whose speculative result the stockholders are alone interested. An injunction against other creditors bringing action is only to prevent the piecemeal administration of an insolvent estate. To extend it beyond this, to enjoin all creditors from prosecuting their rights for an indefinite period simply that the concern may be operated for the speculative benefit of stockholders, would be in effect to enact a judicial stay law which is not a prerogative of a court of equity.

An inspection of this proceeding in the court of common pleas for Pickens county shows upon the face of it no ground in equity for any court to take possession of this property and operate it actively as it is prayed, and thus indefinitely prevent creditors from enforcing their statutory and legal rights and remedies save and except upon the ground of insolvency. It is to be assumed, therefore, that the state court as a court of equity could only have taken possession of the property of the corporation upon some definite and fixed ground of equity jurisdiction. Upon the face of the complaint that fixed and definite ground of equity jurisdiction could only have consisted in the power of the court of equity to take possession of the assets of an insolvent corporation for the benefit of its creditors and forthwith to proceed to wind up, liquidate, sell out, and distribute all the assets among the parties entitled, and for that purpose to enjoin and debar

creditors from asserting their rights only until this distribution and liquidation and adjustment of their just rights can be had with due despatch according to the ordinary proceeding in a court of equity.

[3]. There exists upon the face of this complaint in the state court no other ground or justification whatsoever for a court of equity to have taken possession of the property of this corporation and appointed its receiver, save to enforce the just rights of creditors of an insolvent corporation. The answer of the defendant admits all the allegations of the complaint, and upon this complaint and consenting answer the receiver is at once appointed by the court. No grounds in the order are given by the state court upon which the appointment of a receiver is made. The order does not state that the receiver is appointed because of the insolvency of the corporation, or for any other reason. The order simply appoints a receiver, but the order is made upon the basis of a complaint of this character and upon an answer admitting all the allegations, and made at once as soon as the complaint and answer are filed, both actions being done contemporaneously. Where the order of appointment does not state the grounds, the record upon which the order was made must be referred to, to ascertain the facts which justified the order.

"If the court had merely appointed a receiver, without reciting the grounds of its judgment, the record could have been referred to, or the grounds shown by evidence allunde. *Russell v. Place*, 94 U. S. 608 [24 L. Ed. 214]; *Davis v. Brown*, 94 U. S. 428 [24 L. Ed. 204]." *In re Spalding* (C. C. A., 2d Circuit) 139 Fed. 244, 247, 71 C. C. A. 370, 373.

The state court as a court of equity must, in the absence of any grounds being stated, be presumed to have acted upon the only grounds which at law or in equity would, on the face of the record by any possibility, have authorized the order. Upon the face of the record in the state court no ground can be assigned which would stand the test of such authorization, save the ground of insolvency, and the state court must be presumed to have made the appointment on that ground. It cannot be assumed that the state court acted except upon recognized principles of law and equity.

[4] It appears on the face of the record that the action of the state court was invoked by the corporation itself, in order that the stockholders be relieved from the consequences of their management. From the record as a whole it is fairly inferable that the whole proceeding is a consent proceeding and was done on the application and for the benefit of the corporation. We have therefore proceedings filed nominally for the stockholders and creditors of the corporation, but really filed on behalf of and proceeding from the corporation itself, whereby it seeks to have its creditors and other persons having legal claims against it indefinitely postponed from the assertion of their legal rights, whilst the corporation is operated by a court of equity, and not operated simply to conserve the property only until the same can be sold and its assets liquidated and its creditors paid, but operated indefinitely until, as it is phrased, some reorganization satisfactory to the stockholders or others can be had. This construction of the proceedings in the state court is strengthened

by the fact that the receiver appointed to operate the corporation by the state court is himself, the president of the corporation under whose management the conditions of affairs has arisen which necessitates the appeal to a court of equity to do that which the administration of the corporation has been unable to do; that is to say, to operate and manage its business profitably. The answer of the defendant is sworn to on August 24, 1914, by G. Lang Anderson, as the president of the Maplecroft Mills, and on the same day G. Lang Anderson is the party appointed by the state court receiver upon the complaint and answer. The state court by its appointment of a receiver has ousted the stockholders from their possession of the corporation. It has displaced all the directors and officers of the company. Yet no charge has been made against these officers. The complaint does not allege that they are incompetent or unfaithful. The complaint does not allege that the stockholders or officers of the company have abused their position. Upon what possible theory can the stockholders and officers of the company be deprived of the possession of their property save on the ground that the property really belongs to others, viz., the creditors? It belongs to the creditors because the assets are insufficient to afford any real interest to the stockholders, and the corporation is thus by its own written admission insolvent.

The effect now of this appointment in the state court is to be construed in its relation to the Bankrupt Act. The Bankrupt Act embodies a system of paramount and general provisions for the enforcement by creditors of their rights against corporations and individuals in the contingencies provided for in the act. Upon the happening of the contingencies mentioned in the Bankrupt Act the provisions of the act become paramount and imperative, and the rights of the creditors can be stayed by no pretense or device to the contrary. In other words, where a condition arises which by its situation calls for the paramount operation of the Bankrupt Act, its operation cannot be stayed by the fact that it may be attempted under any guise or method whatsoever to take away from its operation that which should properly be subjected thereto. To hold otherwise would be to destroy the whole effect of the operation of the act. If the effect of the action of the state court in the taking possession of the assets of the corporation be in result to subtract from the operation of the Bankrupt Act that which would be subject to it, the so wording of the order as that the state court's action may be placed on another ground would not be effective to prevent the operation of the Bankrupt Act. In other words, where the real and substantial result of the state court's order was that a receiver was appointed because of the insolvency of the corporation, and the effect of the proceedings in the state court should logically be to wind up and liquidate the assets of the corporation and distribute them as the assets of an insolvent corporation the operation of the Bankrupt Act cannot be defeated because in the proceedings or pleadings or orders or decrees of the state court its action may be based upon no ground at all, or upon any other ground than insolvency. To hold otherwise would be to allow, in any case where for the purpose of effecting such results pre-

tensive grounds were alleged for appealing to the state court, the whole distribution and liquidation of the assets of an insolvent and bankrupt corporation to be taken away, and creditors to be deprived of that which by paramount statute is intended for their benefit under a general and uniform system of administration of insolvent corporations.

"The corporate entity cannot be so disguised that it can successfully masquerade in the name of a stockholder, and, evading the searching eyes of a court of equity, hinder, delay, and defraud its creditors and defeat the provisions of the bankruptcy act. A court of equity looks through forms to the substance of things, thus preserving the rights of innocent parties against all forms of deception and fraud." *Exploration Merc. Co. v. Pacific H. & S. Co.* (C. C. A., 9th Circuit) 177 Fed. 825, 839, 101 C. C. A. 39, 53.

There are cases in which receivers can be appointed by state courts of corporations which are not insolvent, and for purposes which would not call for the operation of the Bankrupt Act. It has been held in the case of a public service corporation that where the administration contumaciously refuses to perform the duties which it is ordered to perform by the decree of the court, the court can appoint a receiver to take possession and perform them. It has been held that where a majority of stockholders override the rights of minority stockholders and pay no attention to the decrees of the court requiring them to respect such rights, the court will take possession of the assets and appoint a receiver who will protect the rights of the minority stockholders. It has been held that where the administration of the corporation is guilty of fraud or mismanagement, or insists upon so performing its business in violation of the plain instructions of law that loss of its charter is threatened, with the destruction of its property, to the great detriment of its minority stockholders, a court of equity will, under certain circumstances, appoint a receiver. But these are all cases in which the corporation still continues as a solvent, existing corporation, and in which there is primarily no question as to the rights of creditors. Where, however, it is a question of the rights of creditors and the appeal to the court is plainly based upon the fact that there is not enough to meet the rights of the creditors, and the action of the state court is to protect and liquidate and care for the rights of creditors, then it is that the Bankrupt Act comes in. That act has prescribed a general, uniform system for the liquidation of insolvent corporations and for the assertion of the rights of creditors, to which every creditor is entitled, and wherever it is endeavored to take away from the operation of the act that which is properly subject to it, it is the duty of the court to consider the substantial results, whatever may be the cloak that is used to cover them. In the present case there is, under the allegations of the complaint in the state court, no known ground of equity jurisdiction to justify the action of that court in taking possession of the assets of this corporation and appointing a receiver, unless it be to protect creditors and for their benefit to liquidate the corporation and wind up its affairs and distribute its assets upon the hypothesis that it is insolvent, and it must be inferred that the state court acted upon the only ground that could justify its action.

[5] It is contended, on behalf of those who resist the adjudication in bankruptcy, that under the state statute the state court has power to appoint a receiver of a corporation that is in imminent danger of insolvency, as well as if it be insolvent. Code Civ. Proc. S. C. 1912, § 303, subd. 4. The language of the Code of Civil Procedure, in using the words "or in imminent danger of insolvency," means, however, danger of insolvency from the standpoint of preserving its assets, that is to say, that unless a receiver be appointed, a corporation just about to become insolvent will have its assets wasted. In other words, the language of the Code of Procedure, "in imminent danger of insolvency," is the equivalent of the word "insolvency" as used in the Bankrupt Act as denoting the ground for the appointment of the receiver. The appointment of a receiver, whether because the corporation is insolvent or in imminent danger of insolvency, is in either case predicated upon insolvency. In the one case it is because that insolvency is actual, in the other case because that insolvency is imminent, but in both cases it is because of insolvency. Where, therefore, a court of equity such as the court of common pleas for Pickens county takes possession of the assets of a corporation and displaces the management and control of the stockholders and appoints a receiver to operate the corporation and preserve the assets with a view to ultimate distribution among the creditors, it can only be on the ground that the property practically belongs to the creditors, because its assets are insufficient to meet any interest in the stockholders. In such case the corporation is insolvent and the appointment of the receiver, whether because the corporation be then actually insolvent or in imminent danger of insolvency, is an appointment because of insolvency within the meaning of subdivision 4 of section 3 of the Bankrupt Act.

"When it appears that the application for a receiver has relation to insolvency, and that the purpose of the proceeding is to have the corporation managed with a view to its dissolution and the distribution of its assets among the creditors of the insolvent, then the application for a receiver is clearly an act of bankruptcy." *Exploration Merc. Co. v. Pacific H. & S. Co.* (C. C. A., 9th Circuit) 177 Fed. 825, 841, 101 C. C. A. 39, 55.

[6] The counsel resisting the adjudication in bankruptcy further insist that, if it be so that the state court had no jurisdiction as a court of equity to appoint the receivers unless the corporation was insolvent, there being no other assignable ground for its action, yet that such error on the part of the state court is an error to be corrected there. That is, that if the state court chose to appoint a receiver when it was not justified in doing so because the court had no ground of equitable jurisdiction, this court must not construe this action of the state court to be justified in that it appointed receivers upon the ground of insolvency, but that it must remit the parties to the state court to go back and ask for a dismissal of the proceedings there on the ground that that court was without power to make the appointment on any ground stated in the complaint. This is, however, to overlook entirely the effect which this court is bound to give to the Bankrupt Act. The Bankrupt Act provides a general uniform system

for the administration of insolvent individuals and concerns. Creditors are given certain rights under this act which they are entitled to have enforced. In the present case, to tell them that the matter is to be remedied in the state court would be to give them no remedy at all. The only parties to the proceeding in the state court are the creditors who have acted on behalf of the corporation in making the application for the receivers in the state court, and the corporation itself, which has acceded to and joined in that application. It would be unreasonable to expect these parties who have themselves acted in the state court in order to procure the receivers now to go there and ask that court to undo what was procured by them to be done on the ground that that court was without power. The directions of the Bankrupt Act are imperative, and creditors are entitled to the rights therein given, and are entitled to have them enforced independent of any action of the state court. Under the Bankrupt Act and the theory by which it is enforced, upon the insolvency of a corporation or individual, the creditors become the owners, as it were, of the property, and have the right to administer it. They are given the right to appoint a trustee of their selection, who is to administer the property very much under their direction and control. This is a positive and uniform system provided by law for the administration of insolvent corporations. Its provisions cannot be defeated by any state action, legislative or judicial.

"The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933.

To allow the state court, or any other court for that matter, save the federal, to administer the assets of such a corporation by receivers is to nullify the provisions of the Bankrupt Act. It is to allow these corporations whose property really belongs to their creditors to be taken away from the control and possession of the creditors and put in the control and possession of an appointee of the court. This control and possession for administration is the right which under the Bankrupt Act is expressly given to creditors, and it is the duty of the court which is charged with the administration of the Bankrupt Act to see that their rights in this respect are enforced and protected. If, therefore, a corporation is in the position in which a receiver has been appointed of its assets because of its insolvency, then the right of the creditors to control, manage, and administer its assets at once arises under the Bankrupt Act, and to remit them to the state court upon the theory that it is in that tribunal that they should make the question that the court has acted erroneously in the proceeding in which they are not parties would be wholly destructive of those rights.

[7] It is suggested that, the state court having already taken possession through its receiver of the property, for the federal court now to adjudicate the corporation bankrupt will lead to a question as to which court is entitled to possess and administer, as the state court

may take the position that it is not a case of insolvency, and that unless it be admitted by the state court that it is a case of insolvency, this court should refrain from action likely to cause friction. It is unfortunately true that the administration of the Bankrupt Act in these respects has caused and will cause friction between the two courts over the possession of the bankrupt assets, unless it is administered by both with the recognition of the fact that in all cases which come within the purview of its provisions the administration of the bankrupt estate necessarily belongs to and must be carried on in the federal court. It is frequently a very invidious and unpleasant duty for the federal court, when the state court has, by a receiver, taken possession of the assets of an insolvent individual or corporation, then to proceed to take them away from the state court for administration in the federal court under the provisions of the Bankrupt Act. The performance of this duty is one to be accomplished by both courts with mutual consideration and comity. However unfortunate and disagreeable this duty may be, it is the duty of the federal court under the Bankrupt Act and the decisions of the United States Supreme Court. In *re Watts & Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. Wherever a corporation is adjudicated to be bankrupt its assets must be administered in the federal court. This is logically essential, as they cannot be administered piecemeal through long-drawn periods by different courts. It is for the purpose of carrying out and enforcing the theory of a general and uniform administration of assets under the provisions of the bankrupt statute. No matter if the state court has taken possession of these assets when the assets so taken possession of are the property of an individual or corporation duly adjudicated bankrupt and whose estate is to be administered in the bankrupt court, it is the obligation of the federal court to administer, and the duty of the state court to deliver, the assets and permit them to be administered in the federal court. For this purpose, under the decisions of the United States Supreme Court, it is the duty of the federal court to grant injunctions against persons and parties proceeding in the state court, and, if necessary, to require the receiver of the state court to deliver up possession of the assets to the trustee in bankruptcy, or even to a receiver appointed in the federal court. In *re Watts & Sachs*, *supra*. To avoid all friction on these points it is necessary to recognize that the Bankrupt Act is paramount in its provisions for the administration of insolvent estates, and that the moment the question comes in that these assets are to be administered upon the theory of insolvency, all other jurisdictions after an adjudication in bankruptcy cease, and that of the federal court becomes exclusive. It is no more exclusive, then, than the jurisdiction in admiralty, which exclusive jurisdiction, under the shipowners' statutory limited liability act, is exercised even to the point of requiring suits for loss or damage in the state courts to be dismissed and the whole matter referred to the federal court. *Steamship Co. v. Manufactory Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038.

It is better for both courts that there should be some uniform rule on this subject, and it would relieve the federal court of the disagree-

able position it is sometimes put into of taking possession of assets, by it being recognized that this condition exists wherever the liquidation or marshaling or distribution of assets of a corporation or individual is to be had because of insolvency. Whenever, in other words, creditors are shown to be in a position in which their rights must be protected, that the assets practically belong to them, and that the corporation is in a position because of insolvency in which its assets should be applied to the liquidation of the debts and the payment of the creditors through an adjudication in bankruptcy, then the federal court alone has the burden of the administration.

If, therefore, it were recognized as a uniform rule that wherever the proceedings in the state court show that what is sought in that court is the ultimate effectuation of these purposes, that is to say, the liquidation of the corporation and the application of its assets to the payment of creditors because of insolvency, then the provisions of the Bankrupt Act directing the method of administration in the United States Court become paramount, and the state court would not attempt to take possession, it would put an end to all question and friction whatsoever. The federal court would be thus relieved from the invidious duty of deciding whether or not in any particular case it should interfere with a court of equal dignity and concurrent jurisdiction because the nominal ground upon which the state court acted was not stated to be insolvency, although the whole result of the action in that court was necessarily based upon the theory that the corporation was to be liquidated as an insolvent corporation.

[8] Under the evidence in the case now before the court it is found that the only ground upon which the state court, to wit, the court of common pleas for Pickens county, could possibly have made the order of appointment of a receiver and taken possession of, to operate and eventually liquidate and marshal and distribute, the assets of the Maplecroft Mills under the allegations of the complaint was because of insolvency. The Supreme Court of the state of South Carolina has approved, for the state courts of the state of South Carolina, the same definition of insolvency as that given in the Bankrupt Act. *Miller v. Land Co.*, 53 S. C. 364, 31 S. E. 281. Where the court of common pleas for Pickens county appointed a receiver because of insolvency, it must be presumed that it found under the laws of South Carolina it was such an insolvency as is defined to be insolvency in the Bankrupt Act, and that it adjudicated that question as against the Maplecroft Mills, so as to determine it as well for these proceedings as for those in the state court. It could not well be that the company was found to be insolvent in the state court for its own purposes on its own application, and then solvent at the same time in the federal court so as to defeat the application of its creditors. The position taken in the sixth ground of the motion for a new trial that in this proceeding the corporation had the right to disavow the action taken in the state court as not properly authorized by corporate action, so that in the one proceeding it would benefit by that action as duly authorized and in the other it should be at liberty to disavow it to the prejudice of creditors,

is disposed of by the principle decided in *Exploration Merc. Co. v. Pacific H. & S. Co.*, supra, 177 Fed. 840, 101 C. C. A. 39.

These conclusions are in conflict in many particulars with the conclusions of the United States Circuit Court of Appeals for the First Circuit, in the case of *In re Wm. Butler & Co., Inc.*, 207 Fed. 705, 125 C. C. A. 223. That decision, however, was by a divided court, an able judge (Judge Putnam) dissenting. The reasoning and conclusions of the United States Circuit Court of Appeals for the Ninth Circuit in *Exploration Merc. Co. v. Pacific H. & S. Co.*, 177 Fed. 825, 101 C. C. A. 39, seem the better, and in the absence of any controlling decision in this circuit have been followed.

It is therefore ordered that the motion for a new trial be and the same is hereby refused.

It is further ordered, adjudged and decreed that it appears that the said Maplecroft Mills was insolvent at the date of the filing of the petition for involuntary bankruptcy herein, and that within four months prior to the filing of said petition a receiver was by the court of common pleas for Pickens county, because of insolvency, put in charge of its property, and it is thereupon ordered, adjudged, and decreed that the said Maplecroft Mills be, and the same is hereby, declared to be a bankrupt under the provisions of the statute of the United States in such case made and provided.

In re PARSONS LUMBER & PLANING MILL CO.

(District Court, N. D. West Virginia. December 12, 1914.)

1. FRAUDULENT CONVEYANCES (§ 308*)—TRUST DEED—NECESSITY OF RECORD—"CREDITOR."

Failure to record a mortgage or trust deed is not a fraud on creditors as a matter of law, under the recording act of West Virginia; since the term "creditors," as used in Code W. Va. 1913, c. 74, § 5 (sec. 3835), providing that unrecorded conveyances shall be invalid as against creditors, means lien, and not unsecured, creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 923-940; Dec. Dig. § 308.*]

For other definitions, see *Words and Phrases*, First and Second Series, *Creditor*.]

2. CORPORATIONS (§ 542*)—DEED OF TRUST—EXECUTION—LIABILITY OF DIRECTORS.

Code W. Va. 1913, c. 53, § 52 (sec. 2884), provides that corporate directors shall cause a record of their proceedings in all meetings to be properly kept, and that no member of the board shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president, or other officer, or employé, or be present at the board while the same is being considered. *Held*, that where the secretary and general manager of a West Virginia corporation executed a deed of trust of its property to secure certain stockholders and directors, including himself, for their liability as indorsers of certain of the corporation's paper, under a by-law purporting to give him unlimited power to control and manage its business, without any direction or vote at a regular meeting of either stockholders or directors, and withheld the deed from record during a time when debts on behalf of the company sufficient to render

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it wholly insolvent were incurred, and caused such deed to be recorded only a few weeks before the institution of bankruptcy proceedings, it was fraudulent and void, though ratified at a stockholders' meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Parsons Lumber & Planing Mill Company. On petition to review a referee's order setting aside a deed of trust as a preference. Affirmed.

Samuel T. Spears, of Elkins, W. Va., for petitioning creditors.

A. Jay Valentine, of Parsons, W. Va., for defending creditors.

DAYTON, District Judge. The bankrupt is a corporation. W. H. McWhorter, W. G. Davisson, and R. J. Clifford, were stockholders and directors, and W. G. Davisson was secretary and general manager, thereof on November 12, 1912, when it purported to execute a deed of trust upon certain real estate in Parsons, Tucker county, W. Va., to secure W. H. McWhorter, W. G. Davisson, and R. J. Clifford as its indorsers upon notes aggregating \$5,000 and renewals thereof, discounted in banks and the proceeds applied to its use. This deed of trust, made to D. A. Davisson, trustee, was executed, for and on behalf of the corporation, by W. G. Davisson, its secretary and general manager, under the authority of a by-law of the corporation conferring upon such officer the duty to control all the business affairs of the company, with power to purchase, sell, enter into contracts, and make deeds on its behalf. It was not authorized by a direct vote had at a regular meeting of either stockholders or directors, but its execution was ratified and confirmed subsequently, on December 30, 1912, by a stockholders' meeting.

This deed of trust, executed on November 12, 1912, as stated, was acknowledged November 13, 1912, but was not recorded until January 6, 1914, a few weeks before the corporation was adjudged bankrupt. In the body of the deed of trust erasures were made, whereby one lot of ground, originally embraced therein, was stricken out. These erasures are admitted by Davisson, the secretary and manager who executed it on behalf of the corporation, to have been made by him, but whether before or after its acknowledgment, or whether before or after its ratification by the stockholders' meeting, he is unable to state. In the course of the bankruptcy proceedings before the referee, W. H. McWhorter, one of the indorsers secured thereby, filed his petition, praying preference for these \$5,000 of notes, proved by the bank owners in the cause, by reason of this deed of trust. Creditors contested the prayer of this petition, asserting the deed of trust to be void and constituting no lien. The referee sustained this contention of creditors, and at the instance of McWhorter this ruling of the referee is before me for revision.

The contention of creditors is that this trust deed is fraudulent and void, because (a) it was designed to give a preference and was withheld from recordation, and therefore subject to sections 2 and 5 of chapter 74 (sections 3830 and 3835) of the Code of West Virginia; (b) because

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the erasures made in it; and (c) because it was not authorized by action of the corporation's board of directors enrolled in the minutes of a meeting regularly held, in which minutes it affirmatively appeared that these three directors, McWhorter, Davisson, and Clifford, withdrew from the meeting and did not vote upon the question of its authorization.

[1]. Since the decisions of *Holt v. Crucible Steel Co.*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, *Gilbert v. Pepper*, 65 W. Va. 355, at page 364, 64 S. E. 361, 36 L. R. A. (N. S.) 1181, *In re Charles Town Light & Power Co.* (D. C.) 199 Fed. 846, and *Davis v. Hanover Savings Fund Society* (affirming the latter case) 210 Fed. 768, 127 C. C. A. 318, it is well settled that the mere failure to record a mortgage or deed of trust is not a fraud upon creditors as matter of law, for, in the *Holt Case*, the Supreme Court holds that the effect to be given such unrecorded instrument must be determined by the recording law of the state, and that the question arising under that law turns upon who are included in the term "creditors" in the state statute; while, in the *Gilbert-Pepper Case* the Supreme Court of Appeals of West Virginia has held that this term "creditors," as used in section 5, c. 74, of the Code, refers solely to lien and not to unsecured creditors. In the *Davis-Hanover Case* the Circuit Court of Appeals for this circuit has held that a transfer made by a bankrupt is to be judged, in determining the question whether or not it constitutes a preference, as of the time when it was made, and not of the time of its registration.

[2] At the time when this deed of trust was made, November 12, 1912, the evidence seems clear that this corporation was not insolvent; therefore section 2 of chapter 74 of the Code becomes inapplicable. The question in consequence, narrows itself down to whether or not, under all the facts and circumstances, this deed of trust was fraudulent in fact in its execution, and on that account should be held invalid. In this connection, it is to be noted that in the *Charles Town Light & Power Co. Case* the unrecorded mortgage was executed to secure general bonds of the corporation, negotiable in character, which in good faith had been purchased by the banks, and that the failure to record the mortgage was not the direct fault of the banks, but of the trustee in the mortgage. These banks were in no wise interested, as stockholders, directors, or otherwise of the debtor corporation. Here the deed of trust was executed, not to directly secure the bank creditors, but to secure, for their surety obligation as indorsers, three men who were both stockholders and directors of the debtor corporation. It was not authorized by vote of the board of directors as required by section 52, c. 53, of the West Virginia Code, which expressly provides that directors shall cause a record of their proceedings in all directors' meetings to be properly kept, and that:

"No member of the board shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president or other officer or employé, or be present at the board while the same is being considered."

In construing this statute in *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, where the lumber company had conveyed its

property to a trustee to secure its debt, and had preferred a firm composed of two of its directors, both of whom were present at this board meeting, when such conveyance was ordered and such preference directed, but did not vote on that question, the Supreme Court of Appeals of this state held the conveyance as to such preference to be *prima facie* fraudulent and void. In *Hope v. Salt Co.*, 25 W. Va. 789, it is held:

(1) The relation existing between a director and the corporation is that of a trustee.

(2) Where a director of a corporation, dealing with the corporate property, obtains an interest in or control over the same for his own benefit or advantage, either with or without the consent of the other members of the board of directors, the transaction will be viewed with jealousy, and it will for slight grounds be set aside by a court of equity at the instance of those standing in the relation of beneficiaries of such property, or at the instance of some one claiming through or under them, who but for such advantage so obtained by such director would have the right to charge said property with the payment of their debts.

(3) Where a director of a corporation, claiming to be a creditor thereof, has obtained from his codirectors a deed of trust or mortgage upon the corporate property to the exclusion of other creditors, such transaction will be presumed to be fraudulent; but such presumption may be rebutted by clear and convincing evidence that the same is fair and reasonable and wholly free from all taint of fraud and unfairness.

In effect the law demands that a director, acting in a fiduciary capacity as trustee, must do nothing that will in any way give him personal advantage over any stockholder or creditor of the corporation, or either directly or indirectly do anything in his own interest calculated to deceive or mislead others, whether stockholders or creditors, to their injury. In this case can it be said that Davisson, McWhorter, and Clifford fulfilled this legal obligation resting upon them as directors, when they secured this deed of trust from the corporation? I think not. They ignored the Code requirement of securing its execution at a regular directors' meeting, with recorded minutes showing their withdrawal and refusal to vote for its authorization. On the contrary, they caused it to be executed by one of themselves as secretary and general manager, under and by virtue of a by-law giving him apparent unlimited power to control and manage the company's business. They then withheld this deed of trust from public knowledge, and incurred debts on behalf of the company sufficient to render it wholly insolvent, and only a few weeks before the institution of bankruptcy proceedings disclosed its existence. Davisson, as secretary and manager, executed the deed. Davisson thereby sought to secure himself and two codirectors for their personal indorsement on notes for \$5,000 money borrowed. Davisson concealed the existence of this trust, and as manager incurred large debts for and on behalf of the company; in other words, secured others to give it credit which he and his two codirectors were not willing to obtain for it without being secretly secured by lien upon the company's real estate in a way that would largely destroy the security that such other creditors supposed they had in the unincumbered property of the company for the payment of their debts at the time they were contracted. This was clearly unjust and unfair, and brings

this trust deed under the ban of the law as fraudulent and void, so far as it seeks to establish a lien upon the property of the corporation for these debts.

Reaching this conclusion, it is not necessary to discuss the question of erasures in the deed, or any other objections.

It follows that the referee did not err in holding this deed of trust void, and as giving no lien preference to these three directors, and his decree in the premises must be in all respects affirmed.

STATE OF IDAHO, to Use of LEONARD et al., v. AMERICAN SURETY CO. OF NEW YORK.

(District Court, D. Idaho, S. D. October 2, 1914.)

1. REMOVAL OF CAUSES (§ 107*)—PROCEEDINGS FOR REMAND—SUFFICIENCY OF MOTION.

A motion to remand a cause to the state court, from which it has been removed, will not be denied merely because it does not specifically state the grounds thereof, where it raises the question of the federal court's jurisdiction, and clearly signifies the unwillingness of the moving party to submit thereto.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 103*)—PROCEEDINGS FOR REMOVAL—PETITION.

Where, though a petition for the removal of a cause to the federal court was apparently not drawn on the theory that a separable controversy existed between defendant and one of the plaintiffs, it prayed that the whole suit be removed, and from the petition and the complaint together a separable controversy clearly appeared, the failure of the petition to clearly outline the nature of the separable controversy, state the value of the matter therein in dispute, and the names of the parties, as would have been the better practice, was not sufficient ground for remanding the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. § 103.*]

3. REMOVAL OF CAUSES (§ 48*)—SEPARABLE CONTROVERSIES—SEPARATE INTERESTS OR PLANS.

The state, on behalf of the depositors in an insolvent state bank, sued the surety on the bond of its former state bank commissioner, alleging that he had neglected his duties, to the injury of the depositors. The complaint in each cause of action sought to recover the amount of the claim of a particular depositor, and not a distributive portion of the penalty of the bond. H., one of the claimants, was a nonresident of the state. All the other claimants were residents, but none of their claims, except that of L., amounted to \$3,000. The surety was a New York corporation. Held, that there was a separable controversy between defendant and L., entitling defendant to a removal to a federal court because of diverse citizenship, though the aggregate of the claims exceeded the penalty of the bond, as the right to a removal is governed by the case as stated in the complaint, which did not show that the case involved priorities or joint interests in a specific fund.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.*]

4. REMOVAL OF CAUSES (§ 102*)—SEPARABLE CONTROVERSIES—REMOVAL OF WHOLE SUIT.

Notwithstanding the general rule that the removal of a separable controversy carries with it the entire suit, the causes of action other than

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Ren'r Indexes

that in favor of L. would be remanded to the state court, as H., a non-resident of the district, could not be required to submit her claim, alleged to be entirely separate and distinct from that of the other claimants, to the federal court of such district, nor could the court, even by consent, take jurisdiction of the separate and distinct claims for less than \$3,000.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.*]

At Law. Action by the State of Idaho, for the use and benefit of William Leonard and others, against the American Surety Company of New York. On motion to remand to the state court. Motion granted in part, and denied in part.

Edwin Snow, of Boise, Idaho, and J. G. Hedrick, of Hailey, Idaho, for plaintiffs.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for defendant.

DIETRICH, District Judge. William Leonard and 15 others, named in the complaint, were depositors in the Idaho State Bank at Hailey, which on August 31, 1910, closed its doors and permanently suspended payment on account of insolvency. At that date and for some time prior thereto one William G. Cruse was state bank commissioner, whose duty it was to inspect the affairs of this and other state banks. Upon his appointment in March, 1909, he had executed a bond to the state of Idaho in the penal sum of \$50,000, conditioned upon the faithful discharge of his duties, with the defendant as surety thereon. In the complaint it is alleged that Cruse neglected his duties in certain specified particulars, to the injury of the depositors; and it is claimed that under the statutes of Idaho the bond, while running to the state, is for the use and benefit of any one injured through the misconduct or negligence of the commissioner, and that suit may be maintained in the name of the state for the use of any one who may have suffered damage.

In the complaint the state is named as plaintiff, but it is expressly averred that it has no real interest, and that the suit is brought for the use of the 16 persons named as depositors. As between these several depositors it is not shown that there is any community of interest, their claims all being waged in the same action to save the expense of numerous suits, and for no other reason. All of the beneficiaries are resident citizens of Idaho, with the exception of Annie I. Harris, who resides in California. Her claim is for \$46,672.74, and that of the claimant William Leonard is for \$9,656.93. No one of the other claims reaches \$3,000.

The defendant is a corporation organized under the laws of New York, and has brought the record here from the state court, where the action was commenced, by a petition for removal, upon the ground of diversity of citizenship between it and the claimants. The plaintiff moves to remand.

By both sides it seems to be conceded that the case falls within the rule that, whenever the state is a mere figurehead or a nominal party

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in a suit upon a bond, its presence will be disregarded, and only the citizenship of the beneficiaries or real parties in interest will be taken into consideration in determining whether the requisite diversity of citizenship exists. *City of New Orleans v. Whitney*, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102. The precise point urged by the plaintiff is that, neither the defendant nor the claimant Annie I. Harris being a resident of this district, the cause cannot be removed here over her objection, under the rule of *In re Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164.

[1] Preliminarily it is objected by the defendant that the motion to remand does not state the grounds upon which counsel for the plaintiff now actually rely. True, such grounds are not specifically stated, but the motion does raise the question of our jurisdiction, and clearly signifies the unwillingness of the plaintiff to submit thereto any of the causes of action pleaded. Certainly it cannot be said that there has been a waiver by Annie I. Harris of the objection that the removal is not to the district of her residence or that of the defendant, and though the objection is not specifically stated in the motion, she now distinctly urges it.

[2] If I understand correctly the defendant's position, it now seeks to sustain federal jurisdiction upon the ground alone that between it and the claimant, William Leonard, a resident of Idaho, there exists the requisite diversity of citizenship, and that he asserts a claim in his own right in excess of the amount required to confer jurisdiction, and that the claim is of such a character as to constitute a "separable controversy." From the form of the petition it is to be inferred that probably this was not the theory entertained by counsel when the petition was drawn, and upon behalf of the plaintiff it is now objected that, it not appearing from the petition itself that removal is sought upon such ground, the existence of a separable controversy cannot be made the basis for retaining jurisdiction. But the prayer of the petition is that the whole suit be removed, and, taking both the petition and the complaint together, it clearly appears that there is involved in the suit a controversy between William Leonard and the defendant of the value of over \$9,000. While it is doubtless better practice for the petition itself clearly to outline the nature of the separable controversy and to state the value of the matter therein in dispute, and the names of the parties thereto, where such facts clearly appear upon the face of the complaint, the failure of the petition to restate them will not be deemed to be a sufficient ground for remanding the cause. In the one decided case cited by the plaintiff as a precedent for the view which it urges, *Gates Iron Works v. James E. Pepper & Co.* (C. C.) 98 Fed. 449, it did not appear anywhere in the record what was the value of the matter involved in what was claimed to be the separable controversy.

[3, 4] The only real question, therefore, is whether the controversy between the plaintiff, acting on behalf of William Leonard, and the defendant, as the same is set forth in what is called the first cause of action, constitutes a separable controversy. In form the action is one at

law, in which the plaintiff seeks to recover 16 separate judgments for 16 individual depositors in a bank, having no relation to each other, and no one having any interest in the recovery of any other. Ordinarily there could be no question that such controversies are all separable one from the other. Upon behalf of the plaintiff, however, it is contended that inasmuch as the aggregate of these 15 several claims is apparently in excess of the penalty of the undertaking, upon which the action is brought, necessarily the relief to be granted to one of the plaintiffs will be somewhat dependent upon the relief granted to the others. The rule relied upon is that a suit which involves priorities or joint interests in a specific fund presents no separable controversy. *Fidelity Insurance v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898.

Such may be the principle upon which the controversy will ultimately be adjudicated, but the difficulty about it is that such is not the theory upon which the complaint is drawn. As the pleading now stands, the defendant is compelled to resist claims for money judgments greatly exceeding \$50,000. Leonard prays, not for a distributive portion of \$50,000, but for a personal judgment against the defendant in the sum of \$9,656.93, together with interest thereon at the rate of 7 per cent. per annum from September 1, 1910. And it is elementary that we must be governed by the plaintiff's case as it is set forth in the complaint. In this view it is thought the claim must be held to constitute a separate and distinct cause of action, and a controversy entirely separable from the other causes of action. The removal was therefore proper, in so far as concerns this one cause of action. But by a parity of reasoning it is thought that all other causes must be remanded. I am not unmindful of the general rule that the removal of a separable controversy carries with it the entire suit; but the conditions here are unique, and there seems to be no other way of giving effect to the removal statutes according to their spirit and intent. The joinder in one suit by means alone of a nominal plaintiff of 16 different causes of action in favor of 16 different plaintiffs, with no joint or community interest, is unusual, and upon the one hand we cannot permit the resort to such practice to operate to cut off the defendant's right to have a controversy between it and a resident of the state litigated in the federal court, and upon the other it cannot be regarded as a warrant to this court to exercise jurisdiction beyond that which the statutes confer.

We cannot compel Annie I. Harris, a nonresident, to submit to an adjudication here of a claim which she alleges is entirely separate and distinct from that of each of the other claimants, and we cannot take jurisdiction, even by consent, of a separate and distinct claim of less than \$3,000 in value, belonging to one depositor, because we have jurisdiction of the claim of another depositor in excess of that amount. It is hardly necessary to add that if the plaintiff had, in a single cause of action, set forth the facts substantially as they appear in the 16 different causes of action, and had prayed only for a decree adjudging that, by reason of such facts, the defendant was indebted to the plaintiff, for the use and benefit of the several claimants, in the sum of \$50,000, and further that the decree apportion the amount of the recovery

to the several claimants as their rights and interests should ultimately appear, the questions discussed would present a different phase.

In harmony with the foregoing views, an order will be entered remanding all causes of action except the first, and as to that the motion will be denied.

IDAHO RY., LIGHT & POWER CO. et al. v. MONK, County Treasurer, et al.

(District Court, D. Idaho, S. D. June 18, 1914.)

1. TAXATION (§ 318*)—ASSESSMENT—TIME FOR ASSESSMENT—STATUTORY PROVISIONS.

Laws Idaho 1913, p. 201, § 92, providing that the state board of equalization must assess all property to be assessed by it at its meeting convening on the second Monday of August, and must complete the assessment on the fourth Monday of August, is for the benefit of the public, and not for the protection of the taxpayer, and is directory only; and hence, where the board, while still in regular session, adopted a tentative valuation of a hydro-electric power plant, and referred such valuation to the state tax commission for investigation, report, and recommendation, an assessment made December 4th, after receiving such report, materially increasing the tentative valuation, was not void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 530, 531; Dec. Dig. § 318.*]

2. TAXATION (§ 363*)—ASSESSMENT—RIGHT OF TAXPAYER TO HEARING.

Under Laws Idaho 1913, p. 202, § 95, providing that every person whose property is to be assessed by the state board of equalization shall, upon request therefor in writing, be entitled to a hearing before the board in relation to his assessment, where a taxpayer appeared at the board's regular session in August, presented data, and made an argument with reference to the valuation to be placed upon its property, and the board adopted a tentative valuation of such property, which it referred to the state tax commission for investigation, report, and recommendation, and after receiving such report met, pursuant to the call of the chairman, as provided in the adjournment of its August session, such taxpayer was not entitled to notice before the making of an assessment materially increasing the tentative valuation, in the absence of any claim that it did not know that the valuation fixed in August was tentative, that it requested notice before any change therein was made, or that any promise in respect to a further hearing was made, especially where it never requested in writing a hearing pursuant to section 95.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 603-606; Dec. Dig. § 363.*]

In Equity. Suit by the Idaho Railway, Light & Power Company and another against William Monk, as Treasurer and ex officio Tax Collector of Canyon County, Idaho, and another. Bill dismissed.

Cavanah, Blake & MacLane, of Boise, Idaho, for plaintiffs.

J. H. Peterson, Atty. Gen. of Idaho, J. J. Guheen, T. C. Coffin, and E. G. Davis, Asst. Attys. Gen. of Idaho, R. L. Givens, of Boise, Idaho, B. W. Henry, of Caldwell, Idaho, and C. E. Melvin, of Silver City, Idaho, for defendants.

DIETRICH, District Judge. This suit was brought by the Idaho Railway, Light & Power Company against the treasurer and the auditor of Canyon county to enjoin the collection of certain taxes levied against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its property. The cause is submitted upon the complaint and the answer and a brief stipulation of facts.

The property assessed is a hydro-electric power plant, together with transmission lines and distributing systems, by which the plaintiff furnishes electric current for lighting and power purposes in Ada, Canyon, and Owyhee counties, Idaho. The assessment was made by the state board of equalization, and it is objected, not that the property was exempt from taxation, or that the valuation is excessive, or that the board is without general authority or jurisdiction in the premises, but that its proceedings were so irregular as to render void that part of the valuation here called into question. Section 89 of the revenue laws of the state (Session Laws 1913, p. 200) provides that every corporation owning property of this character shall, on or before the second Monday of July of each year, furnish to the board a verified list and description thereof. By section 92 it is provided that the state board must assess all property subject to its jurisdiction at the meeting of the board "convening on the second Monday of August in each year, and must complete the assessment of such property on the fourth Monday of August in that year." In section 93 it is provided that the board may, for the purpose of securing information, require the attendance of the owner of property, or of any officer or manager or agent of such owner, and require him to answer under oath all questions propounded to him. Section 95 provides that:

"Every person whose property is to be assessed by the state board of equalization shall, upon request therefor, in writing, be entitled to a hearing before the said board in relation to his assessment or the assessment of other property in the state, and the said board shall, upon any such request, fix a time for such hearing within the period within which such assessment must be made, and such hearing shall be conducted in such manner as the said board may direct."

By section 96 it is directed that on or before the first Monday of September in each year the state auditor, as secretary of the board, shall prepare and transmit certified statements of the assessment of property by the board to the auditors of the several counties of the state.

The assessment complained of was made for the year 1913, and it appears that while the board was in session on August 18, 1913, a representative of the plaintiff company appeared, presented data, and made an argument with reference to the valuation to be placed upon its properties. Apparently this hearing was informal, for no request in writing was ever made by the plaintiff, as provided in section 95, and no hearing was ever ordered. Upon August 25th, the board being still in regular session, a tentative or conditional valuation of several properties, including that of the plaintiff, was adopted, as appears from the following entry in the minutes of the board:

"It was found upon investigation that reports on this class of property in many cases were incomplete and unsatisfactory, and for this reason are unsafe upon which to base an assessment; therefore, upon motion duly carried the following valuations were temporarily set, and by same motion, the said valuations were referred to the state tax commission for investigation, report, and recommendation as to valuation, property which had escaped, and any other recommendations and suggestions said commission might see fit to make, to the end that said property might be equitably taxed, the said

temporary and tentative valuations to be filed in abeyance, and not definitely and finally fixed or acted upon until said report from said tax commission had been filed and acted upon by the state board of equalization, the board having practically no data or information upon which to base a true assessment."

Appended to the entry was a detailed schedule of the valuations. Why the board adopted this tentative valuation is left to conjecture, and, upon the whole, seems quite inexplicable. Again, for some reason which apparently no one is able to explain, these assessments, although expressly stated to be tentative, and ordered "to be filed in abeyance and not definitely and finally fixed or acted upon," were promptly certified to the auditors of the several counties in which the properties are situate. Upon receipt of the certificates, these officers entered the valuations upon the tax rolls of the county, without any notations that they were tentative only. On November 22d, two days before the time when taxes became due and payable under the law, the state auditor telegraphed the county officers not to issue official receipts upon the valuations theretofore certified, and on December 4th the board of equalization again met, pursuant to the call of the chairman, as provided in the adjournment of August 25th. No notice of this meeting was given to the plaintiff; and, in so far as appears, it had no knowledge thereof, and was unrepresented. At this meeting, after considering the report of the state tax commission, the board entered an order very materially increasing the tentative valuations of August 25th, and thereupon the state auditor certified them to the several counties, with directions to the proper officers to enter the new valuations upon their assessment books, and to charge and collect taxes upon the basis thereof.

It is of the increase in valuation made at this meeting that the plaintiff complains. In due time it tendered to the defendant county officers, and they received, without giving a receipt in full, the entire amount of taxes due upon the valuation of August 25th; its contention being that the excess valuation of December 4th was without jurisdiction, and therefore void, because (1) the board was without power to act after the fourth Monday of August; and (2) assuming that its power did not cease upon that date, still it could not thereafter act without notice to the plaintiff.

[1] As to the first proposition, it is thought that section 92, prescribing the period for making assessments, is not mandatory, but directory only. There is no language which, either in terms or by fair implication, prohibits the board from performing the primary duty imposed upon it after the fourth Monday of August, and upon the whole I entertain no doubt that the provision relied upon in section 92 was intended for the benefit of the public, and not for the protection of the taxpayer, and therefore falls within the general rule that provisions in revenue laws, fixing the time within which duties are to be performed, are directory only. *Cooley on Taxation* (3d Ed.) p. 487; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *State Auditor v. Jackson County*, 65 Ala. 142, 150; *Buswell v. Supervisors*, 116 Cal. 351, 48 Pac. 226; *Sweet v. Boyd*, 6 Okl. 699, 52 Pac. 939; *Anderson v. City of Mayfield*, 93 Ky. 230, 19 S. W. 598; *Hart v. Plum*, 14 Cal. 148.

I have examined the several decisions cited by counsel in support of a contrary view, but they all involve statutory provisions differing to some degree from the law of this state. Take the case of *Stone v. Sessions*, for instance, reported in 100 Mich. at page 343, 58 N. W. at page 1014. The gist of the decision is correctly stated in the head-note, which is as follows:

"Under a city charter providing that the board of review shall not increase an assessment after the first five days of its session, the doubling of an assessment after seven days renders it void."

Here are express negative words, denying authority after the lapse of a certain prescribed period. Not quite so explicit, but of like import, is the statutory prohibition involved in *Napa Savings Bank v. Napa County*, 17 Cal. App. 545, 120 Pac. 449. The other cases, while perhaps not so obviously distinguishable, furnish the plaintiff but little support. It may be added that, this being a question of assessment, and not of equalization, section 79 of the revenue law tends to confirm rather than to militate against the view which we have adopted. It provides that:

"The state board of equalization may meet at any time or place designated by the chairman for the purpose of promulgating rules or considering any matters in relation to assessment and taxation, but no assessment shall be equalized except at the meetings prescribed for that purpose" in the act.

[2] Nor do I think the second proposition tenable. It is conceded that actual notice to the plaintiff of the meeting of the board held during the period prescribed by law was not required, the statute itself giving constructive notice to all the world. It is further conceded that if the adjournment of August 25th had been to a day certain no notice of the adjourned meeting would have been necessary. But the argument is that, upon the passing of the fourth Monday of August, and with the indefinite adjournment of the board, no valuation could thereafter be put upon a taxpayer's property without first giving him actual notice and an opportunity to be heard.

The case relied upon with considerable confidence at the argument, and the only one directly in point to which my attention has been called, is that of *Mercantile Bank of Cleveland v. Hubbard*, County Treasurer, decided by the Circuit Court of Appeals of the Sixth Circuit, reported in 105 Fed. at page 809, 45 C. C. A. at page 66. The case arose in Ohio, and the facts are closely analogous to those of record here. While the statute of Ohio required notice to the taxpayer, the court took occasion to express the opinion that, without the statutory requirement, "such action could not be taken as would affect a citizen's property rights by increasing the value of his property for taxation without giving him an opportunity to be heard." It is to be noted, however, that this case, under a different title, was taken to the Supreme Court of the United States for review, where the decision of the Circuit Court of Appeals was reversed upon this very point. *Lander v. Mercantile Bank*, 186 U. S. 458, 469, 22 Sup. Ct. 908, 913 (46 L. Ed. 1247). After referring to certain of its earlier decisions, the Supreme Court, speaking through Mr. Justice McKenna, said:

"We do not think the principle of those cases is affected by an adjournment of the Ohio board without fixing a date of meeting. How were the rights of the bank affected and to what inconvenience was it put? It did not appear at the first meeting of the board. It rested on the evidence it had returned to the auditor, and it knew that the report it had made to the comptroller of the state would be before the board, and it knew also the duties and power of the board. The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjournments. What it had done the bank could easily have ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board."

Observations of like character are applicable to the present case. The plaintiff, doubtless acting upon the general notice provided by the statute, appeared before the board at its regular meeting, furnished data, and by way of argument presumably presented such considerations as it had to offer upon the question of the proper valuation to be placed upon its property. It was thus given a hearing, although it had made no formal statutory request therefor. It did not have the right to be present, as in case of a trial in a court of law, during the entire time the board had under investigation and consideration the valuation to be placed upon its property. It had the opportunity and was accorded the privilege of making its showing both upon the facts and the law, and of these it availed itself. What more had it the right to ask? It must have known that the valuation of August 25th was tentative and subject to change. It does not charge that it was misled or deceived. It is not alleged that it requested to be advised before any change in the tentative valuation was made by the board, or that any promise in respect to a further hearing was made or broken. Besides, it is to be noted that only property owners who make request in writing for a hearing are entitled to be heard, and, the plaintiff having failed to make such application, it cannot complain of the failure of the board to give it a further hearing.

Having taken this view of the only grounds upon which the plaintiff contends the enforcement of the tax should be restrained, it is unnecessary to consider the several objections raised by the defendants to the sufficiency of the bill and of the showing therein made, to warrant equitable relief. Accordingly the bill will be dismissed.

MEDLIN MILLING CO. v. MOFFATT COMMISSION CO. et al.

(District Court, W. D. Missouri, W. D. January 9, 1915.)

No. 3691.

1. CORPORATIONS (§ 501*) — ACTIONS — RIGHT TO EQUITABLE RELIEF — ACCOUNTING.

Where an officer of a corporation wrongfully used and lost its funds in certain gambling transactions in grain through defendant commission company, the corporation was entitled to sue in equity to recover the money so lost, because of the trust relationship arising by operation of law and a necessity for an accounting and possible discovery.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1920-1929, 1931, 1932; Dec. Dig. § 501.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONSPIRACY (§ 18*)—CIVIL CONSPIRACY—FAILURE OF PROOF.

An allegation of civil conspiracy operates chiefly to affect the introduction of evidence, and to fix liability on parties who would not otherwise be directly liable, so that failure to establish conspiracy, is not ground for abatement; the establishment of liability directly against one or more defendants being sufficient to support an appropriate decree.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18-24; Dec. Dig. § 18.*]

3. GAMING (§ 14*)—PURCHASE AND SALE OF FUTURES.

At common law a contract for the sale of grain for future delivery, the parties intending that it should not be delivered, but that the obligation should be discharged by a payment of differences, was void as a mere wager; while under Rev. St. Mo. 1909, §§ 4780, 4785, relating to such subject, the contract is void if either party has such intention.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 25, 26; Dec. Dig. § 14.*]

4. GAMING (§ 14*)—DEALING IN FUTURES.

Commodities may be bought in good faith for future delivery, and if so bought hedging will be permitted to secure those who make contracts in advance against the fluctuations of the market, even though it be expected that such purchase will be satisfied by set-off, instead of by an actual delivery of the grain; the test being the real intention of the parties with respect to actual delivery.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 25, 26; Dec. Dig. § 14.*]

5. GAMING (§ 11*)—TRANSACTIONS ON BOARD OF TRADE.

Though legitimate operations on Boards of Trade in accordance with the formalities prescribed and established are recognized as valid, the mere adoption of such formulæ, even though operative within such boards to compel delivery, if demanded, will not protect a transaction which does not contemplate such delivery, though clothed in the garb of regularity.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 19-21, 23, 26; Dec. Dig. § 11.*]

6. CORPORATIONS (§ 426*)—POWERS—CHARTER—ILLEGAL ACTS—DEALING IN FUTURES—ULTRA VIRES.

Where a corporation organized to operate a flour mill, with power to purchase grain necessary for the operation of the mill, etc., it was entitled to buy grain for future delivery, and hedge such bona fide contract when necessary to protect itself against the fluctuations of the market; but it had no right to gamble in futures, and such gambling, being prohibited both by the corporation's charter and the policy of the law, and acts of its officers in using its funds for such illegal purpose, were ultra vires, and not binding on the corporation or its stockholders, nor can they be ratified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.*]

7. CORPORATIONS (§ 487*)—DEFENSES—ULTRA VIRES.

Where defendant commission corporation, through its regularly constituted officers and agents, permitted a treasurer of plaintiff corporation to use complainant's funds to gamble in futures through the instrumentalities afforded by defendant, and defendant received complainant's funds so unlawfully diverted by its treasurer, defendant could not invoke the doctrine of ultra vires, when sued by complainant to recover the money so diverted, nor escape liability because it had paid out a large part of the fund to others.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

8. CORPORATIONS (§ 306*)—LIABILITIES—OFFICERS AND DIRECTORS.

Where gambling transactions in futures between complainant's treasurer and defendant corporations were all conducted in the name of defendant as a corporation; and complainant's money lost therein was all received by defendant corporation, a recovery thereof by complainant was limited to defendant corporation, and could not be had as against its officers and directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 306.*]

9. PARTIES (§ 6*)—REAL PARTY IN INTEREST.

A corporation, being financially embarrassed by reason of the misuse of its funds by its treasurer in certain gambling transactions in grain through defendant corporation, authorized by resolution the transfer of its cause of action to recover the fund from defendant to one who was a director and its attorney. No formal transfer was made, however, and the resolution was rescinded. *Held*, that such proceedings did not affect the corporation's right to maintain the action to recover the funds in its own name.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6, 7; Dec. Dig. § 6.*]

At Law. Action by the Medlin Milling Company against the Mofatt Commission Company and others. Decree for complainant.

Scarritt, Scarritt, Jones & Miller, of Kansas City, Mo., for complainant.

Ball & Ryland, of Kansas City, Mo., for defendants.

VAN VALKENBURGH, District Judge. The complainant, a Texas corporation, seeks to recover from the defendants, a grain brokerage company of Kansas City, Mo., and its controlling officers, and one F. M. Rogers, who was treasurer and general manager of the complainant, an amount equivalent to the funds and moneys of the complainant alleged to have been unlawfully, by collusion and conspiracy on the part of the defendants, diverted from the uses and corporate purposes of the complainant, and by the defendants appropriated to unlawful and illegal uses by means of certain wagers or gambling transactions with respect to the rise and fall of future prices of grain. The complainant's charter limits its powers and purposes to those of owning and operating a flour mill and the necessary lands, buildings, machinery, and appliances therefor, and "to purchase grain and other property necessary for the operation of the said mill, and to transact all business incident thereto for the mutual profit and benefit of the stockholders."

The statutes of Missouri relative to contracts for the purchase and sale of grain and other products for future delivery (section 4780, R. S. Mo. 1909) provide:

"All purchases and sales or pretended purchases and sales, or contracts and agreements for the purchase and sale, of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain or agricultural products whatever, either on margin or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, and all the buying or selling or pretended buying or selling of such property on margins or on optional delivery, when the party selling the same, or offering to sell the same, does not intend to have the full amount of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property on hand or under his control to deliver upon such sale, or when the party buying any of such property or offering to buy the same does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited. Any company, copartnership or corporation, or member, officer or agent thereof, or any person found guilty of a violation of the provisions of this section, shall be fined in a sum not less than three hundred dollars nor more than three thousand dollars."

Section 4785 provides:

"All contracts made in violation of section 4780 * * * of this article shall be considered gambling contracts and shall be void."

The trades under review began about the middle of April, and ended about the middle of July, 1910. The first one was arranged between Rogers personally and the defendants as a pretended sale of 10,000 bushels of wheat, and was closed out three days later at a profit. The defendant corporation was a member of the Kansas City Board of Trade, and all the deals were cleared and closed out through what is known as the clearing house of that board. All of the trades through the clearing house were conducted in the name of the defendant corporation and as its business, and all marginal differences were settled by debit and credit to the defendant corporation. As losses would occur, the defendant corporation, acting through its controlling officers, who were also defendants, would draw its draft upon the milling company for the amount of those losses, and Rogers, either personally or by directing some clerk so to do, would draw a check on the funds of the plaintiff corporation in its bank, and so pay the drafts of the defendant corporation. By those means the funds of complainant were transferred to the treasury of the defendant corporation. The source of these funds and the nature of the trades made were well known to the defendants.

Largely as a result of these and similar transactions the plaintiff corporation suffered financial embarrassment, and the situation was revealed to its controlling officers and directors. Shortly thereafter negotiations were had with its creditors looking to a discharge of its indebtedness and to possible rehabilitation. Among other things, a transfer of this cause of action to one D. T. Bomar, a director and counsel of the complainant company was considered. Appropriate resolutions were adopted by the board of directors, and a tentative agreement to that effect was made; but that arrangement and agreement were, prior to the institution of this suit, canceled and annulled, and this action by the corporation was instituted with the assent and approval of all the parties in interest.

Two questions are interposed at the outset: (1) Is the suit properly addressed to a court of equity? (2) Has the conspiracy charge been established, and, if not, what is the resulting effect upon complainant's right to recover?

[1] It would seem that the bill states grounds for equitable relief. Because of the trust relationship, which arises by operation of law, and the necessity for an accounting, and perhaps of discovery, the courts have recognized the propriety of this form of action. Pearce

et al. v. Dill, 149 Ind. 136, 48 N. E. 788; English v. McIntyre, 29 App. Div. 439, 51 N. Y. Supp. 697; Central Stock & Grain Exchange v. Bendinger, 109 Fed. 926, 48 C. C. A. 726, 56 L. R. A. 875; Cook on Corporations (6th Ed.) vol. 2, pp. 452, 1155.

[2] An allegation of civil conspiracy operates chiefly to affect the introduction of evidence and to fix liability upon parties who would not otherwise be directly liable. The failure to establish it does not abate the suit as in criminal conspiracy, which is the gist of the action. In the former case, the establishment of liability directly against one or more of the defendants is sufficient to support an appropriate decree.

[3] Under the common law a contract for the sale for future delivery of grain or other commodities, the parties to which intend that the goods shall not be delivered, and that the obligation of the contract shall be discharged by the payment of one party to it to the other of the difference between the contract price of the goods at the date fixed for their delivery, is void, because the contract evidences a wager. And under the statutes and decisions of the state of Missouri such a contract is void if either of the parties to it has such an intention. Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284.

[4] Of course, grain may be bought in good faith for future delivery; and if so bought in good faith, hedging will be permitted to secure those who make contracts in advance against the fluctuations of the market, even though it be expected that such purchases will be satisfied by set-off, instead of by the actual delivery of the grain. Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236-249, 25 Sup. Ct. 637, 49 L. Ed. 1031. The rule in this state, as well as generally, is laid down by the Kansas City Court of Appeals in Hingston v. Montgomery, 121 Mo. App. 451, 460, 97 S. W. 202, 204:

"The test to be applied in determining whether sales of commodities for future delivery are legitimate business transactions, or are fictitiously made for the purposes of gambling, is to ascertain the real intention of the parties with respect to the actual delivery of the commodity. A person has the right to sell for future delivery a thing he does not own, provided he and his vendee intend at the time that an actual delivery is to be made; and parties to such contracts have the undoubted right afterwards to release each other from performance, either with or without the payment of a consideration by one of them. Such incidents are not uncommon in legitimate business. But the mere making of a written contract under which a delivery or its legal equivalent may be compelled is by no means conclusive of a mutual intention to deliver. The real intention is to be gleaned from all the facts and circumstances, and when it appears that the written agreement is a subterfuge intended to conceal the actual agreement it will be disregarded. Lane v. Logan Grain Co., 105 Mo. App. 215 [79 S. W. 722]."

[5] Legitimate operations on Boards of Trade, in accordance with the formalities prescribed and established by such bodies, are recognized; but the mere adoption of such formulæ, even though operative within such boards to compel delivery, if demanded, will not protect a transaction which does not contemplate such delivery, even though clothed in the garb of regularity. The law looks beyond the form, and deals with the substance of things.

[6] The Medlin Milling Company had the undoubted right to buy

grain for future delivery, and to hedge such bona fide contracts when necessary to protect itself against the fluctuations of the market. It had no right under its charter to gamble in futures, as that term is used and understood in this discussion. Such dealings were clearly ultra vires this corporation, and were prohibited, both because of the restrictions of its charter and the policy of the law. Any acts of its officers or agents, of the kind thus forbidden, are not binding upon it. To this extent they are strangers to it. Neither has the corporation power to ratify such acts, because illegal and immoral in the eyes of the law. *Jemison et al. v. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697; *Bank v. Edwards*, 243 Mo. 553, 147 S. W. 978; *McCormick v. Market Bank*, 165 U. S. 550, 17 Sup. Ct. 433, 41 L. Ed. 817; *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. In *McCormick v. Bank*, supra, the Supreme Court said:

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

Where, in addition thereto, the act is immoral, as viewed by the expressed policy of the state, the reasoning takes on added strength. The transactions here complained of were conducted by the treasurer of the milling company on the one side, and by the defendant corporation, through its officers named as codefendants, on the other. To my mind the evidence clearly discloses that they were gambling transactions pure and simple. No delivery was contemplated by either party. The grain was not bought and sold for future delivery for the use of the milling company in a legitimate way and to protect it against market fluctuations, but merely for the purpose of closing out the deals upon market quotations. Defendants knew that the funds of complainant were being diverted for this unlawful purpose. The amount thus diverted appears to be \$23,362.50.

[7] The doctrine of ultra vires cannot be invoked by the defendant corporation. It dealt in an unlawful manner, through its regularly constituted officers and agents, to the disadvantage of complainant, whose interests were betrayed by its treasurer. It received the funds thus unlawfully diverted. The fact that it may have subsequently paid out a large part thereof to others cannot avail it. *Huie v. Allen*, 87 Hun, 516, 34 N. Y. Supp. 577; *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788; *Jemison et al. v. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697; *Central Stock & Grain Exchange v. Bendinger*, 109 Fed. 926, 48 C. C. A. 726, 56 L. R. A. 875.

[8] Inasmuch, however, as the dealings were conducted in the name of the defendant corporation, and, so far as the record shows, the money was received by it, the recovery should be confined to this de-

fendant, which must be left to deal with its own officers and directors in that regard as the law may permit.

[9] But one consideration remains, and that is whether the plaintiff in this case is the real party in interest. I am of opinion that it is. The conveyances that were contemplated by the action of the board of directors were but steps in a project of liquidation. Various classes of assets were thus allotted to the representatives of different creditors, and, for certain other than these choses in action, the conveyances were actually made and delivered. No such transfer of title was made of these causes of action. It was authorized by resolution; but it sufficiently appears that this action was rescinded. Under the circumstances of this case the mere resolution could not operate effectively to complete the transfer contemplated. The proposed assignee was a director of the complainant company, a relative of its president, and an attorney in charge of its litigation. Nothing was done by the corporation which could not be withdrawn in any event by consent of both parties to the action. Even though title had been vested in Bomar, it might by him have been reconveyed to the company. No formal action to this end was necessary, because no formal transfer had been made. I think there can be no doubt that the complainant has the right to prosecute the action in its own name.

If complainant were an individual, whose funds had been thus employed by an agent without authority, there could be little division as to the law. Are the stockholders of a business corporation less fortunately situated? It is of paramount importance that the funds of such corporation should not be diverted by its agents from their legitimate channels and applied to unauthorized and forbidden uses with knowledge, actual and constructive, of third parties by whom, as broker or principal, the funds thus diverted are received and misapplied. If this remedy does not exist, the law forbidding transactions of the nature here involved is easily susceptible of evasion.

A decree will be entered accordingly.

In re MAGEN et al.

(District Court, E. D. Pennsylvania. December 10, 1914.)

No. 3641.

1. BANKRUPTCY (§ 414*) — DISCHARGE — OBJECTIONS — BOOKS OF ACCOUNT — FAILURE TO KEEP.

That cash sales, even when payment was received in the presence of the bankrupts' bookkeeper, were purposely and intentionally omitted from the books, was sufficient to sustain a specification of objection to the bankrupts' discharge for failure to keep books of account from which their financial condition could be ascertained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

2. BANKRUPTCY (§ 413*) — DISCHARGE — OBJECTIONS — PROOF — VARIANCE.

Failure of the trustee to prove the whole amount alleged in specifications of objection to the bankrupts' discharge, alleging concealment of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assets, failure to account for assets, and fraudulent omission of property from schedules, was not material.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. § 413.*]

3. BANKRUPTCY (§ 413*)—APPLICATION FOR DISCHARGE—OBJECTION—RULINGS OF REFEREE.

Where specifications of objection to the bankrupts' discharge were filed with the referee, an objection that his report set out a synopsis thereof, instead of setting them out in full, was frivolous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. § 413.*]

4. BANKRUPTCY (§ 415*)—APPLICATION FOR DISCHARGE—HEARING—EVIDENCE—OBJECTIONS—WAIVER.

An objection to the introduction in evidence, on hearing of objections to bankrupts' discharge, of the bankrupts' testimony taken in their general examination, except as against the bankrupt whose testimony was introduced, etc., not made before the referee, is not available on exceptions to the referee's report, adverse to the application to discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698-708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Morris Magen and another, trading as the Magen Bros. Company. On exceptions to referee's report sustaining specifications of objection to the bankrupts' discharge. Overruled. Report confirmed.

Julius C. Levi, of Philadelphia, Pa., for objecting creditors.

Bernard Harris and Henry N. Wessel, both of Philadelphia, Pa., for bankrupts.

THOMPSON, District Judge. The referee recommends that the first, fourth, tenth, and eleventh specifications of objection to the discharge of the bankrupts be sustained. The bankrupts filed 16 exceptions to the referee's report; the first, second, third, fourth, and fifth being based upon alleged error in specific findings of fact. The testimony amply sustains the findings of the referee to which the second, third, fourth, and fifth exceptions are directed.

[1] The first exception is:

"(1) Because the learned referee erred in finding as a fact 'that the bankrupts instructed their bookkeeper not to enter cash sales, and that this method of not entering cash sales entirely falsified the books, and made it impossible to ascertain from them the bankrupts' true condition.'"

There does not appear to be any direct evidence of instructions, as such, from the bankrupts to their bookkeeper not to enter cash sales; but there is ample evidence to show that the cash sales (and in cash sales the bankrupts included those paid for by money, checks, and notes), even when payment was received in the presence of the bookkeeper, were purposely and intentionally omitted from the books. The grounds of the first exception are immaterial, as the evidence amply justifies the referee's first formal finding of fact in support of the first specification of objection, viz.:

"That the bankrupts have, with intent to conceal their true financial condition, and in contemplation of bankruptcy, failed to keep books of account from which such condition might be ascertained."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There was, therefore, no error as charged in the sixth exception, in recommending that the first specification of objection be sustained.

As to the fourth specification of objection, charging removing, transferring, and concealing, merchandise amounting to not less than \$75,000 and upwards, or permitting the same to be done, with intent to hinder, delay, and defraud creditors, the referee finds that the bankrupts transferred, removed, destroyed, or concealed assets to the amount of \$40,808.96.

As to the tenth specification of objection, charging failure to account for assets to the value of \$116,067.06, the referee finds that the bankrupts have failed to account for assets to the amount of \$40,808.96.

As to the eleventh specification of objection, charging that the bankrupts knowingly and fraudulently omitted property to the value of \$116,067.06 from their schedules in bankruptcy, and fraudulently concealed it from their trustee, the referee finds that the bankrupts knowingly and fraudulently omitted property of the value of \$40,808.96.

[2] The evidence amply sustains the findings of the referee as to the amount of the assets under the fourth, tenth, and eleventh specifications, being \$40,808.96. The failure of the trustee to prove the whole amount alleged in the specifications of objection is not material in passing upon the right of the bankrupts to be discharged. In order to make the specifications conform to the proof, however, the fourth, tenth, and eleventh specifications of objection may be amended, so that the figures therein set forth may conform to the fact proved as found by the referee. *In re Lesser* (D. C.) 108 Fed. 205; *In re Knaszak* (D. C.) 151 Fed. 503.

The referee was not in error, therefore, as charged in the seventh, eighth, and ninth exceptions.

[3] The charge in the tenth, eleventh, and twelfth exceptions, that the referee erred in setting forth specifications of objection not identical with those actually filed by those creditors, is frivolous, as the specifications of objection filed were before the referee, and, in referring to them in his report, he set out a synopsis of them, instead of setting them out in full.

[4] The thirteenth exception charges that the referee erred in recommending the sustaining of the first, fourth, tenth, and eleventh exceptions without sufficient proof. Under that exception, under the first to ninth, inclusive, and the fifteenth and sixteenth exceptions, it is argued that the referee should not have considered the testimony of the bankrupts taken in their general examination, except as against the bankrupt whose testimony was introduced, nor the testimony of other parties taken before the referee. Counsel for the bankrupts cites in support of this position the recent decision of this court in the Case of Malschick & Levin, 217 Fed. 492 (In Bankruptcy, No. 3915), in which an opinion was rendered October 29, 1914. In Malschick & Levin objection upon that ground was made at the time the testimony was offered, and its admission was against objection throughout the hearing before the referee. In the present case the testimony of the bankrupts was offered and received without objection upon that

ground; the only ground of objection being as stated by their counsel as follows:

"Mr. Levi: I offer in evidence, in support of the specifications filed in opposition to the discharge of the bankrupts, the testimony of each of the bankrupts taken before you under this proceeding, and since the case has been referred to Richard S. Hunter, Esq., referee in bankruptcy.

"Mr. Harris: I object to the offer, on the ground that the proceedings, and the first meeting of creditors, and continuations thereof, were never adjourned sine die; that at no time were the bankrupts given an opportunity to either revise, amend, or correct their testimony, nor has counsel for the bankrupts been given an opportunity to cross-examine them upon such points as he may deem proper to cross-examine them, for the purpose of elucidating points in their favor. The testimony has never been signed, as far as I recollect, and the specific charges contained in the specifications of objection should be borne out by such testimony as would bear directly upon the points at issue.

"Mr. Levi: I offer in evidence the evidence of all other parties outside of the bankrupts taken before the referee.

"Mr. Harris: I ask that I be given an opportunity to examine the testimony, and, if necessary to make objection to this offer."

Opportunity was afforded to examine the bankrupts, and after their examination by their counsel in this proceeding no further objection was made to the testimony taken in the original proceeding. The bankrupts must therefore be deemed to have waived objection upon the ground now stated.

The general exceptions (14, 15, and 16), charging that the findings of the referee are against the law, against the evidence, and against the weight of the evidence, are without merit.

An order will be entered allowing the fourth, tenth, and eleventh specifications of objection to be amended to conform with the proof as to amounts found by the referee, and thereupon the exceptions to the referee's report will be dismissed, the report confirmed, the first, fourth, tenth, and eleventh specifications of objection sustained, and the petition of the bankrupts for their discharge denied.

THE ROSALIE MAHONY.

(District Court, W. D. Washington, S. D. November 19, 1914.)

No. 1508

1. SEAMEN (§ 29*)—LIABILITY OF VESSEL FOR INJURY TO LONGSHOREMAN—NEG-
LIGENCE OF FELLOW SERVANTS.

Libelant, with another longshoreman, both employed directly by the ship, were engaged in loading and piling lumber on the deck of a vessel from a truck, when he was injured by lumber from another truck, which upset while being unloaded by two seamen near by. It was not shown that the trucks in use were unusual, unsuitable, or unsafe appliances, and the evidence tended to show that the truck upset by reason of the manner in which it was being unloaded by the seamen, who commenced unloading from one side, instead of from across the top. *Held*, that the injury was due to the negligence of fellow servants, for which the ship was not liable.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. WORDS AND PHRASES—"BOX DOLLY."

A "box dolly" is a vehicle which has but one wheel, a wide cylindrical drum in the center of it, and is shaped like a box, the lower part of which extends down as far as the axis of the drum.

In Admiralty. Suit by Samuel Knudsen against the steamship Rosalie Mahony; Olsen & Mahoney, Incorporated, claimant. Decree for claimant.

Wedell Foss, of Tacoma, Wash., for libelant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for claimant.

CUSHMAN, District Judge. Libelant, in the employ of the Rosalie Mahony, an American steam schooner in the lumber-carrying trade from ports on Puget Sound to California ports, while engaged in stowing lumber being loaded thereon from a scow, was injured by part of a truck load of lumber falling on him upon the upsetting of the truck.

At the time of his injury libelant and another longshoreman were stowing lumber on the deck of the vessel. Other men were similarly engaged. It was broad daylight. Sling loads of lumber were being hoisted from a scow alongside the vessel by means of the vessel's steam winches, and were lowered upon trucks, which trucks were then pushed along the top of the deck load to the place where it was desired to stow the lumber, there being two men to each truck.

[1] Libelant and the longshoreman working with him were both experienced men. At the time of the injury they were both stowing a sling load of lumber that had been landed and handled as above indicated. Two other men, regular seamen of the ship, pushed another loaded truck to a point near where libelant was working, and commenced to unload it. In doing so they did not take off a layer of lumber entirely across the top of the load on the truck, but removed a part of several layers down one side of the truck, when it suddenly, and without any other apparent reason than the manner in which it was being unloaded, tipped over, striking and injuring the libelant's left foot seriously.

The loads of lumber on the trucks were somewhat larger than the loads ordinarily handled, this being occasioned by the fact that the lumber was loaded on the scow from the mill by use of a steam crane, which deposited the sling loads from the crane on the deck of the scow in large, regularly shaped loads, which loads on the scow were kept separate by placing under each load, and between the loads, blocks, to enable the convenient removal, after the depositing of the load, of the cable in which the load was carried by the crane.

When the scow was brought alongside of the ship, these sling loads of lumber, without being broken up, were removed from the scow by means of booms and steel cables on board the ship, being deposited, as stated, upon the trucks. Being originally made up at the mill, their size was determined without consideration of the trucks upon which they were eventually placed. These trucks were four-wheeled, with a 30x36-inch frame, the deck of which was about 20 or 22 inches high. The sling loads of lumber were about 8 inches wider than the top of the truck.

There is evidence tending to show that the load which tipped over was composed of long and wet timbers. The loading was being done under the direction of the mate. Libelant seeks to recover because no means were provided by which to steady the truck while it was being unloaded, because the sling load of lumber placed on the truck was too large, and was not placed upon the truck evenly and properly balanced, and because the four-wheeled truck was used, instead of a "box dolly."

[2] There is no evidence in any way tending to support the first ground of libelant's contention. A "box dolly" has but one wheel, a wide cylindrical drum in the center of the vehicle, which is shaped like a box, the lower part of which extends down as far as the axis of the drum. The "box dolly" will never stand by itself. One end or the other of the load falls down and rests upon the deck.

The libelant's contention is that the "box dolly," being more difficult to upset, was the only safe and suitable appliance for use in such work; but the evidence fails to show that the truck used was an unusual, unsuitable, or unsafe appliance for the use to which it was being put. It may or may not have been more likely to tip over than a "box dolly." Its tendency so to do is not shown to have been so much greater than that of the "box dolly" as to show it unfit to be used for this purpose, or not reasonably safe and suitable. It had compensatory advantages in the ease and speed with which it might be used.

The fact that the truck, after it had been loaded, was trundled over the top of the lumber already loaded for 15 or 20 feet, to the point where it was desired to unload it, where it was partly unloaded before it tipped over, warrants the finding that the proximate cause of its falling was the manner pursued by the two seamen engaged in unloading it, in that they did not remove the layers across the top of the load, but unloaded it from one side. This shows that, within the narrowest sense, the act causing the injury was that of a fellow servant engaged in the same common employment as libelant, for which claimant is not liable.

Even if it were conceded that the load put upon the truck was unusually high and large, and that that fact contributed to its falling, yet would the act of so loading the truck be the act of a fellow servant of libelant. *Olson v. Ore. Coal & Nav. Co.*, 104 Fed. 574, 44 C. C. A. 51; *Hermann v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853. The fact that unusually large loads of lumber were being handled on the trucks at this particular mill does not show incompetency on the part of the mate, nor any of the officers of the ship. *Hermann v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853, at pages 856 and 857.

Libelant contends that the case of *Olson v. Oregon Coal & Navigation Co.* is not controlling, because in that case the vessel was being navigated at sea and not loaded within a state's jurisdiction; but the decision clearly holds that the maritime law and the common law, in respect to the fellow-servant rule, are the same, and the chief case relied upon as authority by the court in *Olson v. Oregon Coal & Navigation Co.* was *Quinn v. Lighterage Co.* (C. C.) 23 Fed. 363, where

libelant was injured through the negligence of the master of the vessel in giving a premature order and setting the winch in motion while the vessel was being loaded.

How giving consideration to the laws of the state of Washington would benefit libelant is not made to appear, as the court in this case heretofore held—upon claimant's exceptions to the libel—that the Workmen's Compensation Act of the state of Washington did not affect this court's jurisdiction in admiralty. The common-law or statutory liability under the state law (Workmen's Compensation Act [Laws 1911, c. 74]) has been abolished. *The Bee* (D. C.) 216 Fed. 709.

Libelant has placed much reliance upon *The Joseph B. Thomas*, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58. That decision does not support libelant's contention. As the court points out, the chief disputed fact in the case was whether the negligence was that of a stevedore or a sailor:

"Their argument [the ship and its owners] is that the injury to appellee occurred from the immediate act of the person who trod upon the covers; that such person was a fellow servant of the appellee, one of the employes of the stevedore who was loading the vessel, under a contract with the owners thereof, and over whom appellants had no control." 86 Fed. page 660, 30 C. C. A. 334, 46 L. R. A. 58.

It is true that the court finally held that the proximate cause of libelant's injury in that case was neither that of a fellow servant of libelant, nor of a seaman in the service of the ship, in negligently knocking the keg into the hatch, thereby injuring libelant, but that the negligence was that of the ship, in that its servant placed the keg and left it near the open hatch. But in the present case the longshoreman (libelant) was not in the employ of a contracting stevedore engaged in loading the vessel, but was a servant of and in the immediate employ of the ship, and together with the seamen—who were working with the upset truck—was engaged in the common undertaking of loading the vessel.

Decree will be for claimant.

SUNDLES v. IDAHO-OREGON LIGHT & POWER CO.

(District Court, D. Idaho, S. D. August 28, 1914.)

1. CORPORATIONS (§ 560*)—RECEIVERS—JUDGMENT.

Where a receiver was appointed for an insolvent corporation pending an action against the corporation for a tort, judgment could not be granted in that action against the receiver; the court being unable therein to adjust the equities of the parties, if any.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.*]

2. CORPORATIONS (§ 566*)—INSOLVENCY—CLAIMS—JUDGMENT FOR TORT—PREFERENCES.

Where judgment was recovered against a corporation for tort, plaintiff was not entitled to have the same allowed as a preferred claim against the corporation's assets in insolvency as against the rights of mortgaged bondholders, either under Const. Idaho, art. 11, § 15, providing that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Legislature shall not pass any law permitting the leasing or alienation of any franchise, so as to release or relieve the franchise or property held thereunder from any liability of the lessor, grantor, lessee, or grantee contracted or incurred in the operation, use, or enjoyment of such franchise, or any of such privileges, or independent thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.*]

At Law. Action by A. H. Sundles against the Idaho-Oregon Light & Power Company, continued in the name of W. J. Ferris, appointed receiver of the defendant's property pendente lite. On motion for judgment. Judgment granted against the corporation, but denied as against the receiver.

Richards & Haga, of Boise, Idaho, for plaintiff.

Cavanah, Blake & MacLane, of Boise, Idaho, for defendant.

DIETRICH, District Judge. The defendant corporation is engaged in furnishing to private consumers electric light and power, and on or about June 5, 1913, in the course of the construction of one of its transmission lines, its employes carelessly left a wire suspended in such a way that the plaintiff, while mowing weeds in the public highway, came into contact therewith and was very seriously injured. He commenced this action in the state district court to recover damages, and upon the petition of defendant the same was removed to this court. In the meantime, in a suit originally brought against the corporation for the foreclosure of a trust deed given to secure a large issue of bonds, and executed and recorded long before the happening of the accident, the defendant W. J. Ferris was appointed receiver of all of its property, who, by permission of the court, has appeared here upon its behalf.

[1] It seems that the defendant carried insurance in a casualty company, indemnifying it against loss on account of accidents such as this, and upon the recommendation of the receiver he was authorized to accept from the insurer \$3,500 in compromise of its liability, and to execute to it a release in full. An understanding has also been reached between counsel for plaintiff and counsel for the defendant corporation and its receiver, with the approbation of the court, by which the responsibility of the defendant for the accident is acknowledged, and a judgment against it is to be entered for \$7,000, leaving open for determination, however, the general question of the dignity of the judgment with respect to other claims against the property of the estate. In view of the acknowledged liability of the corporation, an order has already been made directing the receiver to pay over to the plaintiff the full amount of \$3,500 received from the casualty company, so that the question now submitted on the motion for judgment against the receiver is whether or not the balance of \$3,500 can be treated as a preferential claim against the insolvent estate. In any view of the question it is thought the motion for judgment against the receiver cannot be allowed. The action is one at law to recover damages for a tort, and in it the court could not adjust such equities, if any, as may exist. Other claims for preferences are being pressed, and the claimants, as well as the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mortgage trustee, have a right to be heard in resistance to the allowance of this as a preferred claim, and it will therefore be necessary for the plaintiff to intervene in the foreclosure suit.

[2] While upon this ground alone the motion must be denied, the general question of the rights of the holder of a liquidated claim arising out of a tort, as against the trustee of a pre-existing mortgage, has been submitted, and will be disposed of. The weight of authority is undoubtedly adverse to the plaintiff's contention. There is little to be added to the brief and comprehensive exposition of the law upon the subject in *Farmers' Loan & Trust Co. v. Northern Pacific Co.* (C. C.) 74 Fed. 431, where the conclusion was reached that the allowance of such a claim in preference is unwarranted. See, also, *Trust Co. v. Riley*, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; *Easton v. Huston, & T. C. R. Co.* (C. C.) 38 Fed. 12; *In re Dexterville Mfg. Co.* (C. C.) 4 Fed. 873; *Hiles v. Case* (C. C.) 14 Fed. 141; *Farmers' Loan & Trust Co. v. Detroit, etc., R. Co.* (C. C.) 71 Fed. 29; *Farmers' Loan & Trust Co. v. Green Bay, etc.* (C. C.) 45 Fed. 664; *Central T. Co. v. Wabash, etc.* (C. C.) 28 Fed. 871; *Central T. Co. v. East Tennessee, etc., Co.* (C. C.) 30 Fed. 895; *Ames v. Union Pacific R. Co.* (C. C.) 74 Fed. 335; *Foreman v. Central T. Co.*, 71 Fed. 776, 18 C. C. A. 321. The plaintiff's view is more or less strongly supported by *Green v. Coast Line R. Co.*, 97 Ga. 23, 24 S. E. 814, 33 L. R. A. 806, 54 Am. St. Rep. 379, *Farmers' L. & T. Co. v. Northern Pacific R. Co.* (C. C.) 71 Fed. 245, *Farmers' L. & T. Co. v. Kansas City, etc.* (C. C.) 53 Fed. 182, and *Dow v. Memphis, etc., R. R. Co.* (C. C.) 20 Fed. 260. The last two cases, however, were decided by Judge Caldwell at circuit, and seem to be out of harmony with *Trust Co. v. Riley*, *supra*, in the decision of which by the Circuit Court of Appeals he participated.

While it has not been called to my attention that the Supreme Court of the United States has ever considered the question, it has clearly been its disposition to limit rather than to extend the application of the rule of preferences. *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; *Gregg v. Metropolitan T. Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717.

The further contention is made that a preference right may in some manner be made to rest upon section 15 of article 11 of the Constitution of Idaho, which is as follows:

"The Legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any liability of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges."

But I am unable to concur in the view that this provision is applicable. Of it the Supreme Court of Idaho has said (*Seymour v. Boise R. R. Co.*, 24 Idaho, 7, 132 Pac. 427):

"It will be noticed that the Constitution does not forbid a transfer of the franchise and property of a corporation, but simply declares that no sale or transfer shall release the franchise and property held thereunder from any liability incurred by the grantor or lessor or grantee or lessee in the operation, use, or enjoyment of such franchise. Section 15, art. 11, Const.; *City of South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579, 93 Pac. 490. It

was the intention of the framers of the Constitution to make these pre-existing 'liabilities' preferred claims against the franchise and property transferred, and to declare them prior and superior to any subsequent bonds, mortgages, or incumbrances placed thereon by the purchaser or transferee of such franchise and property."

If we assume, without deciding, that a mortgage constitutes an "alienation" within the meaning of this provision, it is to be borne in mind that there is no question here of "releasing" or "relieving" the franchise or the property of the defendant company from the payment of the plaintiff's claim. The only question is whether, in applying such franchise and property to the payment of the liabilities of the corporation, the so-called equitable lien of the plaintiff shall displace a pre-existing contract lien of which the plaintiff had notice. It is not thought that the section was intended to effect such a result.

It may be added that this claim and others which are being urged for preferential allowance against the property of this and other receivership estates pending before us strongly emphasize the need of both national and state legislation establishing at least certain general rules for the guidance of courts in administering insolvent estates of corporations of this character. Both bondholders and general creditors are entitled to a measure of certainty as to their relative rights not afforded by the judicial decisions.

Judgment will go in favor of the plaintiff and against the corporation, but not against the receiver, for \$7,000 and costs, with the understanding that counsel for the plaintiff shall enter upon the record a credit of \$3,500 upon account of the judgment. Should the plaintiff desire to intervene in the foreclosure suit, for the purpose of making a supplemental or different showing in support of his claim of preference, or for the purpose of pro forma making up a record, with the object of obtaining a review in the appellate court of the conclusion here reached, permission is granted to intervene and file his complaint in intervention.

UNITED STATES v. CHICAGO, M. & P. S. RY. CO.

(District Court, D. Idaho, N. D. June 16, 1914.)

No. 443.

COMMERCE (§ 27*)—RAILROADS—HOURS OF SERVICE LAW—"EMPLOYÉ."

The Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677-8680]), which provides that it shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad from one state to another, and that "employés," as used therein, means persons actually engaged in or connected with the movement of any train, did not apply to the engineer of a work train operated wholly within one state, though upon a line of railroad constituting a part of the company's through highway of interstate commerce, and though the train was engaged in hauling materials for the repair of the track over which interstate trains ran.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, First and Second Series, Employé.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Civil action by the United States against the Chicago, Milwaukee & Puget Sound Railway Company. On demurrer to the amended complaint. Demurrer sustained.

J. L. McClear, U. S. Atty., of Cœur d'Alene, Idaho, J. R. Smead, Asst. U. S. Atty., of Boise, Idaho, and Walter N. Brown, Sp. Asst. U. S. Atty.

Geo. W. Korte, of Seattle, Wash., for defendant.

DIETRICH, District Judge. The amended complaint contains two causes of action substantially alike. In each the defendant is charged with the violation of what is commonly known as the "Hours of Service Act." 34 Stat. 1415. Reference to the first count will suffice.

The specific charge is that on or about October 31, 1912, the defendant permitted one J. H. Crown, a locomotive engineer upon one of its work trains, to remain on duty for a longer period than 16 consecutive hours. The work train was being operated between Karnar and Pedee, both in the state of Idaho, upon a line of the defendant's railroad constituting a through highway of interstate commerce, and was being used for hauling dirt or earth to fill certain bridges. It is expressly alleged that Crown "was solely engaged in and connected with the movement" of this work train, and that the train was "solely engaged in hauling" dirt, as already explained. It is further alleged that the defendant was a common carrier engaged in interstate commerce by railroad in the state of Idaho. By the demurrer the defendant challenges the sufficiency of the facts alleged to constitute a cause of action.

The question submitted is whether an employé upon a railroad "work train" operated wholly within one state, by a railroad corporation engaged in interstate commerce, upon a line of railroad constituting a part of the company's through highway of interstate commerce, falls within the provisions of the act referred to. The act has received an authoritative construction in *Baltimore & Ohio Railway Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878, which it is thought requires the question to be answered in the negative. Much of the argument submitted by the government pertains to the power of Congress in the premises and the effect of the adoption of the defendant's view upon the comprehensiveness of the act. The power of Congress to extend the regulation to employes upon intrastate trains having no direct relation to interstate transportation, and the cogency of the reasons advanced why such extension should be made, may be admitted; but the ultimate question is, not what legislation is possible or desirable, but what we actually have. By the first section thereof the act is made to apply "to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad" from one state to another; and the term "employes" as used is declared "to mean persons actually engaged in or connected with the movement of any train." In the *Baltimore & Ohio Case* it was urged by the railroad company that the act was unconstitutional, because, as was said:

"Its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employes engaged in local business."

But this contention was rejected by the court, under the view that only employes "who are connected with the movement of trains in interstate transportation" are comprehended within the terms of the act. It was held that the term "employes" is qualified by the clause, "engaged in the transportation of passengers" from one state to another, as well as by the clause, "engaged in or connected with the movement of any train." Following the quotation of section 1 in full, it was said:

"No difficulty arises in the construction of this language. The first sentence states the application to carriers and employes who are 'engaged in the transportation of passengers or property by railroad' in the District of Columbia or the territories, or in interstate or foreign commerce. The definition, in the second sentence, of what the terms 'railroad' and 'employes' shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employes must be engaged in order to come within the provisions of the statute."

Again it was said:

"The statute, therefore, in its scope, is materially different from Act June 11, 1906, c. 3073, 34 Stat. 232, which was before this court in the Employers' Liability Cases, 207 U. S. 463 [28 Sup. Ct. 141, 52 L. Ed. 297]. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employe, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employes as well as the carriers. But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid. * * * The fundamental question here is whether a restriction upon the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation."

But it is further urged that if the statute cannot be construed so broadly as to include every employe engaged in or connected with the movement of any train, and that if its provisions apply only to those employes who are engaged in or connected with the movements of trains in interstate commerce, still an engineer employed as was this one, falls within the prohibitions of the statute, because, as is said: (1) He is actually engaged in and connected with the movement of trains in interstate commerce, and is an employe actually engaged in interstate commerce; and (2), he is an employe who is regularly and generally engaged in and connected with the movement of trains in interstate commerce.

In support of the first proposition, it is argued that inasmuch as the work train passed over a portion of an interstate highway, and carried materials for the repair thereof, the engineer was necessarily

connected with the movement of interstate trains. The reasoning is rather tenuous and wholly ignores the fact that the clause "engaged in the transportation of passengers," etc., qualifies the word "employés" as well as the word "carriers." It must be apparent that, if the train crew upon this work train was "connected" with the movement of interstate trains, it would be quite impossible to imagine a trainman upon any train, running upon any part of an interstate road, who is not in some way connected with the movement of interstate trains. No reason is conceivable why Congress would include a local work train and exclude a local passenger or freight train. That being the case, the clause "engaged in the transportation," etc., as qualifying the term "employé," is wholly redundant, for, if we adopt the government's theory, the act applies to any trainman upon an interstate railroad, regardless of the question whether or not the train to which his duties pertain crosses the state line or carries passengers or freight in interstate commerce. And it is to be added that if an engineer is "connected" with the movement of trains in interstate commerce, by the fact merely that his work train is supplying material for the repair of the track over which such interstate trains run, then surely the men who put such material in place, and indeed all workmen having to do with the construction and maintenance of the roadbed and bridges, including sectionmen, are so "connected," for in a measure the duties of all such employés relate to the safe movement of interstate trains. And in that view the clause "actually engaged in or connected with the movement of any train" becomes meaningless, for the act would comprehend all persons having any connection, direct or indirect, with the movement of persons or property in interstate transportation, regardless of the question whether, according to the common understanding, their duties relate to the movement of interstate trains. Some reference is made to the decisions under the Safety Appliance Act (Comp. St. 1913, §§ 8605-8612) and the Employers' Liability Act (Comp. St. 1913, §§ 8657-8665), but the language of neither of these acts is closely analogous.

As to the second proposition, it is only necessary to say that it assumes conditions which are not shown to have any existence in fact. We are not at liberty to presume that the defendant ever employed Crown in any capacity other than as an engineer of the work train, or that the work train was ever used outside of the state of Idaho. Hence the abstract legal question involved in the proposition need not be discussed.

For the reasons stated, an order will be entered sustaining the demurrer.

UNITED STATES v. INNES.

(District Court, D. Oregon. December 14, 1914.)

No. 6518.

1. ALIENS (§ 23*) — CHINESE PERSONS — EXCLUSION — LANDING OF VESSEL'S CREW.

Chinese Exclusion Act (Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478 [Comp. St. 1913, § 4310]) provides that the master of any vessel, who shall knowingly bring within the United States and land or permit to be landed any Chinese laborer or other Chinese person in contravention of the provisions of the act, shall be guilty of a misdemeanor. *Held*, that such act did not prohibit the bringing of Chinese within the United States as a vessel's crew without intent that they shall remain in the United States but shall depart with the vessel, nor did it prohibit the members of a Chinese crew from being allowed shore leave, subject to the regulations of the Commissioner of Immigration, while the vessel remained in port.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-90; Dec. Dig. § 23.*]

2. ALIENS (§ 36*) — CHINESE PERSONS — IMPORTATION — "PERMIT" — "KNOWINGLY."

Chinese Exclusion Act, § 9, provides that the master of any vessel, who shall knowingly bring within the United States on such vessel and land or permit to be landed any Chinese laborer, etc., shall be guilty of a misdemeanor. *Held*, that the word "permit," as so used, meant to suffer or allow to be or come to pass, to take place by tacit consent or by not prohibiting or hindering, allowing without expressly authorizing, and the word "knowingly," with knowledge, actual or imputable; and hence the offense was not committed by the master of a ship, who had taken reasonable precautions to prevent members of his Chinese crew from going ashore, by the escape of a Chinese carpenter without knowledge of the master either that the Chinaman was going ashore or that he intended not to return to the ship if permitted to land.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 36.*]

For other definitions, see Words and Phrases, First and Second Series, Knowingly; Permission.]

R. M. Innes was informed against for alleged knowingly and unlawfully permitting an alien Chinese person to land in the United States, in violation of the Chinese Exclusion Law. Information dismissed, and defendant discharged.

E. A. Johnson, Asst. U. S. Atty., of Portland, Or.

Huffer & Hayden, of Tacoma, Wash., for defendant.

WOLVERTON, District Judge. The defendant is, upon information of the prosecuting attorney, charged with knowingly and unlawfully permitting one Ah Quai, the said Ah Quai being an alien and a Chinaman, to enter into and land, and be landed in the United States, in violation of section 9 of the act of September 13, 1888. 25 Stat. 476. Trial was had before the court; a jury being waived.

[1] Section 9 of the act, which is the section under which the information is preferred, provides:

"That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—45

any Chinese laborer or other Chinese person, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor."

The first section of the act declares that it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as in the act provided, and the act is very properly entitled "An act to prohibit the coming of Chinese laborers to the United States."

The offense denounced is against the master of a vessel for bringing within the United States, and landing, or attempting to land, or permitting to land, any Chinese laborer or other Chinese person, in contravention of the provisions of the act. The act has for its purpose the exclusion from the United States of all Chinese persons, with the exceptions designated. The denunciation of the statute, as just indicated, is against bringing such within the United States and permitting them to land. The act, by reasonable intentment, does not inhibit the bringing of Chinese within the United States as a crew upon a vessel, to depart when the vessel departs; there being no intention or purpose that the Chinese shall remain in the United States. Nor do I conceive that the statute will be violated if the members of the Chinese crew are allowed shore leave, subject to the regulations of the Commissioner of Immigration, at a time while the vessel is in port; it being the understanding and purpose, of course, that such members shall return to and depart with the vessel, and not remain within the United States for any purpose. *Taylor v. United States*, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130; *United States v. Ah Fook*, 183 Fed. 33, 105 C. C. A. 325.

[2] With this understanding of the act, we may ascertain the meaning of the word "permit," as the charge is that the master did permit the said Ah Quai to land. The primary definition, as given in the Century Dictionary, is:

"To suffer or allow to be, come to pass, or to take place, by tacit consent or by not prohibiting or hindering; allow without expressly authorizing."

It is said in *Gregory v. United States*, 17 Blatchf. 325, 330, Fed. Cas. No. 5,803:

"The word 'permit' is defined thus: 'To grant permission, liberty, or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize.' The word 'suffer' is defined thus: 'To allow; to admit; to permit.' The word 'admit' is defined thus: 'To permit; to suffer; to tolerate.' The word 'allow' is defined thus: 'To suffer; to tolerate.' The word 'tolerate' is defined thus: 'To allow so as not to hinder; to permit as something not wholly approved; to suffer; to endure; to admit.' Every definition of 'suffer' and 'permit' includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is what is to be done."

The word "knowingly" is employed in the present statute, as it was in the statute which was being considered in the opinion. As illustrative here, the learned judge further says:

"When it is said that a person suffers or permits a yard to be used for purposes of ingress and egress to and from a distillery, his sufferance or permission must be applied to the whole subject-matter, and he does not suffer or permit the ingress and egress to and from the distillery, unless he is conscious that there is a distillery as well as ingress and egress."

Applying the thought here, the defendant must not only have had knowledge, imputable at least, that the Chinaman was going ashore, but he must also have had reasonable grounds to believe that the Chinaman would not return to the ship if allowed to land.

The defendant was obliged to put into the Port of Astoria on account of insufficiency of coal to carry him to Seattle. While in that port, and about 4 o'clock in the afternoon, he was advised by a member of the crew (the crew being composed in the main of Chinamen) that Ah Quai, the carpenter, was intending to go ashore and desert the ship. Being so advised, he at once took steps to procure watchmen to prevent the Chinaman from leaving the ship. He succeeded in obtaining the services of E. T. Gooch, the immigration inspector, and L. M. Persons, also in the immigration service, the former of whom came to the ship about 5:30 p. m. and the latter a half hour later. These two continued their watch on and about the ship from the time of their arrival.

About the time of Gooch's arrival, two Chinamen were seen starting to leave the ship, and the captain, as he says, believing they were local Chinese, permitted them to depart. These men subsequently returned, and proved to be part of the crew. Subsequently three other Chinamen, being members of the crew also, returned to the ship. By what authority they went ashore does not appear. However, no other Chinamen were seen to go ashore after the watch was instituted. Near 7 o'clock, or shortly thereafter, it was reported, without special information as to where the news came from, that the carpenter was missing. When the captain was informed of it, he said he thought he would be back. Gooch and Persons made an effort to find the Chinaman, but were unable to do so, and the ship weighed anchor without him.

Persons testifies that he heard the captain ask the mate to see if the carpenter was in his room, and that he (Persons) went with the mate and found that he was not there. Persons further says he later heard the mate say to the captain, "The carpenter is now in his room;" and that he went at once to the carpenter's room and did not find him there. The captain testifies that it was not his intention to allow any of the Chinamen ashore, and that he kept watch until the watchmen came on board, and instructed his officers to the same purpose. Brodie, the chief officer aboard, testifies that, after the immigration officers came on board, he saw Ah Quai on the forward deck, and spoke to him, and sent him aft into No. 3 hold to do some work. This was about 6:45 p. m. He further states that, after 7 o'clock, search was made for him, but without avail. The third officer relates that he saw the carpenter on the fore well deck about 7 o'clock; that he had been working down No. 3 hold all day; and that he did not see him after that time.

The strong tendency of this testimony is to the effect that Ah Quai was aboard the ship at the time the immigration officers came on as watchmen, and that from that time on the master was doing all that could reasonably be expected of him to prevent his escape to shore. At least I am unable to say, beyond a reasonable doubt, that the mas-

ter permitted the Chinaman to land, within the purview of the act in question.

The information will therefore be dismissed, and the defendant discharged.

In re HAGEMAN et al.

(District Court, E. D. Pennsylvania. December 8, 1914.)

No. 4934.

1. SHERIFFS AND CONSTABLES (§ 29*)—FEES—SALE OF PROPERTY—DISTRESS WARRANT—STATUTES—REPEAL.

Act Pa. April 3, 1872, § 2 (P. L. 772), providing that the fee for collection of rent by distress, or otherwise, to be charged to the landlord apart from the commissions allowed by law, shall be 5 per cent. on the amount actually collected, was repealed by Act Pa. Feb. 17, 1899 (P. L. 3), providing that the fees of a constable for selling goods levied or distrained should be, for each dollar not exceeding \$100, three cents, and for each dollar in excess of \$100 two cents, and repealing inconsistent acts.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 46; Dec. Dig. § 29.*]

2. BANKRUPTCY (§ 267*)—DISTRESS WARRANT—SALE OF GOODS—CONSTABLE'S FEES.

Where a tenant's goods were levied on under distress warrant by a constable, but the landlord's proceedings were stayed by bankruptcy proceedings against the tenant, and the goods were subsequently sold, not by the constable, but by the receiver in bankruptcy, the constable was not entitled to payment of fees for a sale out of the proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

3. SHERIFFS AND CONSTABLES (§ 44*)—FEES—DISTRESS—SALE OF GOODS.

Act Pa. May 26, 1891 (P. L. 122), provides that, where a tenant makes an assignment for the benefit of creditors, the landlord shall be first entitled to receive, out of the proceeds of a sale of the goods liable to distress, the rent due at the time of the assignment, provided, if the proceeds of the sale shall not be sufficient to pay the landlord and the costs of the assignment, the landlord shall be entitled to the proceeds after deducting so much for costs as he would be liable to pay on a sale under distress. *Held*, that where a sale of a tenant's goods is made, and the proceeds are insufficient to pay the rent and costs, then there is to be deducted from the amount payable to the landlord the sum he would be required to pay on a sale under distress, but there is nothing to authorize a deduction to be paid to a constable having made a distress levy, but who has not made a sale.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 68; Dec. Dig. § 44.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Elias Hageman and another, individually and as copartners, trading as the Pennsylvania Bedding Company, bankrupt. On certificate for review of a referee's order denying a constable's claim for commissions for property levied on under distress warrant, but sold by receiver in bankruptcy. Affirmed.

Lionel Teller Schlesinger, of Philadelphia, Pa., for claimant.
George G. Cookman, of Philadelphia, Pa., for trustee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THOMPSON, District Judge. [1, 2] The order which is before the court for review is based upon the facts and conclusions of law set out in the referee's opinion, which is as follows:

"In this case, before the petition in bankruptcy was filed, the constable, under a landlord's warrant, had made distraint on all the goods of the bankrupts. Soon after this distraint was made, and before a sale, creditors filed a petition against the bankrupts, and a receiver was appointed by the court. The court also upon petition entered an order restraining the landlord and the constable from further proceedings upon the distraint. Afterwards an order was obtained directing the receiver to sell, and all the goods on the premises, except goods which belonged to others than the bankrupts, were sold by the receiver, and this sale was confirmed by the court. The proceeds of the receiver's sale amounted to \$3,400. The amount of the rent for which distraint was made was \$1,714.01.

"The constable claims commissions of three cents for each dollar not exceeding \$100 and for each dollar in excess of \$100 two cents, amounting to \$35.28, under Act of Assembly of February 17, 1899 (P. L. 3), and 4 Supp. to P. & L. Digest, p. 1001, and also commissions of 5 per cent. on the amount actually collected, amounting to \$85.70, under Act of Assembly of April 3, 1872 (P. L. 772) § 2, 1 P. & L. Dig. p. 2644, making his total claim for commissions \$120.98. It appears that, after the receiver had made his sale, certain goods belonging to others were left on the premises, and counsel for the receiver obtained an order of court vacating the original restraining order as to those goods, and the constable thereupon sold the same. From this sale the constable realized the sum of \$59.50, which he has credited against the commissions he claims on the sum of \$1,714.01, the amount of the rent due for which distraint was made.

"The act of February 17, 1899, is an act, according to its title, to fix, regulate, and establish the fees to be charged and received by constables in this commonwealth. In the first section of said act provision is made by numerous items for the fees of constables. One of the paragraphs of said section is as follows: 'For selling goods levied or distrained, for each dollar not exceeding one hundred dollars, three cents, and for each dollar in excess of one hundred dollars, two cents.' Section 2 of this act provides as follows: 'All acts or parts of acts inconsistent herewith are hereby repealed; but this act shall not be understood or construed to repeal, modify or affect the provisions of the following acts.' And then follows a recital of certain acts not repealed. In this recital the act of April 3, 1872, is not included.

"Act April 3, 1872 (P. L. 772) § 2, provides that the fee for collection of rent by distress or otherwise, to be charged to the landlord, apart from the commissions allowed by law, shall be 5 per cent. upon the amount actually collected. In this case the constable did not make collection from the sale of the goods of the bankrupts. He did not sell the goods of the bankrupts upon which he had levied or distrained. The act of 1899 allows fees to the constable for selling goods levied or distrained; that is, the constable is compensated for crying the sale, for the conduct of the sale, and for collecting and disbursing the amount of the sale. How can it be said that where the constable does not sell he is entitled to receive the fees prescribed by the act for selling?

"The act of April 3, 1872, under which the constable claims 5 per cent. for collection of rent by distress, provides that this shall be paid on the amount actually collected. In this case the constable did not collect the rent, or any part of it. The act of 1899 fixes, regulates, and establishes the fees of constables, and repeals all acts or parts of acts inconsistent therewith, and the act of 1872 is repealed by the act of 1899. If the act of 1872 is not repealed by the act of 1899, the constable did not collect the rent, and is not entitled to receive 5 per cent. on the amount actually collected. The sale was made under an order of the court by its own officer, the receiver.

"The claim of the constable for commissions for selling and collecting is not sustained. It is ordered that the claim of the constable for commissions for selling and collecting be dismissed."

[3] It is contended by counsel for the petitioner that the constable is entitled to the commissions claimed before the referee in view of the Pennsylvania act of May 26, 1891 (P. L. 122), which provides as follows:

"That in all cases where a tenant or tenants shall make any assignment for the benefit of creditors, of goods and chattels, upon demised premises and which are liable to distress by the landlord for rent, the landlord shall be first entitled to receive, out of the proceeds of the sale of such goods and chattels by the assignee or assignees, any sum or sums of money due him for rent of such demised premises at the time of the making of such assignment, not exceeding one year's rent: Provided, that if the proceeds of the sale by the assignee or assignees shall not be sufficient to pay the landlord and the costs of the assignment, the landlord shall be entitled to receive the proceeds of sale, after deducting so much for costs as he would be liable to pay in case of a sale under distress."

It is argued that the language of the proviso of the act indicates an intent in the Legislature that, where an assignee sells, the constable shall receive his costs as in case of a sale by him under distress. Upon examination of the act it is apparent that this construction is erroneous, and that the act has no application to the present controversy. The intent of the act is that, if the proceeds upon a sale by an assignee are sufficient to pay the rent due the landlord and the costs of the assignment, the landlord shall be paid in full. If not sufficient to pay both, there shall be deducted the amount which the landlord would be liable to pay in case of a sale under distress, and the landlord shall receive the balance. The object of the act is apparently to put into the hands of the assignee the amount of the expense to which the landlord would have been put if he had been obliged to obtain his rent through the constable or other officer selling under distress, and to pay the landlord only the amount he would have received under those circumstances. This was the construction put upon the act in the case of *Lane v. Washington Hotel Co.*, 190 Pa. 230, at page 236, 42 Atl. 697, at page 699, where Mr. Justice Dean says:

"The first section of the act of May 26, 1891, directs that, where the fund in the hands of the tenant's assignee is not sufficient to pay the landlord's rent and the costs of assignment, so much of the costs shall be deducted from the rent as the landlord would have been subject to had he made sale under a distress. Although this provision cannot in its precise terms be made applicable to a receiver, we deem it in all respects equitable, and direct that it be adopted in making distribution of this fund."

There is no language in the act which can be construed as meaning that in any case the amount so deducted shall be paid to a constable who has not earned any commissions by a sale. The referee's conclusions in construing the acts of 1872 and 1899 are based upon sound reason, and it is ordered that the petition be dismissed, and the referee's order of October 7, 1914, affirmed.

In re H. W. BUNDY & CO.

(District Court, S. D. Mississippi. November 28, 1914.)

No. 1114.

BANKRUPTCY (§ 397*)—EXEMPTIONS—PARTNERSHIP PROPERTY.

Under Bankr. Act July 1, 1898, c. 541, § 6a, 30 Stat. 548 (Comp. St. 1913, § 9590), providing that such act shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws in force at the time of the filing of the petition, a member of a bankrupt partnership was not entitled to an exemption of goods from the stock of merchandise owned by the partnership under the statutes of Mississippi, in the absence of any binding decision of the Mississippi courts in favor of such exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 678; Dec. Dig. § 397.*]

In Bankruptcy. In the matter of H. W. Bundy & Co., bankrupts. On review of the referee's findings. Finding sustained, and exemption claimed by bankrupt denied.

A. K. Foot, of Canton, Miss., for exceptors.

NILES, District Judge. H. W. Bundy & Co., a copartnership composed of B. L. Johnson and H. W. Bundy, filed a petition in voluntary bankruptcy, with schedules by each of the partners individually, and an adjudication in bankruptcy followed.

It appears that in June, 1914, Bundy, who contributed no capital to the partnership, but was to share in the profits because of his assuming the management of the business, executed a transfer of any interest he might have had in the firm to Johnson. Bundy then left the state, but the business was continued in the old firm name, H. W. Bundy & Co., and was known to the public as such; the petition in bankruptcy being filed as a copartnership. Bundy claimed no exemptions. Johnson claimed as exempt, under the Mississippi statute, goods from the stock of merchandise in the hands of the trustee to the amount of \$250, which claim was disallowed by the referee, and now contested by the bankrupt.

The question here presented is whether a member of a copartnership is entitled to exemptions out of the partnership estate. Exemptions allowed bankrupts are governed by the state laws, or, as expressed in the United States bankruptcy law of July 1, 1898 (chapter 3, § 6a):

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

In this situation recourse must be had to the exemptions allowed under the laws of this state, and as interpreted by its Supreme Court. It does not appear, however, that the Mississippi Supreme Court has passed upon the precise question at issue; but counsel for the bankrupt and the referee have cited a number of Mississippi cases considered as establishing their respective positions. The court has examined

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

these authorities, with the conclusion that none cited control the case at bar, though the principle announced in *McGrath et al. v. Sinclair*, 55 Miss. 89, though treating of real property, might at first glance be applied to this case, in which it is announced that:

"If the house and lot was partnership property in such sense as that the social creditors could subject it to their debts, then it would be dealt with as assets of the firm in a court of equity, and A. G. Sinclair and wife could not successfully hold it, or any part of it, as a homestead against the mortgagees. * * * If real estate be acquired with partnership funds, for partnership purposes, or is put into the company as stock, by agreement, then it will be considered as joint property."

However, as the court does not hold this case nor any other of the Mississippi authorities as conclusively defining the bankrupt's claim for exemptions herein, recourse must be had to other state and federal authority.

The subject of "Exemptions" is exhaustively treated in *Cyc.*, which authority is decidedly against individual parties claiming exemptions in the partnership property as against the partnership debt; numerous reasons, with authorities, being advanced in support of the proposition:

"By the great weight of authority, individual partners cannot claim exemptions in the partnership property as against a partnership debt. This is held on various different grounds: (1) On the well-known ground that partnership property is subject to the payment of partnership debts, before all other claims; (2) the impracticability, or even inequity, of allowing an exemption out of the property; (3) that under the theory of the civil law that a partnership is an entity—a theory not generally recognized by the common law and one which is inconsistent with its principles—and that the partnership property does not belong to the individual partners, but to the firm, that is, to the legal entity; (4) that the different exemption statutes contemplate only individuals, and have no reference to partnerships. * * * 18 *Cyc.* 1383 (citing authorities).

There can be little doubt of the correctness of the law as above stated, and, without the state law expressly provides for exemptions out of the firm's assets, it follows that this bankrupt has no claim against the estate for exemptions. Collier's work on Bankruptcy (1914 edition), an acknowledged authority, discussing this question, beginning at page 196, states that:

"On principle, they [the individual partners] cannot claim exemptions therefrom; the partnership being an entity, and the partners having no interest in the assets until all its creditors are paid." In *re Beauchamp* (D. C.) 101 Fed. 106; In *re Mosier* (D. C.) 112 Fed. 138.

The position of the federal courts upon this question is convincingly stated by the Circuit Court of Appeals, Ninth Judicial Circuit, in the case of *Jennings v. Stannus & Son*, 27 Am. Bankr. Rep. 384, 191 Fed. 347, 112 C. C. A. 91, in which it is laid down:

"The strong reason in support of this view rests upon the innate difference between the individual and a copartnership as it relates to their respective property rights. Each is a distinct entity. The former holds by the exclusive right, subject only to the right of his creditors to have his property applied to their legitimate demands. Exemption statutes are enacted to meet this express condition, to relieve the debtor in a measure against the demands of his creditors, that he may yet enjoy the necessary comforts of

life. The latter holds by right of the individual members, whose respective interests in the property depend upon mutual agreement between them; the whole being subject to the debts of the firm. The individual interest in the partnership property is joint, and each partner has the right to have the property applied first to the partnership debts before either is entitled to a segregation of his own interest. Levy and execution, it is true, may proceed against the individual interest; but, when made, the same is of the interest subject to the debts of the concern, and a settlement of the copartnership affairs is necessary in the end to determine what the purchaser has really acquired. So that it seems illogical to say that exemption in favor of a partner is within the purview of the statute, unless specially mentioned and declared"—citing *Pond v. Kimball*, 101 Mass. 105; *In re Demarest* [D. C.] 110 Fed. 638.

This court is, as all courts should be, inclined to allow an exemptionist the benefit of the most liberal construction of the exemption laws; but, without a clear-cut convincing, and binding decision of the Mississippi Supreme Court upon this question, the court, in view of the foregoing, must sustain the finding of the referee and deny the bankrupt the exemption claimed.

Let a decree enter in accordance with this opinion.

MULL v. PARROTT BROS. CO.

(District Court, D. Idaho, S. D. December 10, 1914.)

1. COURTS (§ 328*)—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

In a suit for a partnership accounting, where it appeared that the partnership owned no property other than moneys due from the partners, and owed no debts, and the only question, therefore, was the amount due from one partner to the other on account of partnership transactions, the amount in controversy could not exceed the aggregate of the amounts claimed by each partner from the other.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

2. REMOVAL OF CAUSES (§ 107*)—MOTIONS TO REMAND—EVIDENCE.

Where, on a motion to remand a suit for a partnership accounting to the state court from which it had been removed, plaintiff showed that the amount which he claimed to be due him from defendant was less than \$3,000, if defendant made any claim against plaintiff sufficient to bring the amount in controversy up to \$3,000, it was incumbent upon it to show that fact, even though it was not necessary for it as a matter of pleading to show or set out the amount which it claimed plaintiff owed it.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

3. REMOVAL OF CAUSES (§ 109*)—PROCEEDINGS IN STATE COURT AFTER REMAND.

Where plaintiff procures the remand of a cause to the state court on a showing by affidavit that the amount of his claim is less than \$3,000, he is bound by this limitation on the amount of his claim in the future proceedings in the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 235; Dec. Dig. § 109.*]

In Equity. Suit by Charles H. Mull against the Parrott Bros. Company. On motion to remand to the state court. Cause remanded.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. O. Longley, of Twin Falls, Idaho, for plaintiff.

Otto E. McCutcheon and O. E. McCutcheon, both of Idaho Falls, Idaho, for defendant.

DIETRICH, District Judge. [1] The suit is for a partnership accounting. It was commenced in the state district court, and upon petition of the defendant the same was removed to this court, upon the ground of diversity of citizenship and the further representation that the controversy involves a dispute exceeding in value \$3,000. The correctness of this allegation as to the value of the matter in dispute is put in issue by a denial on the part of the plaintiff, and that issue is now submitted upon the pleadings and affidavits.

By the affidavit of O. J. Parrott, filed on behalf of the defendant, it is shown that the partnership operations of the plaintiff and defendant were limited to different jobs of construction work, aggregating in value an amount approximating \$100,000. So far as appears, the partnership is not indebted to any person, nor is any person indebted to it; all contracts having been fully completed and paid for, and the indebtedness of the partnership having been discharged. Furthermore, it appears that the partnership owns no property, at least no property other than such claims as it may have against the defendant and the plaintiff for moneys received by one or both of them on account of partnership transactions for which they have not accounted.

In his complaint the plaintiff does not allege or intimate what amount he claims to be due from the defendant to the partnership or to him as one of the partners. The prayer is for an accounting and for judgment for such amount as may appear to be due. On the other hand, in the amended answer, which the defendant proposes to file, it is suggested that there may be something due from the plaintiff to the partnership, on account of two of the contracts which constituted a part of the partnership business. In an affidavit supporting his objection that the suit does not involve a dispute of the requisite value, the plaintiff definitely specifies the matters on account of which, and the amounts for which, he claims credit, and, according to the statement, there is due to him the sum of only \$1,432.34. He claims no more. In the amended answer of the defendant, already referred to, the statement or suggestion that the plaintiff may be indebted to the defendant is of a very general character, and is of such an indefinite nature that I am inclined to think it can serve no useful function in the consideration of the motion to remand.

To sustain the jurisdiction of this court the defendant relies very largely upon the case of *Rogers v. Lawton* (C. C.) 162 Fed. 203, where, in a suit for a partnership accounting, a plea was filed to the jurisdiction, on the ground that the amount in controversy did not exceed \$2,000. The following is all that the court said upon the subject:

"Assuming the plea to be true, it appears therefrom that the common personal property considerably exceeds \$2,000, and I shall assume, without particular examination of the question, that the whole of the common property constitutes the amount in controversy, and that the court has jurisdiction."

By the plaintiff here it is suggested that there is no palpable fund, and hence the rule assumed to be correct in the *Rogers-Lawton* Case

has no application; but, if we put aside that distinction, as not controlling, I am not convinced that reason would justify the general application of such a rule. If it appeared clearly to the court that there was a specific fund of the value of \$5,000, and the plaintiff asserted ownership of one half thereof, and conceded ownership in the defendant of the other half, it is difficult to see how the dispute in such case could involve the whole fund, or how the matter in dispute could be deemed to be of a value of more than \$2,500. It is true the dissolution of a partnership and the settlement of its affairs may involve incidental considerations distinguishing it from the supposed case; but here, as already suggested, it is not contended that the partnership owes anything or is owed anything, and the only question, therefore, is: How much is due from one partner to the other on account of the partnership transactions? The plaintiff comes into court and represents that on account of certain specific matters there is a balance due him of less than \$1,500. The defendant might possibly claim that upon such an accounting there would be found to be due him, the defendant, a large sum, so that the differences between the parties might aggregate an amount in excess of \$3,000. In such a suit it would not do to say that the amount which the plaintiff claims an accounting would show to be due him measures the value of the matter in dispute, but I see no reason for holding that the value of the matter in dispute could exceed the aggregate of that claimed by the plaintiff to be due him and that claimed by the defendant to be due to it.

[2] It may very well be that it was not necessary as a matter of pleading for the defendant to show or to set out the amount which it claims the plaintiff owes to it as a balance, but for the purposes of this motion it was incumbent upon it to make such a showing. In order to procure a removal from the state court, it was compelled to represent that the value of the matter in dispute exceeds \$3,000. It is now shown that the entire claim of the plaintiff is less than \$1,500. If the total matter in dispute exceeds \$3,000, it must be because of some claim that the defendant makes against the plaintiff exceeding \$1,500; but there are no representations or explanations in the affidavits or pleadings from which we can intelligently reach the conclusion that in good faith it does assert such claim. For the reasons stated, it is thought that the cause must be remanded to the state court, and an order will be entered accordingly.

[3] Of course, in any future proceedings in the state court, the plaintiff will be bound by the limitations placed upon his claim in the affidavit filed herein in support of his motion to remand.

HARDING v. HARDING-COOR CO.

(District Court, S. D. Mississippi. December 17, 1914.)

No. 1088.

EVIDENCE (§ 459*)—ACTIONS ON AGENTS' CONTRACTS—PAROL EVIDENCE.

Where stockholders in a corporation, one of whom was its general manager in control of its affairs, borrowed money on the representation that it was to be used by the corporation in paying for flour purchased by it,

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

and the corporation received the money, parol evidence was admissible, in an action on a note executed by such stockholders, to show that they were acting as agents for the corporation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.*]

In Bankruptcy. In the matter of the Harding-Coor Company, bankrupt. On petition by the trustee to review an order of the referee allowing the claim of R. J. Harding. Decree in favor of the claimant.

Flowers, Brown & Davis, of Jackson, Miss., for exceptors.

Watkins & Watkins, of Jackson, Miss., opposed.

NILES, District Judge. The Harding-Coor Company was duly adjudicated a bankrupt, and a trustee appointed and legally qualified as such. During the administration of the bankrupt estate, R. J. Harding filed a claim against it, the several items of which aggregated \$8,308.11. Objection was entered by the trustee to an item of \$3,000 in the probated claim, and thereupon an order was entered by the referee, allowing the entire amount as claimed by R. J. Harding in his petition as filed, and, petition for review having been filed by the trustee objecting to the said item of \$3,000 included in the claim of R. J. Harding, the matter is submitted to the court for decision.

From the record in this case it appears that E. J. Harding, son of the petitioner herein, Col. R. J. Harding, together with one D. B. Coor and W. W. Downing, organized a corporation known as the Harding-Coor Company, with a stated capital stock of \$10,000. Stock to the amount of \$2,500 was issued to E. J. Harding and paid for by Col. Harding, his father. Downing paid in his subscription of \$500, and these two items seem to be the only "real money" contributed to the venture; Coor, the heavy villain of this financial tragedy, contributing his share in flour (probably belonging to some one else), of the value of \$4,500, and a promise of actual cash when his aunt could "realize on some Gulfport property." Coor, the presiding genius of the corporation, and who departed hence without day at the first sign of trouble, was the general manager, and directed affairs to such an extent that E. J. Harding and Downing, the other stockholders, were mere nonentities, and knew nothing of and seemed to care less about the actual financing of the business; E. J. Harding, at least, being completely under his domination, and Downing supremely indifferent.

Coming back to the question at issue—that is, the objection to the item of \$3,000 claimed by R. J. Harding—the undisputed facts involved are these: Coor and E. J. Harding, a few days after the organization of the Harding-Coor Company, represented to Colonel Harding, the petitioner herein, that the company had received a consignment of flour then on the railroad tracks at Jackson, which they were compelled to pay for before unloading; that it was bought at a bargain, and requested him to loan the company \$3,000 with which to pay for same, stating that they had not the money, but would have soon, and proposing that a note be executed for this purpose by the company, to be indorsed by him, upon which the money could be raised at the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bank. The note was duly executed and signed by Coor and E. J. Harding, indorsed by Col. Harding, and the money thus secured. The note was later renewed, and eventually paid by R. J. Harding, indorser, and thus included in his claim for other items of indebtedness due to him by the bankrupt corporation. The trustee contends that the item is not a proper one, because it was not signed by the Harding-Coor Company, and therefore the loan was not extended to the corporation, and that, as the note was signed by E. J. Harding and Coor, it is not competent to show by oral testimony that they acted as agents for the corporation in the transaction.

As affects Col. Harding's claim, it is unnecessary to discuss the stock subscription, how much was paid in, by whom, the number of shares each held or contracted to purchase, the duplicity of Coor, the inefficiency of E. J. Harding, or the indifference of Downing. Did E. J. Harding and Coor secure the \$3,000 from Col. Harding upon the representation that the money was to be used by the corporation in paying for the flour mentioned, and as testified by the petitioner, who says, "He [Coor] asked for money to pay for flour and feedstuff he got at a bargain"? It is certainly established that this loan was made by Col. Harding to the corporation, to be used for the special purpose detailed, and the corporation received the money. This being true, it would seem that, in executing the note indorsed by Col. Harding, E. J. Harding and Coor were acting as agents for the Harding-Coor Company. In such event, we think it well settled that parol evidence is admissible to bind the principal when the agent appears as principal. This has been held in the cases of *Curtis v. Blair*, 26 Miss. 322, 59 Am. Dec. 257; *Steamship Co. v. Harbison* (C. C.) 16 Fed. 691; *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Manufacturing Co. v. Goddard*, 14 How. 446, 14 L. Ed. 497.

In discussing the law of principal and agent it is stated in 31 Cyc. 1658:

"It is a well-settled rule of evidence that where a reading of a simple contract discloses that it is executed for or on behalf of a principal, or discloses an intention to bind such principal, or is so uncertain in its terms as to leave the whole matter in doubt whether the principal or the agent is to be bound, parol evidence is admissible to show that the principal is the real party in interest and is therefore liable on the contract. Indeed, the courts in a great majority of the jurisdictions go to the further extent of holding that parol evidence is admissible to change the principal on a simple contract wherein the agent appears as principal * * *" (citing authorities).

The court is of the opinion that the referee ruled correctly upon this question, and decree should enter accordingly.

IN RE McCARTNEY.

(District Court, D. Idaho, N. D. August 12, 1914.)

BANKRUPTCY (§ 140*)—PERSONAL PROPERTY—TRANSFER—DELIVERY.

The bankrupt, owning a homestead, orally agreed with petitioner, his brother, that he should have the logs on the homestead in consideration of clearing the land. Such agreement was made in good faith, and peti-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tioner at great expense cut the timber, cleared part of the land, and purchased a sawmill to manufacture the logs into lumber, because it was impracticable to market the logs by reason of their inaccessibility to existing sawmills. From the moment the logs became personal property, petitioner exercised exclusive dominion over them, and had exclusive possession, except only that they remained on the bankrupt's homestead. *Held*, that there was an immediate delivery, followed by an actual change of possession, so as to pass title to the logs to petitioner as against the bankrupt's trustee, under Rev. Codes Idaho, § 3170, declaring all transfers of chattels void, if made by persons having at the time the possession and control thereof, and not accompanied by immediate delivery, and followed by actual and continued change of possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In Bankruptcy. In the matter of bankruptcy proceedings of John E. McCartney. On review of an order of a referee denying the petition of George H. McCartney for possession of 100,000 feet of logs. Reversed, with instructions to grant petition.

J. B. Hogan, of Coeur d'Alene, Idaho, for petitioner.

Robt. D. Leeper, of Coeur d'Alene, Idaho, for trustee.

Jas. H. Frazier, of Coeur d'Alene, Idaho, for H. H. Hubbard, creditor.

DIETRICH, District Judge. Inasmuch as all parties in interest stand upon the findings of fact made by the referee, it is deemed to be unnecessary to restate the facts in detail. The logs in question were cut from trees growing upon the homestead entry of the bankrupt, under an oral agreement by which the petitioner, George H. McCartney, a brother of the bankrupt, was to have the logs in consideration of his clearing the land. That such an agreement was made is not questioned. It is also conceded that it was made in good faith, and that at great expense the petitioner cut the timber, cleared part of the land, and purchased a sawmill for the purpose of manufacturing the logs into lumber. Obviously it would be highly inequitable now to deprive him of the fruits of his labor and expense.

The referee was of the opinion that there was not such an immediate delivery of the logs to the petitioner and such an actual and continuous change of possession thereof as to comply with the provisions of section 3170 of the Revised Codes of Idaho, declaring all transfers of personal property to be void if made by persons having at the time the possession and control thereof, and if not accompanied by immediate delivery and followed by actual and continued change of possession. It has, however, been generally held that such statutes must be given a practical construction, and only such acts are required upon the part of the vendor as under the circumstances are reasonable. Here, when the agreement was entered into, the timber was standing upon the ground. It was a part of the real property. In so far as was practicable, the petitioner took possession thereof. He and his employes set to work to fell the trees and to cut them into logs. By reason of the inaccessibility of existing sawmills, it was impracticable to market the logs; it was necessary to purchase a mill and place the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same upon the land. This was done. From the moment the logs became personal property the petitioner exercised exclusive dominion thereover, and had exclusive possession, excepting only that the logs remained upon the homestead of the bankrupt. But it was impracticable to remove them therefrom. It is not contended that any creditor was misled, and it is difficult to see how one using reasonable diligence could have been misled. The most casual inquiry would have elicited the facts, and the facts all the time were that the logs belonged to the petitioner.

Admittedly the question is largely one of the meaning and application of the state statute, and were there a decision of the Supreme Court of the state directly in point it would be deemed to be controlling, but no such decision has been called to my attention. In principle it is thought that *Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722, favors the petitioner's contention, and I find no decision necessarily militating against it.

It is held that the referee erred in concluding that the petitioner's possession was insufficient, and the order will therefore be reversed, with instructions to enter an order granting the prayer of the petition.

COOPER et al. v. E. L. WELCH CO.

(District Court, D. North Dakota. December 5, 1914.)

CORPORATIONS (§ 665*) — FOREIGN CORPORATIONS — ACTION — JURISDICTION — STATUTES—REGULATION—SERVICE OF PROCESS.

Laws N. D. 1897, c. 54, as amended by Laws N. D. 1903, c. 56, in so far as it attempts to regulate the business of foreign corporations and individuals engaged in interstate commerce in North Dakota, is void, so that, where a Minnesota corporation did no business in North Dakota, except to solicit orders for grain there to be shipped to it at its place of business in Minnesota, the statute had no valid application to it, and it could therefore not be legally sued in North Dakota, though it had in fact attempted to comply with the law by filing in the office of the secretary of state a power of attorney appointing that officer its attorney to accept service of process in all actions against it within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.*]

At Law. Action by W. T. Cooper and others against the E. L. Welch Company, a Minnesota corporation. On motion by defendant to quash the service. Granted.

John E. Greene, of Minot, N. D., for plaintiffs.

W. F. Doherty, of Minot, N. D., for defendant.

AMIDON, District Judge. This cause came duly on to be heard upon the motion of defendant to quash the service of process herein upon the defendant, and dismiss the cause, and was argued by counsel for the respective parties; John E. Greene appearing for plaintiffs, and W. F. Doherty, of Minot, N. D., appearing for the defendant.

I think the motion must be granted. In so far as chapter 54 of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Laws of 1897, as amended by chapter 56 of the Laws of 1903, attempts to regulate the business of corporations and individuals engaged in interstate commerce, it is void. It was conceded upon the argument, and clearly shown by the evidence, that the defendant is engaged in no local business in North Dakota. It has no place of business there. Its only business in the state consists in soliciting orders for grain to be shipped to it at its place of business in Minnesota. Its business is, therefore, exempt from the provisions of the statute above referred to, and falls exclusively within the jurisdiction of Congress; and in so far as the statute attempts to regulate such business, it is void under numerous decisions of the Supreme Court of the United States. The same construction has been applied to a kindred statute by the Supreme Court of the state of North Dakota in the case of Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 115 N. W. 844, 18 L. R. A. (N. S.) 134. The foregoing was conceded at the argument of the motion.

It was sought to support the jurisdiction of the court, however, upon the fact that the defendant filed with the secretary of state a power of attorney appointing that officer its attorney for service of process in all actions against the company in the state. Since the argument, counsel for plaintiffs have presented to the court a certified copy of the power of attorney. It appears that the instrument was executed in purported compliance with the provisions of the state statute above referred to. The provisions of the statute requiring the filing of a power of attorney, as part of its scheme, must fall with the other provisions of the statute, in so far as it relates to citizens doing interstate commerce business.

It was further sought to support the jurisdiction upon the ground that the general statute of North Dakota requires foreign corporations doing business within the state to file such a power of attorney appointing the secretary of state its agent for the service of process. Upon the showing made that the defendant's business is confined exclusively to interstate commerce business, I do not think it falls within the purview of the general statute requiring foreign corporations to file a power of attorney. This was the holding of the Supreme Court of the state in the case of Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 115 N. W. 844, 18 L. R. A. (N. S.) 134. I do not think, therefore, that the instrument filed with the secretary of state can in any view make the defendant subject to the service of process in this state.

It is therefore ordered that the motion be and the same is hereby granted, and service of process upon the defendant is hereby quashed and the action dismissed.

NOTE.—See *SIOUX REMEDY CO. v. COPE*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. —, handed down after above opinion was filed.

CITY OF PHILADELPHIA v. WELSBACH STREET LIGHTING CO.
OF AMERICA.

(Circuit Court of Appeals, Third Circuit. January 2, 1915.)

No. 1854.

1. MUNICIPAL CORPORATIONS (§ 250*)—CONTRACTS—CONSTRUCTION BY CITY OFFICER PURSUANT TO CONTRACT.

A city invited bids for furnishing street lamps, submitting with the invitations specifications and instructions to bidders, which were made a part of the contract with the successful bidder. Such instructions stated that, if a bidder was in doubt as to the meaning of the specifications and accompanying papers, he should notify the director of public works, who would send a written instruction to all bidders, and that any doubt as to the meaning of the specifications would be explained by the director, and any directions required to complete any of the provisions thereof given by the director. The specifications provided, relative to tests at intervals of the illuminating power of the lamps, that the tests should be made with the clear glass globe inclosing the lamp removed. In response to an inquiry from the successful bidder, the director prior to the execution of the contract advised the bidder in writing that lamps showing average conditions would be selected for the tests, that the contractor should have notice and an opportunity to check the results of the tests, and that any depreciation of the mantle or change in the adjustment of the burner occurring during transportation to the place of test should be corrected before the test was made. *Held*, that under the contract this interpretation by the director was an interpretation of the specifications by the city itself, which it was estopped to deny, and hence, in an action on the contract, the admission of such interpretation was not error, as varying the terms of a written contract, especially as the interpretation had slight, if any, probative force, the statement as to depreciation of the mantle or change in the adjustment of the burner being nothing more than an interpretation of which the contract itself was susceptible, while the implication that the lamps would be moved in making the tests was rendered unimportant; the city, on the occasions when tests were made with the lamps in place, having clearly broken the contract by making the tests without removing the globes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 688-691; Dec. Dig. § 250.*]

2. MUNICIPAL CORPORATIONS (§ 255*)—CONTRACTS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a contract with a city to furnish street lamps and maintain them at 60-candle power, with a provision for deductions from the contract price if the average illuminating power as ascertained by tests to be made by the city was less than the agreed power, proof that each lamp before it was installed in place was tested and possessed the required candle power made a prima facie case for the contractor, as knowledge whether the contractor had maintained all the lamps at the required candle power was within the possession of defendant, and only upon that knowledge as derived from its tests was it required to make payments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 701; Dec. Dig. § 255.*]

3. MUNICIPAL CORPORATIONS (§ 253*)—STREET LIGHTING CONTRACTS—METHOD OF TESTING LAMPS.

Under a contract to furnish street lamps, providing for deductions from the contract price if the average illuminating power was less than 60-candle power, and providing for a test by selecting a number of lamps from those in use and determining their illuminating power, the average candle power of the lamps so tested to constitute the basis for calculating the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—46

light furnished during the month, and further providing that in making the test the burner complete, with mantle and chimney, should be used, but that the clear glass globe inclosing the lamp should be removed, deductions could not be based upon tests made by the city without removing the globes, and, in an action on the contract, evidence as to the results of such tests was properly excluded; it not appearing that tests with the globes removed were impossible.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 695; Dec. Dig. § 253.*]

4. APPEAL AND ERROR (§ 882*)—INSTRUCTIONS—HARMLESS ERROR.

In an action on a contract to furnish street lamps, providing for deductions from the contract price if the average illuminating power as ascertained by tests should be below 60-candle power, where the monthly statements of deductions rendered by the city to the contractor, and introduced by the city, referred to such deductions as penalties, and the whole controversy revolved around these statements and the methods by which they were reached, the court's use of the words "penalties" and "penalize" in referring to such deductions was not prejudicial, though they were not, strictly speaking, penalties, as the jury was as familiar as the court with the descriptive words employed by the city, and must have understood the court's use of such words.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by the Welsbach Street Lighting Company of America against the City of Philadelphia. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action in assumpsit on a written contract, whereby the plaintiff below engaged to furnish and maintain at a given illuminating power for a specified period a certain number of incandescent naphtha lamps, and the defendant below promised to make payment therefor at a stipulated rate. Preliminary to the execution of the contract were negotiations between the parties which have an important bearing upon the questions in controversy.

In September, 1912, the city of Philadelphia, through its chief of the bureau of lighting, department of public works, invited the plaintiff, Welsbach Street Lighting Company of America, and other companies, to submit proposals to furnish and maintain incandescent mantle lamps burning naphtha or other illuminating oil for lighting certain of its public streets during the year 1913. This invitation was in writing and was accompanied by printed instructions to bidders and specifications under which the proposals requested were to be submitted. The instructions to bidders contained a clause to the effect that, should a bidder be in doubt as to the meaning of a specification, the director, upon notification, would send a written instruction to all bidders respecting the same. A similar provision was contained in the specifications.

On September 20, 1912, pursuant to these instructions, the Welsbach Company wrote the director of public works that it was in doubt as to the meaning of certain specifications, and requested his written explanation and interpretation of them, in time for consideration before submitting proposals. The director replied on September 21st, answering in writing the inquiries made by the company.

Based upon the specifications, as in part interpreted by the director, the company, on September 24th, submitted five separate proposals for furnishing naphtha lamps, in accordance with the specifications, each proposal covering one of the five lighting districts into which the city was divided, at the rate of \$29 per lamp per year.

On December 31, 1912, a written contract was executed between the city and the company, whereby the company agreed to furnish and maintain lamps

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the type, candle power, and number prescribed by the specifications and proposals attached to the contract, for the consideration therein set forth. Under this contract, 18,222 naphtha lamps, containing their own fuel and being fed automatically, were supplied by the company and distributed among the five lighting districts of the city, for the illumination of streets and alleys which were not reached by gas mains.

The total amount of the bills for the first six months of the contract year of 1913, rendered by the company to the city, less credits allowed, was \$274,976.08. This sum was estimated upon the number of lamps furnished at the candle power required. The city paid the company \$221,813.52, and deducted from the total of the bills rendered and withheld from payment the sum of \$53,162.56, upon the contention that the lamps supplied were deficient in the candle power contracted for to the extent represented by the amount of the deduction.

According to the terms of the contract, as disclosed by the specifications which the contract embraced, the rate at which the city was required to pay for light was apportioned to the candle power of the light supplied, based upon a minimum of 60-candle power for each lamp, and the power of the light supplied was determined according to a method of test agreed upon, the specifications respecting which are as follows:

"8. Tests of Lighting Furnished.—Lamps will be tested photometrically as to actual street illuminating power as described, and the minimum illuminating power they shall be required to furnish on the street at all times under the conditions herein specified will be sixty (60) candle power.

"9. Method of Test of Lantern.—The city shall have the right at any time to test the quality and illuminating power of the lamps and lights as furnished on the street, and for that purpose at least twenty-five (25) lamps may be selected from those in actual use in each district, by the director, in each and every calendar month, and their illuminating power shall be determined photometrically by him by horizontal measurement, using any method sanctioned by standard practice, at the city's photometric station, or elsewhere, at his discretion. The average candle power of the lamps so tested shall constitute the basis for calculating the light furnished by the lights burning during the month and for which the charge is made. The contractor may have a representative present both when the lamps are selected and at the tests.

"The term 'lamp' herein means the burner, complete with mantle and chimney, if any, as found set up for use in any of the streets or public places, and the test herein referred to shall be made with the clear glass globe which incloses the lamp on the street removed, but otherwise under the same conditions as exist when the lamp is taken down; the object of the test being to determine that the actual illuminating power, as contracted for, is given on the street. Each lamp shall be tested with the illuminating material contained in the lamp when taken down.

"10. Failure to Deliver Required Candle Power.—If the average candle power of these twenty-five (25) lamps falls below the minimum candle power required by these specifications, then the contractor shall receive as full payment for that month the proportion of the total amount otherwise due him that the average candle power obtained in the tests bears to the minimum required candle power."

At the time the contract was made there were two city testing stations, both equipped with photometric apparatus for the measurement of the candle power of naphtha lamps, according to a standard method of measurement then pursued. On January 20, 1913, the acting chief of the bureau of gas wrote the Welsbach Company that he had determined to make the test of lamps on the streets with the lamps *in place* stating: "We prefer to make this test with the glass housings on, although the contract states, 'and the test herein referred shall be made with the clear glass globe which incloses the lamp on the street *removed*.'" We understand, however, that this provision may be waived by the written agreement of both parties, and we therefore propose to you that in the interest of fairness to both sides, the measurement of the lamps be made with the glass housings on. We recognize

that a correction should be made for the absorption and reflection of the glass of the housings, and we propose to obtain the value of this correction by means of a study of the net loss of light due to the housings—this study to be made of one hundred glass housings of the type used on the lamps. We propose to use the average correction thus obtained in calculating the candle power, not only of the lamps tested in January, but also of each lamp tested throughout the year."

The company declined to consent to any change in the method of testing from that prescribed by the specifications, and explained to the chief of the bureau of gas its idea of the inaccuracy and unfairness of the proposed method. Notwithstanding the refusal of the company to consent to the proposed change of method of test, the director of the department of public works tested 125 lamps in January and 125 lamps in February, in accordance with the method suggested by the chief of the bureau of gas, and in each instance the test was made without taking the lamp from the post or removing it to a testing station, and without removing the glass globe from the lamp.

One hundred and twenty glass globes were then taken from lamps in the street and tested to ascertain their average quality of absorbing light. After determining that these 120 globes on an average would absorb 13.4 per cent. of light, the lamps in January and February were tested with the globes in place, that is, not "removed," and to the candle power thus ascertained was added the theoretical quantity of 13.4 per cent. of light absorbed by the globe, and the total was estimated as the illuminating power of the lamp and made the basis upon which the city made and withheld payments. At the trial, objection was made to the evidence of the tests made in January and February with the globes on and with the theoretical allowance for light absorbed by the globes added. The objection was sustained, and all evidence of this method of test excluded.

In March, April, May, and June, the city used for testing lamps a portable photometer, which consisted of an automobile truck equipped with a bar photometer and other photometric apparatus inclosed by side and top curtains, which was taken to positions near the lamps to be tested, and lamps were tested in three ways: First, with the same apparatus used in January and February and with the globe in place; second, the lamp was taken down from the post and put in the portable photometer and tested with the globe in place; and, third, the lamp was tested in the portable photometer with the globe removed.

All the deductions made by the director from the amounts of the bills rendered by the company for the first six months of 1913 were based on readings of the lamps tested on the posts with the globes *in place*. When the evidence of these tests was excluded, the city was left without tests for January and February on which to base deductions, and was obliged to recalculate the deductions for the other four months on the basis of the readings made in the portable photometer with the globes removed. These latter readings were disclosed for the first time at the trial of the case, and the new calculations were made by one of the witnesses during the progress of the trial, and admitted in evidence.

Edgar W. Lank, of Philadelphia, Pa., for plaintiff in error.

John G. Johnson, of Philadelphia, Pa. (R. Stuart Smith and Charles E. Morgan, both of Philadelphia, Pa.), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge (after stating the facts as above). The errors assigned in the trial of this cause are 22 in number, extending to rulings of the court upon matters of evidence and to the charge to the jury, the substance of which, when classified, is as follows:

(1) Admissibility of letters between the parties prior to the execution of the contract.

(2) Proof by the plaintiff of the performance of its part of the contract.

(3) Admissibility of evidence of the tests of lamps made by the method employed during the months of January and February.

(4) The charge of the court under the prayers of both parties as to the tests of lamps made by the method used in the months of March, April, May, and June.

(5) The prejudicial effect of the use of the terms "penalty" and "penalize" in the charge of the court.

[1] 1. When the Welsbach Company was invited by the city, through its department of public works, to submit proposals for lighting its streets by incandescent lamps, there accompanied the invitation "specifications" of the proposed contract and "instructions to bidders." The former contained in the usual form the particulars and details of the matter contemplated by the contract into which the company was invited to enter, and the latter contained directions and instructions, intended to guide or instruct bidders with relation to the subject-matter to which their bids were invited. Among the instructions in the two instruments are the following:

"Should a bidder find discrepancies in or omissions from the specifications and accompanying papers, *or should he be in doubt as to their meaning*, he should at once notify the director, who will at once send a written instruction to all bidders. The city will not be responsible for any oral instructions." Instructions to Bidders, section 3.

"Any doubt as to the meaning of the specifications or any obscurity as to the wording of them, will be explained by the director, and any directions which may be required to complete any of the provisions of the specifications will be given by the director." Specifications, section 13.

Entertaining a doubt as to several phases of the specifications, especially concerning the method of test prescribed, the Welsbach Company, before submitting its proposals, or in other words before making its bids, obeyed the instructions adverted to, and wrote to the director of public works asking his interpretation thereof. To this inquiry the director made a written reply, the substance of which was:

(a) That in selecting 25 lamps from any district for test, his selection should be of lamps showing average conditions throughout the district.

(b) That the contractor should have timely notice of the time and place when lamps should be selected and tested, and that the representative of the company would be permitted to check the standards, adjustments, and readings.

(c) That any deterioration of the mantle, or change in the adjustment of the burner, occurring during transportation of the lamp from the street to the place of test, should be corrected before the test is made, so that the test should be of the lamp in the same condition as when in operation on the street, but suggested that 2 or 3 extra lamp tops, in addition to the 25, be taken to the place of test as substitutes, in case one or more of the 25 became disarranged.

These letters were offered and admitted in evidence over the objection of the city that in effect they altered and varied the terms of the written contract afterwards entered into and now in suit.

There must be eliminated from the consideration of the question raised any idea that in this correspondence there existed or was attempted anything in the nature of private negotiations between a bidder and a municipal officer, thereby removing the question from the law and the cases pertaining to such a transaction. This correspondence was inaugurated, conducted, and concluded upon the invitation and within the purpose of formal instructions to bidders, prescribed therefor by the city itself. Its subject-matter did not contemplate nor did it effect a change or alteration of the terms of the specifications as made. The correspondence extended merely to an interpretation of terms concerning which the bidder had a doubt, which, when existing, it was the desire of the city to remove by the method suggested and pursued, thereby obviating misunderstandings between parties, and avoiding subsequent litigation.

The reply of the director of public works, in giving his interpretation of that part of the method of test concerning which the company had a doubt, did not describe or establish any precise test, either by reciting the test contemplated by the specification or by suggesting another. It contained, however, an implication that the lamp, with the mantle and the burner, would be removed from the post and transported from the street to the place of test, and the place of test would be at the "city's photometric station or *elsewhere*," at the director's discretion. As to the location of the place of test, whether proximately or remotely distant from the lamp in place, the correspondence added nothing to nor withdrew anything from the specifications. There is, however, in the letter of the director an implication that before test the lamp would be *moved* to the place of test. The implication that the lamps would be removed before tests acquired an importance, in view of the fact that the January and February tests were made with the lamps in place; but the importance of this implication was lost in contemplation of the other fact that in the January and February tests the city clearly violated an undisputed provision of the contract by making tests without removing the globes. In other words, the city committed a breach of its contract in January and February, when it made tests of lamps without removing the globes, an act to which the correspondence in question did not extend, making unimportant the question raised by the correspondence whether the tests should be made with the lamps in place or should only be made after the lamps were removed. The remaining representation of the director that, when a lamp was transferred from the post to the station, allowance would be made in the test for deterioration in the mantle or change in the adjustment of the burner, occurring upon removal, was nothing more than an interpretation of which the contract itself was susceptible without the aid of the director's interpretation; the sole object of tests being to ascertain the candle power of the lamps, not when tested, but when in operation upon the streets. It occurs to us that the interpretation made by the director of the specifications to which the company addressed its inquiries has a very slight probative bearing, if any, upon the issues as they subsequently developed. Nevertheless they were admitted in evidence, and their admissibility has been challenged.

The letter of the company contained inquiries made upon invitation by the city. That invitation was embraced within the instructions to bidders and specifications, and the instructions to bidders, as well as the specifications, were embraced within and attached to the contract, and made a part thereof. The reply by the director to the inquiries made was an interpretation which the city required the director to make, under the method which the city had adopted to instruct bidders as to what it meant by its specifications, and having adopted this method of giving interpretations to doubtful expressions in specifications, before those specifications became a contract, the interpretation by the city's officer became an interpretation by the city itself, the meaning of which it is estopped to deny, and of the effect of which it cannot complain.

We do not hold that every interpretation by a municipal officer binds the city, even under circumstances where the city has volunteered the interpretation of its employé; but under the circumstances of this particular case, to which the expression of our opinion is restricted, which involve a change by the city from a method of test prescribed by the contract, first, to a method plainly different from that contemplated, and then, second, to a method the similarity of which to the one prescribed is challenged, we believe the city is bound by the act of its director, and the correspondence objected to was properly admitted in evidence.

[2] 2. By the terms of the contract the plaintiff agreed to furnish about 18,000 lamps and to maintain the same at 60-candle power. In proof of performance, the defendant introduced evidence that, before each lamp of that considerable number was supplied and installed in place, it was tested and proven to possess the required candle power. It is contended on the part of the city, however, that while this may be proof that the lamps of the required candle power were furnished, it is not proof that the required candle power was maintained. We are of opinion that by the testimony offered the company *prima facie* has supported the burden placed upon it. This view is aided by an unmistakable inference from the contract, that when it entered into the contract the city recognized the difficulty, if not the impossibility, of the company testing each one of the 18,000 lamps at different periods of each month in order to establish its right to receive or recover payment for maintaining the same at 60-candle power. Therefore the city and the company, in their contract, agreed that, for the purpose of ascertaining the quality and illuminating power maintained in the lamps, the city should select and test 25 lamps from the total in actual use in each district in each month, and that, if the average candle power of the 25 lamps selected and tested fell below the minimum candle power required by the specifications, then the company should receive as compensation for its lighting service in that district an amount decreased in proportion to the deficiency disclosed by the tests. Upon the plan thus agreed upon, knowledge whether the plaintiff had maintained at the required candle power all the lamps in each district for the whole of a month was within the possession of the defendant, and only upon that knowledge, as derived from its tests, was the city required to make

payments. We are of opinion that the plaintiff *prima facie* established its right to recover.

[3] 3. At the trial of this cause the defendant offered evidence of tests made during the months of January and February, holding that the same were in accordance with the specifications of the contract. Without reference to the interpretation placed upon the specifications by the director, previously considered, the specifications provide for a test of the lamps furnished under the contract, by selecting 25 lamps from those in actual use in each district in each month, and their illuminating power, determined photometrically by "any method sanctioned by standard practice at the city's photometric stations or elsewhere," at the director's discretion. The specifications provide, further, that "the average candle power of lamps so tested shall constitute the basis for calculating the light furnished during the month," and that the term "lamp" means "the burner, complete with mantle and chimney, * * * as set up for use in the street, and the tests * * * shall be made with the clear glass globe which incloses the lamp on the street *removed*, but otherwise under the same conditions as exist when the lamp is *taken down*; the object of the test being to determine that the actual illuminating power, as contracted for, is given on the street."

During the months of January and February of the year of the contract the city made its tests without taking the lamp down from the post or removing it to a testing station, and *without removing* the glass globe. In other words, the method pursued during the months of January and February was to test the lamp in place with the globe in place. Recognizing that a lamp which gave a light of 60-candle power without the globe would show appreciably less candle power with the globe in place, due to the absorption of light by glass, the city made a test of 120 lights to determine the average percentage of light absorption by the globes, and ascertained the same to be 13.4 per cent. To the candle power ascertained by test of a lamp in place inclosed by a globe, the city added the estimated percentage of light absorption by the globe, and the two together were computed to represent the candle power of the lamp, upon which the city based its calculations, and made and withheld its payments to the company. Evidence of tests of this character was offered, upon the claim that tests with globes removed, as provided by the contract, were impossible, and therefore tests with the globes in place, being the only method found possible, were permissible. Such did not appear to be the fact, and the trial court, in our opinion, properly excluded testimony of tests by the method followed, upon the ground that they were made by a method in complete conflict with and wholly different from the one agreed upon in the contract.

4. The method of the tests employed by the city during the months of March, April, May, and June differed radically from the method employed during the months of January and February. In these months the city used a portable photometer, which was moved or conveyed to the lamp. It consisted of a photometric apparatus inclosed in curtains. During this period, tests were made in three ways: First,

with the same apparatus used in January and February with the globe in place; second, the lamp was taken down from the post and placed in the portable photometer and tested with the globe in place; and, third, the lamp was tested in the portable photometer with the globe removed.

The results of these tests demonstrate to a certainty the inaccuracy either of the method pursued in January and February or of the one pursued in the months following. In the latter months, tests were made of the same lamp by both methods. Among the reports of these tests, as shown by the testimony of the city, appears a test of one lamp made first by the early method with the globe on, yielding 35.4-candle power, to which was added the 13.4 per cent. candle power estimated to have been absorbed by the globe, and the two together were reported as showing 40.9-candle power. But when the same lamp was tested by the portable photometer under the method of the latter months, with the globe removed, instead of yielding 40.9-candle power, or precisely the same as the total of the two items that comprise this figure, it yielded but 16.02-candle power. This variation was extreme. The variations in the scores of tests of other lamps were not so wide as in this one, but variations existed in all, and in none did the test with the globe removed correspond in candle power with the test made with the globe on plus the estimated light absorbed by the globe.

Evidence of the tests made in January and February having been excluded by the court, the city offered, and the court admitted, evidence of its tests made by the method employed in March, April, May, and June. The company contended that according to the specifications the tests were not only to be made with the globes removed, but were to be made under conditions equivalent to those which prevailed in a laboratory, maintaining that a very slight difference in temperature of a burner, caused by a draft of air, would change its light-giving properties; that the testing apparatus of the portable photometer was protected only by loose curtains; that it was productive of drafts and currents of air, which seriously impaired the efficiency of the naphtha burner while under tests with the globe removed; and that the apparatus employed was one not contemplated by the contract, that it was not a standard method, and was merely an experiment in photometry. On the other hand, the city contended it was not restricted to making tests in photometric stations, but under the terms of the specifications could make them at "the city's photometric stations or *elsewhere*"; that the photometer used, though portable, was of a character contemplated by the contract; that it produced accurate results, and the method followed was sanctioned by standard practice. As the contract required the tests to be made by "any method sanctioned by standard practice," "at the city's photometric stations, or *elsewhere*," the trial court submitted to the jury the question whether the method followed was the one contemplated by the contract, and also whether the tests made upon the device employed were pursuant to a method sanctioned by standard practice. We find no error committed by the court in submitting these questions to the

jury, either in what its charge contained or omitted. The issue was clearly and fully submitted to the jury, and by the jury was decided.

[4] 5. In the charge to the jury the court alluded to the deductions made by the city from the bills presented by the company as "penalties." The word appears in several places in the charge. Strictly speaking, the deductions made by the city were not penalties, and the effect of making the deductions was not to "penalize" the company. If there existed in the case nothing to indicate why the court used these words, we might think the minds of the jurors might have been influenced and prejudiced by them. But in charging the jury the court was not using technical terms with their legal meanings. It was employing terms which had been introduced into the case by the city itself, and which had first been used by the city in rendering its monthly statements to the company of the deductions made, to which deductions it referred as "penalties." Each notice or letter conveying information of the amounts deducted contained a table, which was described as "a statement of penalties by districts." Around these statements and the methods by which they were reached revolved the whole controversy in the case, and very naturally the court drifted into using the descriptive words employed by the city. With these words the jury was quite as familiar as the court, and when they were used by the court the jury knew what they meant and to what they alluded, and therefore could not have been prejudiced by them.

We find no error in the trial below, and affirm the judgment.

STELLWAGEN v. CLUM.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1914.)

No. 2448.

BANKRUPTCY (§ 184*)—PROPERTY VESTING IN TRUSTEE—TRANSFERS BY BANKRUPT.

Bankrupt, a lumber company, transferred certain piles of lumber in its yard to claimant, who was a creditor, by bill of sale. The piles were distinctly marked as sold to claimant. Subsequently, and more than four months prior to the bankruptcy, the lumber was sold by the bankrupt with claimant's consent, and the account against the purchaser therefor was assigned to claimant. At that time, within the rule of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9585 et seq.]) the company was solvent; but under the rule of decision in Ohio it was insolvent. *Held* that, considering the nature and situation of the property, there was such delivery of possession as to dispense with the necessity of recording the bill of sale as a chattel mortgage under the state statute, and that the trustee in bankruptcy could not, by virtue of anything in the Bankruptcy Act alone, question the validity of either the bill of sale or assignment; that the remaining question—whether the trustee or claimant was entitled to the account or its proceeds depended on whether the Bankruptcy Act suspended Rev. St. Ohio, §§ 6343, 6344, as amended April 30, 1908 (99 Ohio Laws, pp. 241, 242), which provide that any assignment or transfer made by a debtor in contemplation of insolvency, with intent to give a preference, or to hinder, delay, or defraud creditors, provided the assignee or transferee knew of such intent, shall be void at suit of any creditor, and a receiver may be appointed, who

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shall take charge of and administer all of the property of the debtor—is certified to the Supreme Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Appeal from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

In the matter of the Georgian Bay Company, bankrupt; Alfred Clum, trustee. From an order denying his petition for surrender of an account, A. C. Stellwagen, trustee for Margaret Zengerle, appeals. Questions certified to Supreme Court.

Appellant filed a petition below for an order to compel surrender and transfer to him of certain white pine lumber and a balance due upon a particular open account then in possession of appellee as trustee in bankruptcy for the Georgian Bay Company. The order was denied, the petition dismissed, and appeal taken.

The Georgian Bay Company, an Ohio corporation, was at the time of the transactions in dispute engaged in the wholesale and retail lumber business at Cleveland, Ohio. February 2, 1910, the company delivered to appellant's predecessor (A. L. McBean), as trustee for Margaret Zengerle and the Dime Savings Bank of Detroit, its bill of sale, describing 433,500 feet of white pine lumber then in the company's yards, and stating a total price of \$14,013, crediting the trustee with certain promissory notes of the company for a like sum and payable, in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank, respectively. Neither the bill of sale nor a copy was filed with the recorder of Cuyahoga county, Ohio; but the lumber so in terms sold consisted of piles (stacked in the ordinary way) which were to be, and at the time in fact were, each distinctly marked: "Sold to A. L. McB., Agt." May 3, 1910, the company, with consent of McBean, sold this lumber and certain of its own lumber then in the yards, to Schuette & Co., of Pittsburgh. Payment was to be made by Schuette & Co., part in cash, part in notes maturing at fixed times between date of sale and the following September 10th, and the balance in cash on or before October 1st. Two days later, May 5th, the Georgian Bay Company transferred to appellant "the balance, 25 per cent. of invoice value or what may show due on the 1st of October, A. D. 1910, of the purchase price of the lumber" (so sold to Schuette & Co.), to secure payment in full of all moneys that should be advanced by, and "payment pro rata of all moneys" then owing to, the Dime Savings Bank, Mrs. Zengerle, and C. M. Zengerle, agent, and any surplus remaining was to be returned to the company. Schuette & Co., while owing a balance of \$7,500 on portions of the lumber it had received, rejected the rest. This can be identified, and is worth about \$4,000. It was the transfer of this balance and the surrender of this rejected lumber that appellant sought in the court below.

October 31, 1910, the Georgian Bay Company made a general assignment for the benefit of its creditors, which was properly filed the following November 7th; and on the 9th of that month the company was adjudicated a bankrupt. At the time there remained due from the bankrupt to Mrs. Zengerle \$7,100. C. M. Zengerle is the husband of Margaret Zengerle, and was the president of the Georgian Bay Company. The notes payable to his wife represented loans of money belonging to her; and in negotiating those loans, and in the transaction had under the bill of sale, he acted as her agent, and as president of the company. The theory of the court below was that the bill of sale (February 2, 1910) was intended merely as security, and, not having been deposited in accordance with section 4150 (2 Bates' Ann. Ohio Stat. p. 2302) concerning chattel mortgages, was null and void; that the transfer (May 5th) of balance accruing October 1st from Schuette & Co. was made with intent to hinder and delay creditors, when, according to the laws and the rule of judicial decision of the state of Ohio, the Georgian Bay Company was insolvent, though not according to the Bankruptcy Act: that Margaret Zengerle was, through her agent, C. M. Zengerle,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

chargeable with knowledge of such intent and insolvency, and the Savings Bank was not; that as to Margaret Zengerle the transfer was null and void, and so was set aside, but that the Savings Bank was entitled to be paid out of the balance of the Schuette account. No appeal was taken from the portion of the decree which allowed recovery by the Savings Bank.

J. Shurly Kennary, of Detroit, Mich., for appellant.

G. B. Marty, of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The ultimate question arising on the hearing here was whether the Bankruptcy Act operated to suspend certain applicable statutory provisions of Ohio (referred to below). We are disposed to hold that, if such provisions were suspended, appellant is entitled, in behalf of Margaret Zengerle, to recover; otherwise, the trustee in bankruptcy is entitled to hold the balance due from Schuette & Co. and the lumber rejected by them, and administer the same as part of the estate of the bankrupt for the benefit of its general creditors.

The reasons for these conclusions in substance are:

(1) As between Mrs. Zengerle and the general creditors of the Georgian Bay Company, there was sufficient delivery of possession of the lumber covered by the bill of sale to dispense with the necessity of depositing the instrument with the county recorder, such possession having been given as the nature of the property and its situation would permit (Rev. Stat. Ohio, §§ 4150, 4151; Ann. Gen. Code Ohio, §§ 8560, 8561; *Hunt v. Bode*, Assignee, 66 Ohio St. 255, 269, 64 N. E. 126; *Ward v. First Nat. Bank of Ironton*, 202 Fed. 609, 613, 120 C. C. A. 655 [C. C. A., 6th Cir.]; *In re Cincinnati Iron Store Co.*, 167 Fed. 486, 491, 93 C. C. A. 122 [C. C. A., 6th Cir.]; *Pattison v. Dale*, 196 Fed. 5, 12, 13, 115 C. C. A. 639, and citations [C. C. A., 6th Cir.]; *Dale v. Pattison*, 234 U. S. 399, 409, 410, 411, 34 Sup. Ct. 785, 58 L. Ed. 1370); the sale subsequently made to Schuette & Co. upon the consent of Mrs. Zengerle's trustee was a distinct recognition of the intent and effect of the bill of sale and the marking of the piles of lumber; and the transfer of account made two days later was manifestly designed at once to execute the purpose of the transaction involved under the bill of sale and transpose the rights thereunder of Mrs. Zengerle, as well as of the Savings Bank, to the sales proceeds.

(2) Upon the hypothesis of suspension of the state statutes, since more than four months elapsed between the delivery of the bill of sale, as also of the transfer of account, and the bankruptcy, the trustee cannot, in virtue alone of the Bankruptcy Act, question the validity of either of those instruments. Section 67e of Bankruptcy Act; *Mayer v. Hellman*, 91 U. S. 496, 501, 23 L. Ed. 377. And see *Randolph v. Scruggs*, 190 U. S. 533, 537, 23 Sup. Ct. 710, 47 L. Ed. 1165.

(3) However, upon the theory that the pertinent state statutes were not so suspended, the general creditors acquired rights thereunder to have the instruments in dispute set aside, because under the facts shown the company was not then able to meet its debts as they fell

due and so was insolvent within the rule of judicial decision in Ohio (as distinguished from the rule of Bankr. Act, § 1, par. 15) defining insolvency (*Mitchell v. Gazzam*, 12 Ohio, 315, 336; *Benson v. Columbia Ins. Co.*, 7 Ohio N. P. [N. S.] 113, 131; *Cincinnati Equipment Co. v. Degnan*, 184 Fed. 834, 840, 107 C. C. A. 158 [C. C. A., 6th Cir.] and citations); and, further, because the instruments were in terms made to a trustee (*Brinkerhoff v. Tracy*, 55 Ohio St. 558, 571, 45 N. E. 1100; *Gashe v. Young*, 51 Ohio St. 376, 389, 38 N. E. 20; *Dickson v. Rawson*, 5 Ohio St. 218, 222; *Bagaley & Co. v. Waters*, 7 Ohio St. 359, 365; *Justice v. Uhl*, 10 Ohio St. 170, 175, 176; *Conrad & Bro. v. Pancost Co.*, 11 Ohio St. 685). The rights so vested in the creditors are enforceable at any time within four years (*Stevens v. Summers*, 68 Ohio St. 421, 441, 442, 67 N. E. 884); and under section 70e of the Bankruptcy Act these rights accrued to the trustee in bankruptcy (*In re Mullen* [D. C.] 101 Fed. 413, 416, decision by the late Judge Lowell, pointing out the course pursued in the enactment of these sections; *In re Schenck* [D. C.] 116 Fed. 554, 555, 556; *In re Toothaker Bros.* [D. C.] 128 Fed. 187, 188; *Bush v. Export Storage Co.* [C. C.] 136 Fed. 918, 921; *Nye, Trustee, v. Hart*, 22 Ohio Cir. Ct. R. 427, 431; *Hull v. Burr*, 153 Fed. 945, 950, 83 C. C. A. 61 [C. C. A., 5th Cir.]; *Gregory v. Atkinson* [D. C.] 127 Fed. 183, 184; *Hurley v. Devlin* [D. C.] 149 Fed. 268, 270; *Manning v. Evans* [D. C.] 156 Fed. 106, 110; *In re Scrinopskie*, 10 Am. Bankr. Rep. 221, 224; 1 *Loveland on Bankruptcy* [4th Ed.] § 381, p. 787; *Collier on Bankruptcy* [8th Ed.] p. 775). Such rights in the trustee cannot in any event be affected, as counsel claim, by the doctrine of *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. The infirmity pointed out in the bill of sale was from the time of its delivery inherent, and the trustee in bankruptcy, in virtue of the rights of the creditors, was invested with distinct authority to avoid the instrument (*Petition of Rouse*, 208 Fed. 881, 882, 126 C. C. A. 90; *Carey v. Donohue*, 209 Fed. 328, 333, 334, 126 C. C. A. 254 [C. C. A., 6th Cir.]).

State Statutes Claimed to be Suspended by the Bankruptcy Act.—The Ohio statutory provisions in force at the date of the bill of sale (February 2, 1910) and in terms vesting rights, if any existed, in the general creditors to have that instrument set aside, were sections 6343 and 6344 of the Revised Statutes, as amended April 30, 1908 (99 Ohio Laws, 241, 242). These sections were each separated and their phraseology was rearranged, though without apparent change in effect, by the General Code of Ohio, approved February 15, 1910 (3 General Code of Ohio, pp. 2392, 2393 and 2982), where they appear as sections 11102, 11103, 11104, 11105, 11106, and 11107 (see, also, 5 Page & Adams, Ann. Ohio Gen. Code, pp. 449, 460, 461, 472); and although the transfer of account was made May 5, 1910, we think it sufficient to set out section 6343 in whole, and section 6344 in material parts (as the sections stood February 2, 1910), in the margin.¹

¹ "Sec. 6343. Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of

The specific claim is that section 6343, when considered in connection with the chapter concerning insolvent debtors (of which the section forms a part), is suspended by the Bankruptcy Act. We take it that counsel's main reliance, although not distinctly stated, is grounded upon that portion of section 6343 which provides:

"A receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

It is worthy of observation that section 6343 was amended shortly before the passage of the Bankruptcy Act, to wit, April 26, 1898 (93 Ohio Laws, 290). Another amendment was made May 12, 1902 (95 Ohio Laws, 608) but it is not important. By the amendment of 1898 it was provided that a sale, etc., whether made in trust or otherwise, with design to prefer one or more creditors to the exclusion of others or with intent to hinder, delay, or defraud creditors, should be declared void as to creditors at the suit of any creditor, and should—

"operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured."

No legislation going this far was ever before enacted in the state. Whether the change made in this provision by the amendment of section 6343 on April 30, 1908, before quoted, was intended as a

insolvency, and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors, and in any suit brought by any creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured.

"Provided, however, that the provisions of this section shall not apply unless the person, or persons to whom such sale, conveyance, transfer, mortgage or assignment be made, knew of such fraudulent intent on the part of such debtor or debtors, and provided, further, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where, upon foreclosure or taking possession of such property, the mortgagee fully accounts for the proceeds of such property.

"Every sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay, or defraud creditors within the meaning of this section, unless the seller or transferrer shall, not less than seven (7) days previous to the transfer of the stock of goods sold or intended to be sold,

modification or not, does not appear; but it is not perceivable that the change so made was substantial. It is further to be observed that section 6344 in terms confines the effect of the conveyance denounced to the particular property sold, etc.; in other words, the duties there imposed upon the receiver or assignee do not extend to the rest of the property of the debtor. This was in harmony with the provisions of both sections 6343 and 6344 as they stood prior to the enactment of April 26, 1898 (2 Rev. Stat. of Ohio [Ed. 1880] pp. 1514, 1515); and this policy is traceable to sections 16 and 17 of the act "regulating the mode of administering assignments in trust for the benefit of creditors," passed April 6, 1859 (56 Ohio Laws, pp. 231, 235; see, also, section 17 as amended February 2, 1863 [60 Ohio Laws, p. 8]); and as early as the act of March 14, 1838, and prior to the enactment of the Ohio Code of Civil Procedure, the same policy prevailed, although the instruments of conveyance were made "subject to the control of chancery" etc. (Swan's Ohio Statutes [Ed. 1841] § 68, p. 717).

It is to be observed of these earlier statutory provisions that they operated to thwart the intent of the grantor in any such conveyance by diverting the property from the trustee he named, and from the creditors he intended to prefer, to another trustee for the benefit of all his creditors. During this period it was held that the act regulating the mode of administering estates of insolvent debtors, which we have seen included these special provisions as they existed prior to 1898, was not suspended by the Bankruptcy Act of 1867 (Mayer

and the payment of the money thereof, cause to be recorded in the office of the county recorder of the county in which such seller or transferrer conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer, which notice shall be in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto; excepting, however, that no such presumption shall arise because of the failure to record notice as above provided in the case of any sale or transfer made under the direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of any sale or transfer of any property exempt from execution.

"Sec. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void. And such court shall appoint a trustee or receiver according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commence a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors." (99 Ohio Laws, 241, 242.)

v. Hellman, 91 U. S. 496, supra, at page 502, 23 L. Ed. 377); Mr. Justice Field saying: "The answer is that that statute of Ohio is not an insolvent law in any proper sense of the term." This court followed that rule after the passage of the present Bankruptcy Act, and of course after the amendment of 1898 to section 6343, though, since only a general assignment was there involved, it would now seem to have been unnecessary to pass upon the effect of section 6343 (In re Farrell, 176 Fed. 505, 509, 100 C. C. A. 63); and it will be remembered that it is not sought in the instant case to recover any property of the debtor except only the lumber (or its equivalent) specifically described in the bill of sale and transfer of account.

The questions, then, of ultimate control, would seem to be whether the change in statutory policy so pointed out offends against the Bankruptcy Act, especially sections 60 and 67; and, if so, whether the whole of section 6343 is suspended, or only the portion which in effect appropriates, for the benefit of all the creditors, the property of the debtor not expressly embraced in the preferential or fraudulent deed.

One view is that the Bankruptcy Act covers such a situation and so occupies the field, that it is paramount and exclusive, and that necessary conflict follows (counsel's reliance being placed upon *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; *Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; 5 Cyc. 240). These citations suggest, also, *In re Edward Klein*, 1 How. 277, note, 280, Fed. Cas. No. 7,865, and *Globe Ins. Co. v. Cleveland Ins. Co.*, Fed. Cas. No. 5,486; *Nor. Pac. Ry. v. Washington*, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237.

The opposing view in substance is that actual conflict must be shown before suspension can be said to prevail, and that the state law, in the present instance at least, operates in aid of the bankruptcy law and so is not in conflict with it (counsel relying on *Miller v. New Orleans Acid Co.*, 211 U. S. 496, 505, 506, 29 Sup. Ct. 176, 53 L. Ed. 300). This is suggestive of the related rule laid down in the *Minnesota Rate Cases*, 230 U. S. 352, 398, 402, 33 Sup. Ct. 729, 57 L. Ed. 1511 et seq., and the kindred decisions following that rule; also *In re Watts & Sachs*, 190 U. S. 1, 31, 32, 23 Sup. Ct. 718, 47 L. Ed. 933; *Randolph v. Scruggs*, supra, 190 U. S. at p. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; *Missouri, Kansas & Texas R. Co. v. Harris*, 234 U. S. 412, 417, 418, 34 Sup. Ct. 790, 58 L. Ed. 1377; *Old Town Bank v. McCormick*, 96 Md. 341, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; and *Herron Co. v. Superior Court*, 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124.

Finding ourselves unable to reach a satisfactory conclusion upon the question of suspension, it is ordered that the following questions of law be certified to the Supreme Court for its instructions thereon:

(a) Whether the Bankruptcy Act of the United States, in force on the dates herein mentioned, operated to suspend section 6343 of the Revised Statutes of Ohio, as such section stood February 2, 1910.

(b) Whether the Bankruptcy Act operated to suspend the sections

into which section 6343 was divided and numbered, February 15, 1910, by the General Code of Ohio, to wit, sections 11102, 11103, 11104, and 11105, as such sections existed May 5, 1910.

(c) If the Bankruptcy Act did not operate to suspend in their entirety the several sections of the Ohio statutes mentioned in the preceding questions, whether such suspension extended only to the portions thereof which in terms appropriated, for the benefit of all the creditors, the property of the debtor not specifically described in the bill of sale and transfer of account in dispute.

A further order will be entered suspending ultimate decision of the cause until answers to such questions are received.

NORDGARD v. MARYSVILLE & N. RY. CO. et al†

(Circuit Court of Appeals, Ninth Circuit. November 9, 1914.)

No. 2398.

COMMERCE (§ 27*)—WHAT CONSTITUTES INTERSTATE COMMERCE—EMPLOYERS' LIABILITY ACT—"ENGAGED IN INTERSTATE COMMERCE."

Defendant railroad company was owned by its codefendant mill company, and its road used as a logging road for the transportation of logs and poles from its timber lands in the state of Washington to Puget Sound, where they were placed in the water. A portion of the logs were thereafter sold to other mills, and the remainder manufactured by the mill company into lumber, which was afterward sold, some for use locally, and some for shipment to other states or countries. The poles, which were intended for piles and electric wire poles, were sold to a dealer, to whom they were delivered in the water, and he rafted and removed them, afterwards reselling them in the course of his business in that and other states. *Held*, that the logs, poles, or lumber did not become subjects of interstate commerce until committed to a carrier for transportation to another state, or started on their ultimate passage to that state, and that defendant railroad company was not engaged in interstate or foreign commerce, within the meaning of Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (Comp. St. 1913, § 8657).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action at law by Gunder Nordgard against the Marysville & Northern Railway Company and the Stimson Mill Company. Judgment for defendants, and plaintiff brings error. Affirmed.

For opinion below, see 211 Fed. 721.

John T. Casey, of Seattle, Wash., for plaintiff in error.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for defendants in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—47

† Rehearing denied March 8, 1915.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. In an action in the court below, brought by a brakeman of a railway train of the defendants in error to recover damages for personal injuries under the provisions of the Employers' Liability Act of Congress of 1908, the court below directed a verdict for the defendants, the defendants in error here, on the ground that the defendants were not engaged in interstate or foreign commerce.

The record shows that the defendant the Stimson Mill Company was engaged in the logging and lumber business, and carried logs on the Marysville & Northern Railway Company, its logging road, from its own timber lands in the forest to the waters of Puget Sound. It dumped all its logs into those waters. A portion of the logs was thereafter sold to various mills on the Sound, and the remainder was taken to the defendant's mill at Ballard, and there manufactured into lumber. The lumber was piled in the mill company's lumber yard. About 20 per cent. of it was sold in the local market, and the remainder, on orders thereafter obtained, was shipped to points in other states and countries. A portion of the timber so hauled on the logging road consisted of poles for electric wires.

One Vollans, a dealer in cedar poles and piling, testified that he sold about 60 per cent. of his poles in California, and 40 per cent. locally. He said:

"I bought the poles from them [the mill company], and they delivered them into the water at Ebey Slough, where they were received by me. I paid so much a pole delivered in the water at Ebey Slough. There I took the poles, rafted them, and towed them away." "The contract was so much a thousand delivered into the water at Ebey Slough, including the hauling over the railroad."

The question is whether, under these facts, either of the defendants was engaged in interstate commerce over the logging road. The Supreme Court has defined what is not and what is interstate commerce. In *Coe v. Errol*, 116 U. S. 517, 525, 6 Sup. Ct. 475, 477 (29 L. Ed. 715), the court said of goods in transit:

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

The court quoted from the opinion in the case of *The Daniel Ball*, 10 Wall. 557, 565 (19 L. Ed. 999):

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

And added:

"But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. * * * Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state."

The language so used in that opinion applies in every particular to the facts in the present case. The poles which were sold to Vollans were not shipped to him from the logging camp, but were sold and delivered to him at tide water. There he took them and towed them away. The testimony does not disclose to what point he towed them, but we may assume that he towed them to a storing place which answered for his warehouse, where he kept his stock in trade, out of which he sold his poles and piling, and where the poles lay until they were sold to customers. It was not known and could not be determined that any particular poles or particular car load of poles were, while being carried on the defendant's road, on their way to a foreign market. As was said in *Coe v. Errol*, they might be sold or otherwise disposed of within the state, "and never put in course of transportation out of the state."

The cases which are cited to sustain the view that these poles were, while on the defendant's road, in the course of interstate transportation, have not in any way modified the principles announced in *Coe v. Errol*, but, on the contrary, have reaffirmed the same, and in each case there has been quoted the rule of Mr. Justice Bradley in *Coe v. Errol* that the test is whether the goods have commenced their final movement for transportation from the state of their origin to that of their destination.

In *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442, lumber was ordered manufactured and shipped for export through a port where there was no local trade, and it was there shipped to its final destination by a vessel not designated before arrival. The court held that a continuous line of shipments through the same port to foreign ports of merchandise in which there is no local trade shows a continuity of transportation which is not broken by a mere delay in transshipment.

In *Louisiana R. R. Comm. v. Texas & Pac. Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215, the court, while holding that a shipment intended for export to a foreign country but shipped to the exporting seaport on local bills of lading, was interstate commerce, said:

"The shipments were in the physical custody of the railroad company until arrival at New Orleans, and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo."

In *So. Pac. Terminal Co. v. Int. Com. Comm.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310, the goods were all destined for export and were shipped on initial bills of lading to a terminal in the same state where they were to be delivered to a carrier for a foreign destination. The court held, following *Coe v. Errol*, that goods destined

for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another state, or are delivered to a carrier for transportation.

In line with these decisions is *Ohio R. R. Comm. v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004. In that case coal was shipped from points in the state of Ohio to "on board" vessels at the port of Huron, but it was all intended for shipment to some point beyond the state, undetermined at the time of shipment, but determined after arrival at Port Huron. The court said:

"By every fair test the transportation of this coal from the mine to the upper Lake ports is an interstate carriage, intended by the parties to be such."

In all of these cases the goods, from the time of their initial shipment, were all on their way to points in another state or country. There might be a pause or delay at a point of transshipment; there might be uncertainty of identity of connecting carriers; there might even be uncertainty as to the precise point of their ultimate destination; but in each case it could be positively affirmed that from the beginning of their transportation they were all in course of transit to points beyond the state in which the original shipment was made.

In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tide water, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant mill company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the mill company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce—

"is defined in *Coe v. Errol* to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage." *General Oil Co. v. Crain*, 209 U. S. 211, 229, 28 Sup. Ct. 475, 52 L. Ed. 754.

We find no error. The judgment is affirmed.

ROSS, Circuit Judge (dissenting). This is a personal injury case, and the real question is whether either of the defendants in error was, at the time the plaintiff in error received the injuries for which he sued, a carrier by railroad engaged in interstate commerce—the action being based upon the Employers' Liability Act of Congress of 1908 (35 Stat. 65). If so, then manifestly the plaintiff in error was likewise so engaged, as he was one of the brakemen of one of the

railroad trains of the defendants in error at the time of his injury. The trial court granted a motion of the defendants for a directed verdict in their favor, which having been returned, and a judgment against the plaintiff below entered, he sued out the present writ of error.

The substantial facts appear to be these: The defendant in error Stimson Mill Company is the owner of a large body of timber land in Snohomish county, state of Washington, which it is engaged in logging, and it also owns and operates a large lumber mill at Ballard, a suburb of the city of Seattle, of that state. For the purpose of transporting its logs, it caused the defendant in error Marysville & Northern Railway Company to be incorporated and pays the costs of its operation. That company was incorporated under the general laws of Washington applicable to railroads, with the incidental power of eminent domain, and constructed a line of railroad about 16 miles long, extending from the vicinity of the logging operations of the mill company to a point on Ebey Slough, one of the mouths of the Snohomish river near the town of Marysville in Snohomish county. The road was connected with the Northern Pacific and Great Northern Railroads, although the only transportation it appears to have done, apart from the specific instances to be mentioned, has been the carrying of the logs of the Stimson Mill Company from its timber lands to Ebey Slough, into which they are dumped, and there a part of them are sold by the Stimson Mill Company to other manufacturers, the remainder being by the mill company rafted and towed to Ballard, where they are sawed into lumber by it, and the hauling of the supplies for the mill company's logging camp, which the railroad company carries free. It further appears from the evidence that on one occasion some gravel was carried by the railroad to the town of Marysville for street purposes, on which no freight was charged, and that on another occasion a car load of lumber was hauled for a friend of the mill company who was starting a logging camp in its vicinity, and for which he was charged only the actual cost of the haul. And the evidence also shows that the mill company sold certain poles and piling, cut from its timber lands and hauled by the railroad, to one Vollans, who sold and sent about 60 per cent. of them to various parties in the state of California, which poles and piling were sold by the mill company to Vollans, delivered in the waters of Ebey Slough.

It further appears that the cars used on the railroad consist of trucks on which the logs are loaded and made fast at either end by chains, there being two brakemen on each train of cars, each of whom assist in loosening the chains and dumping the logs into the water. It was while engaged in that operation that the plaintiff received the injuries complained of by him. These further facts are also made to appear: The mill mentioned has a capacity of about 175,000 feet of lumber in 10 hours, and manufactures its lumber chiefly from the logs cut from the lands of the Stimson Company, from 20 to 25 per cent. of which is sold in the local market and delivered to the purchasers at the mill, the balance being sold for shipment out of the state of Washington either by water or rail, and delivered on board vessels or cars

to the purchaser at Ballard, and billed as directed by the purchaser. When orders are received by the mill company for lumber to be shipped by water, the lumber is piled on the dock, from which a steamer takes it, and where sold for shipment by rail the mill company loads it on board cars, and it is paid for at Ballard by the local agent of the buyer, who directs its destination.

The sole question, as has been said, is whether the defendants in error were at the time in question engaged in interstate commerce within the meaning of the act of Congress above referred to. In the case of *United States and Interstate Commerce Commission, Appellants, v. Louisiana & Pacific Railway Company et al.*, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185, and similar cases, numbered respectively 829, 830, 831, 832, 833, 834, 835, and 836, decided by the Supreme Court May 25, 1914, involving the true character of certain logging roads, that court said, among other things:

"Are they plant facilities merely, or common carriers with rights and obligations as such? It is insisted that these roads are not carriers, because the most of their traffic is in their own logs and lumber, and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211 [34 Sup. Ct. 522, 58 L. Ed. 924]. In that case the Supreme Court of Wisconsin sustained the extension of a spur track to reach the quarries and limekilns of a single company as a public use, authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (233 U. S. 221 [34 Sup. Ct. 525, 58 L. Ed. 924]): 'A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in *Hairston v. Danville & Western Rwy. Co.*, supra (208 U. S. 598 [28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008]): "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago, etc., R. R. Co. v. Porter*, 43 Minn. 527 [46 N. W. 75]; *Ulmer v. Lime Rock R. R. Co.*, 98 Me. 579 [57 Atl. 1001, 66 L. R. A. 387]; *Railway Co. v. Petty*, 57 Ark. 359 [21 S. W. 884, 20 L. R. A. 434]; *Dietrich v. Murdock*, 42 Mo. 279; *Bedford Quarries R. R. Co. v. Chicago, etc., R. R. Co.*, 175 Ind. 303 [94 N. E. 326, 35 L. R. A. (N. S.) 641]."

Applying the principle there referred to to the facts of the present case, I am of opinion that the railroad company here involved is a common carrier. While the chief purpose of its construction undoubtedly

was the transportation of logs cut from the lands of the Stimson Mill Company, it was by virtue of its charter legally bound to carry the logs and other property of the public, and, as the facts show, did on occasion do so. At what charge, or whether without charge, is unimportant; it was clearly entitled to compensation for such transportation, and to the establishment of proper rates therefor. The record shows that a part of the business in which the mill company was engaged was the cutting and selling of poles and piling from its timber lands. The witness Vollans testified on behalf of the complainant in the case—plaintiff in error here—as follows:

"I am a dealer in cedar poles and piling, and in my business have dealt with the Stimson Mill Company and the Marysville & Northern Railway. During the year 1912 they hauled poles and piling for me; I paid them for it. I sell about 60 per cent. of them in California, and 40 per cent. locally. * * * My dealings were entirely with the Stimson Mill Company. I bought the poles from them, and they delivered them into the water at Ebey Slough, where they were received by me. I paid so much a pole delivered in the water at Ebey Slough. There I took the poles, rafted them, and towed them away. This was prior to April, 1912. * * * The contract was so much a thousand delivered in the water at Ebey Slough, including the hauling over the railroad."

It will be observed that the witness there distinctly testified that the defendants in error hauled the poles and piling so bought for the purchaser, about 60 per cent. of which he sold in California, and that the poles and piling so bought and hauled for compensation duly paid were delivered to him in the water at Ebey Slough, from which place he towed them away tied together. If knowledge on the part of the defendants in error that a part of such poles and piling were intended for continuous transportation by the purchaser to another state be essential, such knowledge, I think, might well have been found by the jury from the testimony of Vollans.

The opinion of the majority of the court is based, as it seems to me, upon the assumption that the place in Ebey Slough where the mill company dumps all the logs cut from its lands is a sort of gathering place or rendezvous *at and from which only* it sells its logs, and consequently that the defendants in error are unaffected by anything any purchaser of any part thereof may do with what he purchases. Says the court in its opinion:

"In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tide water, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant mill company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them."

I do not see how that can be properly affirmed in this case, in view of the testimony of the witness Vollans. Even if there were any contradiction of his testimony, which, however, the record fails to show, his credibility was a question for the jury, and not for either the trial court or this court. If true, it seems to me to show that the poles and piling he purchased were cut for him by the mill company from its timber

lands for the purpose of being, in part, transported to the state of California, first by the railroad owned by the mill company, which I think I have shown should be regarded as a common carrier, to the waters of Ebey Slough, into which they were by the contract with Vollans to be dumped, and where he was to receive them for continuous transportation by water to California. Whether by ship or raft is wholly unimportant. Such of the poles and piling as were designed for the California trade did, in my opinion, begin to move from the state of Washington to the state of California when they left the lands of the mill company under the contract testified to by Vollans; and, if that contract was in fact made and acted on as testified to, the commencement of the movement of such poles and piling constituted, in my opinion, commerce between the two states mentioned, within the decision of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, and other decisions of that court referred to in the opinion of this court herein. The principle annunciated in the cases of *Louisiana R. R. Comm. v. Tex. & Pac. Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215, *Southern Pac. Terminal Co. v. Int. St. Com. Comm.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310, *Ohio Railroad Comm. v. Worthington, Receiver*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004, and *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442, is that "it is the essential character of the commerce," not its mere incidents, which determines its true character, and that it "takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country."

For the reasons above stated, I think the judgment should be reversed, and the cause remanded to the court below for a new trial.

THE GIULIA.

(Circuit Court of Appeals, Second Circuit. November 16, 1914.)

No. 13.

1. SHIPPING (§ 132*)—SUIT FOR DAMAGE TO CARGO—BURDEN OF PROOF.

Where it is admitted that merchandise was received on board a vessel in good condition, and delivered at the end of the voyage in bad condition, in order to be relieved from liability under an exception of perils of the sea in the bill of lading, the carrier has the burden of proving that the injury was the result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

2. SHIPPING (§ 141*)—LIABILITY FOR DAMAGE TO CARGO—EXEMPTION IN BILL OF LADING—"PERILS OF THE SEA."

The term "perils of the sea," as used in an exemption clause in a bill of lading, is understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature, or arise from irresistible

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

For other definitions, see Words and Phrases, First and Second Series, Perils of the Sea.

Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Junes Co., Limited, v. Thynas*, 64 C. C. A. 118.]

3. SHIPPING (§ 132*)—LIABILITY FOR DAMAGE TO CARGO—EVIDENCE TO SUSTAIN DEFENSE.

Evidence considered, and *held* not to sustain the burden of proof resting on a vessel to show that damage to cargo by fresh water escaping from a pipe extending from a water tank into the hold was due to perils of the sea, which caused the cargo to move and force the plug from the end of the pipe, but rather to indicate that the plug was not screwed into the pipe, as it should have been, before the commencement of the voyage, thus rendering the ship unseaworthy.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

Appeal from the District Court of the United States for the Southern District of New York.

This suit comes here on appeal from a decree of the District Court of the United States for the Southern District of New York entered on the 30th day of December, 1912, in favor of the libelants.

The Linen Thread Company is a corporation organized and existing under the laws of the state of New Jersey. The Chelsea Fibre Mills (formerly known as the Chelsea Jute Mills) is a corporation organized and existing under the laws of the state of New York. These two corporations filed a joint libel and complaint against the steamship *Giulia*, an Austro-Hungarian vessel, which is admitted to have been within the jurisdiction of the court at the time of the filing of the libel.

The libel was filed to recover damages to hemp shipped on board the steamship between the 20th and 28th days of November, 1905; the shipment being made in the port of Venice, kingdom of Italy, the steamship undertaking and agreeing to carry the same to the port of New York and there deliver the same in good order and condition. The bills of lading acknowledged the receipt of the hemp in good order and condition by the steamship. Some of the bills of lading were indorsed by the respective consignees to the Linen Thread Company and others were indorsed to the Chelsea Fibre Mills. On the arrival of the steamship in the port of New York in January, 1906, the bales of hemp were delivered in a wet and damaged condition.

The hemp was stored in the forward compartment of the between decks, and the libelants alleged that the damage was due to fresh water which flowed into the compartment from fresh water tanks by reason of the broken and defective condition of the cock attached to a pipe in the compartment connected with the fresh water tanks. It was alleged that the pipe and cock had no casing around them, or sufficient protection against damage thereto during the loading of the cargo, or by reason of the working of the cargo after the loading thereof, and that the broken and defective condition of the cock either existed at the outset of the voyage or was due to the improper loading of the cargo and the failure to take proper precautions to prevent the cargo from working and coming into contact therewith.

The answer denies that the damage was in any way due to the negligence of the master, agents, or servants of the steamship prior to her sailing from Venice, and that, if damage was due to faults or errors in the management of the steamer, there was no liability because of the exception contained in the bill of lading, which exception is stated in the opinion of this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lorenzo Ullo, of New York City, for appellant.

Carter, Ledyard & Milburn, of New York City (Walter F. Taylor and J. M. Richardson Lyeth, both of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The court below reached the conclusion that the damage to the cargo was caused by the escape of fresh water from a pipe in the hold of the vessel, and that the water escaped from the pipe because there was no cock, plug, or stopper in the pipe. The defense claimed that the stopper must have been knocked out of the pipe by the working of the cargo and that the cargo worked or shifted by peril of the sea. The court below reached the conclusion that no such sea peril was shown.

[1] The bills of lading provided that the carrier was not to be liable for loss or damages "occasioned by causes beyond his control, by the peril of seas or other waters, by collisions, stranding, jettison, or other accidents of navigation of whatsoever kind." And it is claimed that the court fell into manifest error in holding that the burden of proof was upon the carrier of the goods to show that perils of the sea caused the damage to the cargo and in holding that the burden had not been sustained. It is admitted that the bales of hemp were received by the carrier in good condition and delivered in bad condition. That being so, there certainly is no question but that the carrier, in seeking to be relieved from liability for damages under the exceptions of perils from the sea, was bound to prove that the injuries were the result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence.

[2] But, conceding the burden to be upon the vessel, was the burden satisfied by the evidence? Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence. See 13 Cyc. 258.

[3] The master of the vessel testified that on December 25th he encountered very bad weather; that his ship was rolling badly and the seas coming on deck. He testified that the feeding tube to the condenser broke, as did one of the valves in one of the boilers; that he was compelled to stop the ship and to lower the sea anchor, to have the ship drag; and that the gale was so strong that the pipe rope he had to the sea anchor broke. He also testified that the cargo was moved by the weather and that on his arrival in port he made a regular protest. The protest states that the ship proceeded on her voyage from December 12th to December 18th with variable winds and weather, and that on the afternoon of the latter day a strong northerly gale set in and the sea was high and rough, the ship rolling and pitching, with heavy seas breaking over the decks; that towards night the weather became worse, and the ship was fearfully shaken by the huge bodies of water dashing over and against the ship. The weather continued bad from that time until after December 26th, the ship rolling and pitching and

having her decks flooded. On December 24th the protest refers to "furious storms," with "high, tempestuous sea, ship laboring fearfully, and decks flooded until afternoon." On December 25th "heavy sea, ship rolling heavily." December 26th, "sea rough, and ship plunging fearfully, and taking seas over all."

There was, however, no testimony in the case showing that the hemp had been damaged by sea water. But there was testimony to show that it had been damaged by fresh water. When the vessel reached New York, and while the cargo was still in the hold, the testimony showed that fresh water was running out of a fresh water pipe and into the compartment where the hemp was stowed. The hold in which the bales of hemp were stowed was one intended to be used when necessary for passengers, and on this particular voyage three-quarters of the whole cargo was in that hold. In this hold there was a fresh water pipe, which the master of the ship described by saying:

"This pipe was coming out through the upper 'tween-deck on the forward bulkhead between the two angle irons and down from the upper 'tween-deck to about five or six feet from the lower 'tween-deck where the cargo was."

The pipe was connected to a tank placed in one of the highest places of the ship and was used to supply the fresh water to the passengers when the hold that on this voyage was used for cargo was occupied by passengers. The tank held between $2\frac{1}{2}$ and $3\frac{1}{2}$ tons of water, and was filled about five times a day from the big storage of water kept in the ballast tanks. When this hold was occupied by passengers a cock was attached to the pipe, which passengers used in drawing water, and when the hold was used for cargo the cock was removed and a brass plug was screwed on in its place. The pipe was of galvanized iron and about three-quarters of an inch thick. The cock or plug was protected by an iron fender, which was fastened to the bulkhead of the ship with two three-quarter inch bolts. When the ship reached New York, it was found that this bracket was hanging down and one of the bolts holding the bracket was gone. The plug which should have been in the pipe was not there, and the claim is that it was there in place originally, but had been displaced by the alleged shifting of the cargo. But if the plug was originally fastened into the pipe, and had been worked out by the shifting of the cargo, it should have been found; but it never was found. This plug, which it was the custom to use, and which should have been used, but apparently was not, was a piece of brass threaded at one end and squared at the other, so that it could be screwed tight with a spanner. The testimony showed that the pipe had not been broken or injured and that the threads inside the pipe were not broken. It would seem that if the plug had been in place, and forced out by the shifting of the cargo, there should have been some indications on the pipe showing the strain to which it had been subjected. We are not convinced that the cargo ever shifted, or that, if it did shift, that it displaced the plug running to the fresh water tank, the water from which in our opinion damaged this cargo.

We have not overlooked the testimony of the master of the ship that a plug was screwed into the pipe at Trieste; but we are unable to accept that testimony, in view of the fact that the carpenter whose duty it

would have been to insert the plug was not called and the log books were not produced. The conclusion to which we have arrived is that the ship was not seaworthy at the commencement of the voyage. There is nothing in the testimony to indicate that the plug was broken off or unscrewed in some way. It seems probable that after the cock was removed, when it was decided to put cargo into the hold, some one failed to screw in the plug. At least such a supposition is as probable as that some movement of the cargo in heavy weather unscrewed it, after it had been screwed into place tightly with a spanner. Presumably the tank would not be in service until the ship was ready to receive passengers, and if there was failure to insert the plug at that time no water would escape. Later, when passengers went on board, and the tank was made ready for their use—for there were other pipes running from the tank to other parts of the ship—the cargo no doubt had been stowed to a point above the aperture, so that the absence of the plug was not noticed.

We are unable to find on this record that the plug disappeared through perils of the sea. The appellant has not sustained the burden of proof, and the decree appealed from is affirmed.

PENNSYLVANIA R. CO. v. KNOX.

(Circuit Court of Appeals, Third Circuit. January 4, 1915.)

No. 1880.

1. COMMERCE (§ 27*)—EMPLOYER'S LIABILITY—"INTERSTATE COMMERCE"—"AT HOME"—"DRIFTING."

Empty railroad cars were delivered in New York to the railroad to which they belonged, and were then, being in the hands of the owner, according to railroad regulations and practice, "at home." They were moved, without being billed or destined for any particular place, to points in Pennsylvania, where such cars were usually assembled for distribution and use, and, not being needed at such points, were from time to time moved to other distributing points in that state. They were still "drifting," or waiting to be assigned for service, when an injury to a brakeman on a train on which they were being moved occurred. *Held*, that the interstate movement of such cars ceased when they reached the first distributing point in Pennsylvania, and thereafter their movement did not constitute "interstate commerce," within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 201 [Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, Second Series, At Home; also First and Second Series, Interstate Commerce.]

2. COMMERCE (§ 27*)—EMPLOYER'S LIABILITY—STATUTORY PROVISIONS.

The movement of empty railroad cars is an operation of commerce, and where the movement is interstate the Employers' Liability Act applies.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

Employees engaged in interstate commerce within Employers' Liability Act, see note to *Baltimore & O. R. Co. v. Darr*, 124 C. C. A. 571.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MASTER AND SERVANT (§ 278*)—ACTIONS FOR DEATH—SUFFICIENCY OF EVIDENCE.

In an action for the death of a railway brakeman, due to the breaking of a brake rod, in which it was sought to predicate negligence on the failure to inspect, evidence *held* insufficient to support a verdict for plaintiff, in that it failed to show how long a defect in the rod had existed, whether it could have been discovered by inspection, and whether any inspection, and, if so, what inspection, was made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James Young, Judge.

Action by William C. Knox, administrator of James C. Campbell, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new venire awarded.

James R. Miller, of Pittsburgh, Pa., for plaintiff in error.

H. Fred Mercer, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This suit (which was tried before the late Judge Young and a jury) was brought by the administrator of James C. Campbell, a freight brakeman in the employ of the Pennsylvania Railroad Company, who was killed in the discharge of his duty on October 1, 1910. His death was the result of injuries caused by the twisting off of a brake rod, and (although several acts of negligence are charged in the statement of claim) the only negligence that was insisted on at the trial and in this court is the company's failure to inspect and repair. The action is brought under the Carriers' Liability Act of 1908 as amended in 1910, and the plaintiff was therefore obliged to sustain the affirmative of these two propositions:

(1) That the injury causing death occurred while the deceased was employed in interstate commerce; and

(2) That the company was negligent in the particular charged.

The facts are as follows:

[1] Campbell lived at Derry, Pa., 46 miles east of Pittsburgh, on the main line of the railroad. Part of his usual duty was to assist in the transportation of coke from the coke regions of Westmoreland county to Coleman Yard, on the Allegheny division of the railroad, a point in Pennsylvania 7 miles east of Pittsburgh. At Coleman the coke was taken charge of by another engine and crew and was carried forward in the direction of its ultimate destination, which was ordinarily a point in New York. After the coke was delivered at Coleman, it became Campbell's duty to perform whatever services might be required of him during the remainder of the day. On the morning of October 1st he and the other members of his crew, with an engine and caboose, went first to Pitcairn Yard, 15 miles east of Pittsburgh on the main line, proceeded thence to the Alexandria branch of the railroad, and took charge there of a train of loaded coke

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cars that was destined to New York, and moved it to Coleman. At this point Campbell and his crew detached their engine and caboose, and turned to other duties. These duties took them east 5 miles along the Allegheny Valley division to Verona Yard, where they attached their engine and caboose to about 25 loaded and empty cars—some of them box, and some of them open, cars—and hauled them to Pitcairn, arriving about 11 o'clock in the evening. Campbell received his injury while they were backing these cars upon a yard track, where they were to be left for the night.

If there was nothing else in the case, the contention could hardly be made that interstate commerce was being carried on while cars whose starting point and destination were unknown were being shifted from Verona to Pitcairn, two points in the same state; and the plaintiff, recognizing this difficulty, attempted to meet it by offering further evidence. Testimony was offered to this effect: Among the cars in question were 8 that had been unloaded in New York several days before, and had been delivered in that state to the Pennsylvania system, to which they all belonged. According to railroad regulations and practice these cars were all "at home"—that is, in the hands of the owner—as soon as they were delivered and accepted at any point on the Pennsylvania system. As already stated, all of them had been so delivered in New York; but we are not specially concerned with them until they crossed the line between the states. They arrived in Pennsylvania by different routes, but in all that is now important the facts concerning them are alike. Two of them crossed the line from Red House, N. Y., to Brookville, Pa., and the evidence was uncontradicted that they were then at the orders of the local agent at this point for any use or for any load. As he had no use for them at Brookville, they became part of a new train, with a new crew and a new engine, and were moved to Oil City, Pa., where they were again at the service of the local agent. He had no use for them, and again they became part of a new train, with a new crew and a new engine, and were moved to Phillipston, Pa., where they stopped for the third time and were again available for any use or load. The agent at Phillipston having no occasion to use them, they once more became part of a new train, with a new crew and a new engine, and went forward to Verona, where they took their place with many other loaded and empty cars, all awaiting assignment and use. Finally, at Verona, they were put into a new train, and here they joined the 6 other cars referred to. These also were Pennsylvania system cars, and had come from New York by different routes in different trains. They crossed the line from Olean, N. Y., to Irvineton, Pa., where they came to rest and were available for any use. From Irvineton they went on to Oil City, Pa., and from Oil City to Verona, under the same conditions as the 2 cars first spoken of. As already stated, Campbell's crew and engine took hold of these 8 and about 17 other cars at Verona in order to move them to Pitcairn, where they were to be left for the night and would all be available for such use as the railroad company might desire. At no time during the foregoing movement of the 8 cars in question was any one of them destined to a particular place or for a

particular use, except that all of them were being moved from time to time to the next railroad point where such cars were usually assembled for distribution and use. None of these cars moved forward upon a card stating a destination or upon a bill of lading.

The company admitted that Campbell was engaged in interstate commerce during the morning of October 1st, from the time he left Derry until his engine delivered the loaded coke cars at Coleman, but denied that he was so employed during the remainder of the day. Neither side asked to have this dispute submitted to the jury, and it is probable that both sides took it for granted that the judge would decide it himself. At all events he did decide it, saying to the jury:

"* * * That the facts warrant a finding that the defendant company and Campbell were engaged in interstate commerce at the time of the accident and the time of the alleged injury to Campbell, so that you need devote no attention to that question. I want to put that squarely to you, so that the court may have control of it hereafter. Therefore you need spend no time upon the evidence submitted as to whether or not the company and Campbell were both engaged, or either engaged, in interstate commerce. And you will pass to the consideration of the second question, which is the question of negligence on the part of the defendant company."

[2] This ruling was excepted to and is now assigned for error, but the error complained of is, not that the judge decided the question himself, but that he decided it in favor of the plaintiff, instead of the defendant. We shall therefore treat the case as the parties have treated it, and consider the correctness of the ruling. No doubt the movement of empty cars is an operation of commerce, and where the movement is interstate the act of Congress now in question would apply. *N. Car. R. R. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. But it is also certain that a particular interstate movement must come to an end, and that the act may cease to apply when the movement ceases. If these cars had been billed from New York state to Pitcairn, so that the journey had been defined and the end of the journey had been determined, there would be much reason in the contention that the interstate movement was still going on. On the other hand, if they had been expressly billed to Brookville and Irvineton, respectively, it would not be easy to avoid the conclusion that the interstate movement had ceased at these points, and that the movement afterwards was wholly within the state. But the evidence shows that the cars were not billed at all, and therefore, as the character of the movement depended on the uncontradicted testimony of the witnesses, we feel bound on this record to accept the facts as the witnesses state them. And, if they are so accepted, we cannot avoid the conclusion that these cars had finished their interstate journey when they reached the first halting place in Pennsylvania. They had no more distant destination; they did not leave New York with any other terminus in view; they were then immediately available for any use; in a word, to use the expressive phrase of one of the witnesses, they were "drifting," waiting to be assigned for service. Moreover, they were in the owner's possession, and he was in full control, so that they did not need to go further in order to be "at home." When, indeed, it may be asked, would such cars lose

their interstate character, if they had not lost it under the facts before us? It is difficult to see what other satisfactory test can be applied, for it is clear that they could not remain interstate cars indefinitely. They might have been sent to the repair shop at the first halting place, or have actually been used there to carry freight between Pennsylvania points, and in either event it could not be denied that their interstate character had ceased. Being bound nowhere, we think they became domestic cars after the owner had them in his possession and under his control at the first appropriate distributing point within the state. If the end of a journey has been defined, that presents one situation; if in fact the end has not been expressly determined, the law must determine it in accordance with what is reasonable and just. In the Zachary Case, there was no such evidence as is now before us; the court found it to be a reasonable inference that the cars then in question were in the process of being "carried forward as a part of a through movement of interstate commerce."

[3] But, although we would be obliged to reverse the judgment on this point alone, we think it our duty to consider the other question also, in order to avoid another trial, if possible. After a careful examination of this record we can find no evidence whatever of the failure to inspect. The brake was fastened to the end of a box car, and the short brake rod was in a horizontal position, fastened, of course, into the brake wheel. The rod broke, apparently just where the squared portion that fits into the brake wheel is rounded off to form the remaining portion of the rod. How the accident happened is uncertain. The only testimony on the subject is a declaration of Campbell to another member of the crew that "the brake twisted off with me," and the testimony of one other witness as follows:

"Q. Did you see the brake stem?

"A. Yes, sir.

"Q. What was the condition of the brake stem, where this wheel had come off?

"A. Well, there had been a little defect right next to the wheel.

"Q. What was the defect?

"A. It was rusty.

"Q. What was it that caused the brake wheel to come off—was it that defect?

"A. Well, I don't know. It was twisted off. The iron wasn't sufficient to hold it; whether the man had pulled, or whether he had hit it, it wasn't sufficient to hold the weight. * * *

"Q. Tell the court and jury the condition of the brake shaft when you saw it.

"A. Well it had been broke off, and the iron was curled around, like a fellow would make a twist on the iron.

"Q. Then the iron had twisted, instead of holding steady and still?

"A. Yes, sir.

"Q. And where was it that the iron had broken off, how near to the place where the wheel was fastened on?

"A. Well, it had broke almost against the heavy part of the iron, or against the square.

"Q. Was a portion of the stem that held the brake wheel broken or twisted off? To make myself clear, wasn't there a piece of the stem in the wheel itself?

"A. Yes, sir.

"Q. And didn't that piece of stem to which the wheel was fastened break off?

"A. Yes; sure.

"Q. And how much below that was there of the stem that was broken off?

"A. Well, there wasn't anything that was left there except the heavy part of the iron, with this little curl on it; it was the heavy part of the brake.

"Q. Did you see that place where it had broken off?

"A. Yes, sir.

"Q. What was the condition of the place where it was broken?

"A. Well, it looked to be maybe a little defect there, for one-eighth of an inch.

"Q. How much of it was rusted in—of that crack?

"A. Well, I say I believe there was perhaps one-eighth of an inch.

"Q. And had that one-eighth of an inch rusted in all around?

"A. No, sir; I don't think it had. I didn't examine it very closely, but that was my idea."

There is no evidence how long this slight defect had existed, nor how easily it could have been seen below the brake wheel, nor how soon rust might gather in a crack, nor what might have been disclosed by such inspection as was practicable. Indeed, there is no evidence whatever concerning inspection or failure to inspect. The plaintiff asked one witness whether the records in his office showed what inspection was made of this car between Buffalo and Pitcairn; but, when the witness explained that these records were in the mechanical department, and not in his own office, the plaintiff made no further effort to prove the facts. In the absence of all testimony on this vital subject, the jury should not have been allowed to conjecture whether inspection was made, or was neglected, and what might, or might not, have been discovered by such inspection as was practicable. The burden was on the plaintiff to prove the negligence that was charged, and the evidence about inspection was at his command.

The jury should have been instructed to find for the defendant. The judgment is reversed, and a new venire is awarded.

In re FEDERAL BISCUIT CO.

Appeal of WICKERSHAM.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 16.

BANKRUPTCY (§ 350*)—PREFERRED CLAIMS—RENT—ABANDONMENT—WAIVER.

A landlord's right to a lien on his tenant's goods for one year's rent in arrears, conferred by Act Pa. June 16, 1836 (P. L. 777; 2 Purdon's Dig. [13th Ed.] p. 1558), sought to be enforced against a bankrupt by filing proof of landlord's claim prior to the first meeting of creditors, insisting on their right to priority, was not lost by a subsequent sale of the property by the bankrupt's trustee without notice to the landlord and a mingling of the proceeds with other of the bankrupt's assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

Petition to Revise and Appeal from an Order of the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On appeal by the trustee from an order, and also upon petition to revise said order, made by the District Court for the Southern District of New York, which awarded priority to a claim of the estate of William H. Brill for rent of the premises occupied by the bankrupt, which claim amounted to \$2,354.55. The premises are located in Philadelphia.

The opinion of Referee Macgrane Coxé is as follows:

On April 17, 1912, the claim of the estate of William H. Brill, deceased, Caroline E. Medlar, and Elizabeth B. Medlar was filed in the office of the referee. Thereafter the trustee filed with the referee a petition asking that this claim, among others, be reconsidered and expunged. These objections were first brought on for hearing before the referee on August 1, 1912, when I was attended by counsel for the claimants and for the trustee, and the hearing was closed. Thereafter, and on November 6, 1912, a motion was made by the claimants' attorneys to reopen the hearings. This motion was granted, and the hearings proceeded, and considerable further testimony was taken, and on December 13, 1912, the hearings were finally closed.

This claim was filed in the amount of \$2,354.55, and is for rent alleged to be due to the claimants for the premises situated at Nos. 1428-1434 Fairmount avenue, in the city of Philadelphia. The claimants demand priority of payment for the full amount of the said claim under the laws of the state of Pennsylvania and section 64b (5) of the Bankruptcy Act (Comp. St. 1913, § 9648), which provides that debts entitled to priority under the laws of any state shall be entitled to priority in bankruptcy. The testimony shows that the premises in question had been leased by the claimants, who are the owners, to the A. J. Medlar Company, a Pennsylvania corporation, by a lease executed on December 20, 1907, which expired by its terms on May 22, 1911. On August 11, 1911, the bankrupt purchased and took over the plant of the Medlar Company, and the contract for the sale of the said plant provided that the bankrupt corporation should assume and pay all just debts and obligations of the Medlar Company. The testimony shows that there was due and owing upon the lease from the Medlar Company to the owners, at the time of the purchase of the plant by the bankrupt, the sum of \$4,174.55. The bankrupt entered into possession of the premises after the lease to the Medlar Company had by its terms expired, but an examination of the lease attached to the proof of claim shows that it contained the provision that unless, within three months of the expiration of the lease, a written notice should be given by either party to the other of intention to terminate the lease, it should continue upon the same terms and conditions for a further period of one year.

It appears by the testimony that after the bankrupt entered into possession, at which time rent was due under the lease amounting to \$4,174.55, they delivered to the landlords \$2,100 in stock of the bankrupt corporation, and on November 16, 1911, paid the sum of \$1,000 in cash, reducing the claim to \$1,074.55. Afterwards there accrued rent upon the premises for the months of September, October, November, and December, 1911, and eight days of January, 1912, amounting to \$1,280, making the total amount due \$2,354.55, as stated in their proof of debt filed herein. The claimants demand priority of payment for their claim under a statute of the state of Pennsylvania, known as the Act of June 10, 1836, § 83 (P. L. Pa. 777). It is provided in this act that "the goods and chattels being in or upon any messuage, lands or tenements which are or shall be demised for life, years or otherwise, taken by virtue of an execution and liable to distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking of such goods in execution, provided that such rent shall not exceed one year's rent." Section 64b (5) of the Bankruptcy Act enumerates, among the claims entitled to priority, "debts owing to any person, who by the laws of the states or the United States is entitled to priority."

The point raised in their reply brief by the trustee's attorneys, that the Pennsylvania statute has not been proved, is without merit. The federal courts take judicial notice of all statutes, whether state or federal. Foster's

Fed. Practice (4th Ed.) p. 863; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513. The above provision of the Pennsylvania statutes has been many times considered by the courts, which have held that property taken into the possession of a receiver in bankruptcy shall be considered for the purposes of the statute as taken under an equitable execution. *Longstreth v. Pennock*, 20 Wall. (87 U. S.) 575, 22 L. Ed. 451; *In re Hoover* (D. C.) 113 Fed. 136; *Collier on Bankruptcy* (10th Ed.) p. 910, and cases cited.

Upon the face of the claim, therefore, it would seem that the claimants are entitled to the payment of their claim out of the property on the leased premises. The trustee's attorneys, however, have raised several objections to the allowance of the claim, and advanced a number of reasons for expunging it as a prior claim, which they have argued with great earnestness, which we must consider in passing upon the claim. The first of these is that no lease between the claimants and the bankrupt has been proven to exist, and that, therefore, the claimants cannot take advantage of the statute to impress a lien upon the property on the leased premises.

As I read the Pennsylvania statute, it does not seem to me that a written lease is required, and that even under an oral lease for a year the landlord could take advantage of the priority given by the statute. Assuming, however, that a written lease is necessary under the statute, I think the existence of such a lease is shown by the evidence. Elizabeth B. Medlar testified that no notice of the termination of the lease had been given by the bankrupt to the landlord, and in the absence of such notice the lease did not expire until May 22, 1912. The trustee's attorneys refer to the correspondence and negotiations between the landlord and the bankrupt, and argue that the court must draw the inference from it that there was no lease in existence; but a careful reading of this correspondence and of the testimony regarding these negotiations convinces me that this had reference to the making of a new lease. I think that this real property must be held to have been "demised for years, life or otherwise."

The further objection to the claim is urged by the trustee's attorneys that the lien, if any, granted by the statute, attached only to the property in or upon the leased premises at the time of the filing of the petition in bankruptcy and that no proof has been submitted to show what the value of the said property was at that time. The only evidence upon this point is the testimony of Mrs. Medlar and of one C. A. Wettenhall, who was the president of the Medlar Company and had been the Philadelphia manager of the Federal Biscuit Company, and who was also one of the appraisers appointed by the court to appraise the Philadelphia assets of this bankrupt. Wettenhall testified that on or about January 20, 1912, he made an inventory and appraisal of the property in the Philadelphia plant. He testified from this appraisal that there was at the plant at that time machinery and equipment of the value of \$5,278.70, manufactured stock of \$1,255.36, and raw materials amounting to \$3,469.54. He further testified that the value of the stock and fixtures on January 6th, at the time of the filing of the petition in bankruptcy, and on January 20th, when the inventory and appraisal was made, was practically the same, and that there was very little change in the value of the property on the premises between these dates. It further appears from his testimony that in the latter part of April, 1912, he made another inventory and appraisal, which the claimants have introduced in evidence (Claimants' Exhibit 2), and which shows personal property upon the premises at this time of the value of \$6,684.74. The Philadelphia plant was subsequently sold by the receiver for \$10,000, and this sale has been confirmed by the court. The trustee's attorneys call attention to the fact that a considerable portion of this purchase price may have represented the value of the good will of the business. The only further evidence tending to show the value of the property is that of Mrs. Medlar, who testified that during her visits to the bankrupt's plant she made some observation of the property on hand; but her testimony on this point is so indefinite and uncertain as to throw little light upon the value. After an examination of the inventory and appraisal in evidence, however, and a consideration of the uncontradicted testimony of Wettenhall, I am convinced that there was on the premises in question, at

the time of the filing of the petition, sufficient personal property upon which the lien of the landlords attached to cover their claim.

The trustee's attorneys further contend that even if we assume that the claimants have a valid lien under the statute, and that there was on the leased premises sufficient personal property upon which the lien attached to satisfy it, the lien has been lost because of the sale of the plant and the mingling of the funds realized from this sale with the other cash in the hands of the receiver. They also argue that the claimants have waived their lien by their failure to assert it prior to the sale of which they had due notice. The claimants, on the other hand, assert that they had no notice of the sale of the Philadelphia plant, and that, the said property having been sold by the receiver without notice to them, they have not lost their lien. The procedure followed in the sale of the Philadelphia property was as follows:

At the first meetings of creditors, duly held at the office of the referee on April 19, 1912, it appears that there was considerable discussion among the creditors regarding the proposed sale of the Philadelphia plant. It does not appear that these claimants were present or represented at that meeting, nor does it appear that they were named by the bankrupt in the schedules of its creditors. At this meeting, by a resolution offered by one of the attorneys for the receiver and unanimously adopted by the creditors present, the receiver was authorized to receive any private bid for certain properties of the bankrupt corporation, including this property, and to take such action thereon as he might be advised, looking to a sale of such properties, upon two days' notice by mail to the members named of two committees of creditors, and also "to any creditors or other parties who are here to-day and give their addresses and names to the stenographer as requesting such notice." Shortly after the first meeting, a bid was received by the receiver of \$10,000 for the Philadelphia plant, and upon his petition, verified April 26, an order to show cause, returnable April 29, 1912, was made why he should not accept this offer, and notice thereof was given in accordance with the above-mentioned resolution. No one opposing on the return day of this order to show cause, an order was made by the referee, dated April 30, 1912, authorizing the acceptance of this bid and confirming the sale of the said property by the trustee for the sum of \$10,000. Thereafter, and on or about May 6, 1912, an order was made in all respects confirming this sale by the United States District Court for the Eastern District of Pennsylvania in Bankruptcy. Thereafter, and on or about August 21, 1912, the trustee's objection to this claim was brought on for hearing before the referee.

Thereafter, and on or about October 9, 1912, the claimants here made application to the United States District Court for the Eastern District of Pennsylvania asking for a modification of the order of that court made, as hereinbefore stated, May 6, 1912. This application was made upon notice to the trustee in bankruptcy and he was heard thereon by counsel. The result was that on or about October 9, 1912, the said court modified its said order of May 6, 1912, as follows: It recited that it appeared to the court "that the order of sale of the assets of the Federal Biscuit Company, forming the Philadelphia plant, which was confirmed by an order of May 6, 1912, was entered and the sale had without notice to the said petitioners, and it appearing that the said petitioners have claimed as landlords of the premises whereon a part of the said assets were situate, for rent of the said premises," etc., and thereupon ordered as follows: "This court hereby confirms the private sale of all of the assets of the Federal Biscuit Company, forming Philadelphia plant, consisting of all the machinery, fixtures, merchandise, book accounts, horses, wagons, labels, good will, trade-marks, and any and all other assets of any nature or character whatsoever, comprising said Philadelphia plant, to C. A. Wettenhall, for the sum of \$10,000, and authorizes the trustee in bankruptcy to execute a proper bill of sale for the transfer of said assets, *without prejudice to the right of Caroline E. Medlar, Elizabeth B. Medlar, and Girard Trust Company, trustee under the last will and testament of William H. Brill, deceased, to claim, as preferred creditors, from the fund derived from said sale, the amount of such lien as they*

may have had upon such assets as were upon the premises owned by the said Caroline E. Medlar, Elizabeth B. Medlar, and Girard Trust Company, trustee under the last will and testament of William H. Brill, deceased." The portion of said order underscored as above is the portion added to the original order by the modifying order of October 9, 1912. Thereafter, and on November 6, 1912, and December 7, 1912, the claimants made a motion before the referee to reopen the hearings on the trustee's objections to the claim, for the purpose of permitting this modified order to be introduced into the record, and this motion, after hearing of the trustee in opposition thereto, was duly granted.

It does not seem to me that there is anything in this record to show that these claimants ever had notice of these proceedings for the sale of the property, to which notice they were certainly entitled. The District Court for the Eastern District of Pennsylvania, after hearing counsel for the trustee, by its recital and order, seems to have so found, and I think that the record here is to the same effect. The trustee's attorneys refer to the testimony of Mrs. Medlar as showing that the claimants had actual knowledge of the proposed sale, but I do not think that her testimony bears out that contention. I have searched the record carefully for any evidence showing that these claimants did have actual knowledge, or even reasonable cause to be put upon their notice, and I fail to find any.

The attention of the referee is called to the decision in the case of Vollmer v. McFadgen, 20 Am. Bankr. Rep. 540, 161 Fed. 914, 88 C. C. A. 605. In that case it was held that the landlords' claim for priority for rent was disallowed where the landlords had notice, but it appears that the court found as a fact in that case that the landlords had actual notice and were present at the sale and gave notice to the purchaser that they would hold him responsible for the rent. As all the circumstances of the sale of the Philadelphia plant, in this case, were apparently before the court when it made its order of October 9, 1912, I think that the finding of the court upon the question of notice is conclusive, and that it must be held that the claimants' right to establish their claim, as preferred creditors, was not prejudiced by the sale and by the order of confirmation.

Finally, counsel for the trustee contend that, if the claim is allowed, it should be reduced by the sum of \$250. They point out that it appears in the testimony that for several months the provision of the lease for a monthly rental of \$300 was modified by the landlords, and the sum of \$250 accepted as a monthly rental. It appears from the testimony, however, that no change was made in the lease, and no evidence has been offered by the trustee to show that less than the sum of \$300 a month was ever agreed upon between the bankrupt and the landlords, and no grounds appear for reducing the claim. The fact that the claimants received from the bankrupt the sum of \$3,100 in stock and cash within the year does not, in my opinion, affect their case, and the question as to whether these payments were applied on rent past due on the current year's rent need not be passed on. The Pennsylvania statute does not seem to limit the claimants to rent accruing within the year preceding the bankruptcy, but limits the prior claim for rent to an amount which "shall not exceed one year's rent."

Upon all the facts, I must find that the claimants have established the claim entitled to priority under section 64b (5) of the Bankruptcy Act in the amount of \$2,345.55, and an order may therefore be submitted allowing the claim of the estate of William H. Brill, deceased, Caroline E. Medlar, and Elizabeth B. Medlar as a prior claim in the said sum of \$2,354.55.

Harold B. Elgar, of New York City, for appellant.

Stern, Barr & Tyler and Henry C. Moses, all of New York City, for respondents.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. Priority was asserted by the claimants in the District Court for the balance due for rent of premises known as

Nos. 1428, 1430, 1432 and 1434 Fairmount avenue, Philadelphia, amounting to \$2,354.55. The claim of priority is based upon a statute of Pennsylvania, which is as follows:

"Section 83. The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years or otherwise, taken by virtue of an execution and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: Provided that such rent shall not exceed one year's rent.

"Section 84. After the sale by the officer of any goods or chattels as aforesaid, he shall first pay out of the proceeds of such sale the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution," etc.

Act June 16, 1836 (P. L. 777; 2 Purdon's Digest, [13th Ed.] p. 1558).

The premises in question were occupied by A. J. Medlar Company under a written lease by which that company agreed to pay \$300 per month. This lease expired May 22, 1911, but it contained a clause that unless it were terminated by giving a notice in writing it should continue for a further period of one year on the same conditions. No such notice was given and the lease continued for another year. On August 11, 1911, the bankrupt purchased the Medlar Company's business and assumed the payment of the rent for the unexpired term. It has never paid the rent for the period occupied by it. After attempting to sell the property at auction and failing to get adequate bids, the trustee, with permission of court, sold the entire property for \$10,000. The court allowed the claim for rent at \$2,354.55, giving it a preference under 64b (5) of the Bankruptcy Act, which provides that among the debts entitled to priority are "debts owing to any person who by the laws of the states or the United States is entitled to priority."

It is not necessary to state the facts in detail as they appear in full in the careful opinion of the referee. There can be no doubt that the Pennsylvania law gives a lien for one year's rent to the landlord upon the goods and chattels of the tenant. This statute seems to apply directly to the present facts. But the appellant contends that the claimants waived their right to this lien. On April 17th, two days prior to the first meeting of creditors, the claimants filed proof of claim, insisting that they were entitled to priority under the Pennsylvania law. As the property was sold without notice to the claimants and without their knowledge, it is not easy to see how they could do more than they did do to preserve their rights. The statute is very plain and has been liberally construed by the courts of Pennsylvania. The trustee sold, without notice to the claimants, property upon which they had a lien and if any confusion resulted therefrom the hardship should not be visited upon the claimants. There is little doubt that there was property enough subject to the lien to pay their debt.

We see nothing to justify the assertion that the claimants lost their right to assert their priority or that they assented to the private sale which, as the final order expressly states, was made "without prejudice to the rights of Caroline E. Medlar, Elizabeth B. Medlar and Girard Trust Company, trustee, under the last will and testament of William H. Brill, deceased, to claim, as preferred creditors from the fund derived from said sale, the amount of such lien as they may have

had upon such assets as were upon the premises owned by said Caroline E. Medlar, Elizabeth B. Medlar and Girard Trust Company, trustee, under the last will and testament of William H. Brill, deceased."

The order is affirmed with costs.

STAFFORD CO. v. ALTA VISTA COTTON MILLS, Inc.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1914.)

No. 1261.

SALES (§ 377*)—CONTRACT—MEETING OF MINDS—COMPLAINT.

A complaint for breach of a contract for the sale of certain looms set out a written contract to purchase the looms, signed by defendant, and contained a provision that all contracts were accepted subject to final approval by an officer of the company, and alleged that the contract in question was accepted by plaintiff's Southern agent, who was an officer of the company, and that such provision related only to road salesmen. It was further alleged that the contract provided that the details for the looms should be furnished by the buyer at least 60 days before shipment was required, and charged that the buyer never furnished such details, but attempted to cancel the order because, owing to a change in the management, it did not intend to continue manufacturing cloth in which the looms would be available, but that the looms ordered were standard machinery, and that the specifications in question related to details and attachments that could be readily supplied with any of the standard looms, and were practically immaterial as respected cost to plaintiff or its profit in the transaction. *Held*, that the complaint sufficiently showed a meeting of minds, and was therefore not demurrable on the ground that no contract was ever consummated.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.*]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action by the Stafford Company against the Alta Vista Cotton Mills, Incorporated. Judgment for defendant, and plaintiff brings error. Reversed.

F. S. Kirkpatrick, of Lynchburg, Va. (E. R. Preston, of Charlotte, N. C., on the brief), for plaintiff in error.

N. C. Manson, Jr., of Lynchburg, Va. (A. B. Percy and Wilson & Manson, all of Lynchburg, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. This suit is brought by the Stafford Company, a New Jersey corporation, with its principal office in Massachusetts, against the Alta Vista Cotton Mills, Incorporated, a Virginia corporation, to recover damages for alleged breach of a contract by which the defendant agreed to purchase certain cotton mill machinery from the plaintiff.

The contract and certain correspondence relating thereto are attached to the declaration as exhibits. A demurrer was interposed by the defendant upon various specified grounds, which are in substance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that there never was a complete contract between the parties, but only negotiations which were intended to form the basis of a future contract; that there were certain specifications concerning the machinery which the purchasing company agreed to furnish, but never did in fact furnish; that until these specifications were furnished the plaintiff company had the option to approve or reject the contract; and that there was no final approval by an officer of the company as provided by the contract. The District Court sustained the demurrer and dismissed the suit, and the correctness of that ruling is challenged by writ of error to this court.

The contract in question was executed by filling in and signing a printed blank at the head of which appears this recital:

"All contracts accepted subject to final approval by an officer of the company."

With reference to this provision the amended declaration contains the following averments:

"The plaintiff avers that it duly accepted said contract, and that the defendant was so advised, and as a matter of fact the plaintiff actually had proceeded far with the manufacture of the machines to be supplied by it under said contract."

"The plaintiff further alleges that the contracts, Exhibits A and B, were executed in behalf of the plaintiff by Fred H. White, Southern agent; that said White was an officer of the plaintiff company, fully authorized and empowered to make binding contracts in behalf of the plaintiff, and that said plaintiff was in fact bound by said contracts when so executed as herein set forth by said White; that Exhibit A was drawn on a printed form, and the top line of which, 'All contracts accepted subject to final approval by an officer of the company,' had reference to orders taken by road salesman, and not to White, who was not a road agent, but an officer authorized to bind the plaintiff in said contract, and the defendant was informed that said White had entire charge of said contract and the matters therein provided for when its officers came to Boston to request a release from said contract as set forth in Exhibits C and D."

In our judgment these averments are sufficient as a matter of pleading to charge that this contract received the final approval required by the caption, and that defendant cannot escape the obligation which it entered into on the theory that it was not binding upon the plaintiff because it is not specifically alleged to have been approved by its proper officer. If the declaration fails to state a cause of action, it is not for lack of allegations that the contract was executed by authority and had been approved by an officer of the plaintiff company, but because the contract itself, as set forth in the declaration, is so indefinite and incomplete that neither party can enforce it against the other.

The substantial provision of the contract is an agreement to purchase from the plaintiff 292 40-inch Ideal automatic looms and accessories, "described in the specifications attached," at the price of \$137 each. Certain attachments are also mentioned, which were to be extra at prices named. Immediately after this provision the following is recited:

"The details according to which these looms will be built will be furnished by the purchaser at least 60 days before shipment is required."

The contract price was stated to be \$44,603, of which a certain portion was to be paid in cash and the remainder in stock of the defendant company. The specifications referred to in the contract are set forth in the record, and apparently relate to certain details of construction which, as the quoted paragraph shows, were to be furnished by the purchaser. The declaration alleges that the defendant failed to furnish these details, although duly requested to do so by the plaintiff.

This summary of the agreement discloses the opposing contentions of the parties. The defendant asserts that the absence of these details prevented a meeting of minds, and that there was not and could not be a completed agreement until these details were supplied. On the other hand, the plaintiff contends that the document signed is a complete and binding contract, which is not rendered indefinite in any essential respect because the defendant failed to furnish certain details in accordance with its agreement. Upon this point the controversy turns.

Bearing upon this issue the amended declaration contains a paragraph, which upon demurrer must be accepted as true, and which reads as follows:

"And said plaintiff further avers that the automatic looms so specified in said contract were of a standard form, well known by the cotton mill manufacturing trade; that the details of said looms, which said defendant agreed to furnish, did not increase the cost or difficulty of manufacture, nor did they increase or decrease the profits which would have accrued to the plaintiff from their manufacture; that the said looms are so manufactured and made that the details to be furnished by the defendant could be easily and readily applied to said standard form of loom provided for by said contract; and that although the plaintiff was ready, able, and willing at all times to comply with every detail of the said contract, and with such specifications as the said defendant could reasonably have required, yet the said defendant declined and refused to furnish said specifications, and declined and refused to purchase the said looms as provided in said contract."

In addition to the foregoing there are various allegations to the effect that the defendant, as well as the plaintiff, understood that a binding contract had been executed, and these allegations contain a statement of facts and circumstances which give support to the general averment. For example, it appears that the defendant issued a prospectus, a few months after this contract was entered into, which, among other things, describes the location and equipment of its manufacturing plant, including the number and cost of looms stated to have been contracted for with the plaintiff.

It is inferable that afterwards, and before the mill was ready for operation, there was a change of management of the defendant's business, and also a change of policy respecting the class of goods to be manufactured. One of the exhibits referred to is a letter from the defendant to the plaintiff, in which the writer says he is instructed—"to notify you that on the class of goods that will be manufactured by the Alta Vista Cotton Mills it will be impossible for us to use your looms. We would therefore thank you to cancel the order for same given you by our former management."

It is certainly difficult to harmonize this communication with the claim now made that the contract in question was not understood to be binding when it was executed, but was in the nature of a proposal, or the basis for further negotiations, which did not commit the defendant until it furnished the specifications, and which the plaintiff would then be at liberty either to accept or decline.

Although not distinctly asserted in the brief, it appears to be the defendant's contention that there could be no valid approval of the contract by an officer of the plaintiff company until after the defendant furnished the details which would make the specifications complete. But we do not think it necessary to so construe the agreement. On the contrary, it seems clear to us that the required approval could be given at any time after the contract was signed and without waiting for the purchaser to specify the details. And such approval could be given without substantial risk to the plaintiff, because, taking the averment above quoted at its face value, the specifications which the defendant was to furnish involved only minor and unimportant departures from the standard type of loom which the plaintiff was to supply, and were practically immaterial as respects cost to the plaintiff or its profit from the transaction. The fact may turn out on trial to be otherwise, but it stands unqualifiedly alleged in the declaration.

We are therefore of opinion that the declaration in this case states a prima facie cause of action and that the demurrer ought not to have been sustained. And this conclusion seems to be in accord with the prevailing trend of judicial decisions, as will be seen by the following citations:

The case of *Delker v. Hess Spring & Axle Co.*, 138 Fed. 647, 71 C. A. 97, exhibits features which are quite analogous. In that case the purchaser bought 2,500 sets of Nos. 11 and 12 axles in sizes up to and including 1½-inch, and agreed to specify approximately the various sizes of springs which he was to take in monthly installments. It was further provided that:

"Any goods named in this contract, for which the buyer should neglect or refuse to specify, may, at the option of the seller, be regarded as sufficiently specified above, or, at the option of the seller, such neglect or refusal to specify may be treated as a lawful tender of all undelivered goods, and a refusal to accept same by the buyer, but shall not be construed as a waiver of any rights by the seller."

The purchaser declined to specify the sizes which he wanted, and was sued for the profits which the seller would have made if the contract had been executed. The Circuit Court of Appeals for the Sixth Circuit, citing *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967, and other cases, says:

"These contracts are definite as to the quantity of springs and axles, and as to the price and time of delivery, and nothing remained but the specification by the defendant of the sizes and varieties. A failure on the part of the defendant to keep its agreement to make these specifications as provided is the only way in which the contracts could be rendered uncertain; and it would be illogical to hold that by a breach of that part of the contracts the defendant could relieve itself of all the obligations it had assumed, and take the springs and axles only so long as the price of steel advanced, and, by failing to specify when the market declined, throw the loss upon the plaintiff.

These were not options given to the defendant, but definite agreements by it for the purchase of the property mentioned, and the provisions for the specifications to be furnished did not make them so uncertain that an action did not lie for their breach."

A similar conclusion was reached in *Salmon v. Helena Box Co.*, 147 Fed. 408, 77 C. C. A. 586, in which the Circuit Court of Appeals for the Eighth Circuit uses the following language:

"The trial court properly held that the parties made a valid and enforceable contract obligating defendants to give shipping instructions to plaintiff within a reasonable time, and requiring plaintiff, within like reasonable time, to make shipments according to the instructions. No option was left to either party. The buyers could no more neglect to give shipping instructions without violating their obligation than the seller could neglect to make shipments after receiving the instructions without violating its obligation. The contention of defendants' counsel, that the clause requiring shipments to be made according to shipping instructions to be given from time to time by the buyers renders the contract void for uncertainty or enforceable only at the option of the buyers, is not sound."

In *Hardwick v. American Can Co.*, 113 Tenn. 657, 88 S. W. 797, the Supreme Court of Tennessee discusses elaborately the question whether a purchaser of manufactured goods, for which he was to furnish specifications, can decline to specify in accordance with his agreement, and then claim that there has been no meeting of minds because of the absence of these details. In that case it appears that Hardwick, a stove manufacturer, sold to the defendant 5,000 or more stoves, which were to be delivered within the following year. There were 20 different sizes, kinds, and prices of stoves, and they were to be shipped out upon the order of the purchaser. There was failure to order and specify the sizes and kinds of stoves to be shipped, and the suit of Hardwick was sought to be defended on the ground that there was no complete and binding contract. The court, among other things, says:

"It cannot be doubted that in the ordinary course of business, in respect to which men generally make their calculations, if the defendant had carried out its contract and ordered the 5,000 stoves, it would have ordered substantially the same kinds of stoves which were used to supply the same trade under previous contracts with the Conklin factory, as it anticipated doing when the contract was entered into. Equally there can be no doubt, under the facts found by the Court of Chancery Appeals, that the defendant's failure to carry out the contract by ordering the 5,000 stoves resulted from its determination pending the running of the contract to drop a certain class of its customers, which it had previously supplied, viz., retail dealers. Having dropped these, it then desired to escape from the contract, and is now using the element of apparent uncertainty supposed to reside in the contract to elude the obligation to faithfully carry it out. It is the duty of the court, however, to ascertain, if it can, the meaning which the contract bore in the minds of the parties, and to enforce that meaning or intention. For the purpose of discovering this intention, we must view the situation or the parties and their surroundings so as to place ourselves in the position which they occupied, and thus be able to see the things spoken of in the contract as they saw them. Taking this point of view, with the aid of the facts found by the Court of Chancery Appeals, we think it clear that the meaning of the contract is as above indicated, and that this enables us to attain substantial certainty."

To the same effect and quite instructive is the case of *John Single Paper Co. v. Hammermill Paper Co.*, 96 App. Div. 535, 89 N. Y. Supp. 116, in which the nature of the contract then under consideration and the conclusion of the court will appear from the following excerpt from the opinion:

"We think that the order given by plaintiff to defendant, if and when accepted, constituted a complete and binding contract between the parties, subject to the right of defendant to cancel the same if plaintiff did not within due time furnish the necessary and proper specifications. The order which plaintiff signed and executed specified the amount and general kind and quality of paper to be furnished, the price, and the terms of payment, with other details relating to shipment and delivery. The specifications which were to be furnished related only to the details of size and weight of the paper which was to be supplied. These details were limited, and, as found by the referee, related to the size and consequent weight of the sheets. It was not intended that they should affect either the general character, quality, or price of the paper, and there is no sufficient evidence or finding by the referee that the specifications in these respects violated any of the agreements or negotiations of the parties. In our opinion, the contract was not rendered incomplete or indefinite in its substantial provisions and requirements because plaintiff was left in the future to furnish these details of size and weight."

In the case at bar the record indicates that defendant failed to give the specifications which it agreed to furnish, because it had decided to change the class of goods to be manufactured, and did not want the kind of looms which had been ordered from the plaintiff. It therefore seeks to take advantage of its own refusal to comply with its part of the agreement in order to evade the contract obligation into which it had entered. The defense it sets up is based wholly upon its own default, and should not be permitted to prevail without more persuasive reason than now appears. In short, we are convinced that the facts set forth in the declaration entitle the plaintiff to a trial of the action.

The judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MATHER v. STOKELY.

(Circuit Court of Appeals, First Circuit. January 6, 1915.)

No. 1068.

1. INTEREST (§ 28*)—RATE—LAW GOVERNING.

In an action for breach of the covenants in a deed to land in another state, the rate of interest recoverable is that fixed by the law of the forum.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 56-59; Dec. Dig. § 28.*]

2. COVENANTS (§ 131*)—BREACH OF COVENANT—MEASURE OF DAMAGES.

In Massachusetts, the measure of damages for a breach of covenants of seisin is the consideration paid, with interest from the date of payment, though plaintiff has had undisturbed possession, and has not been called upon to account for mesne profits, and may never be so called upon.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 254; Dec. Dig. § 131.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TAXATION (§ 755*)—TAX DEEDS—AUTHORITY TO MAKE.

A Florida tax deed, made in 1869, was void, where it was executed by the deputy tax collector in his own name, instead of by the collector in his own name.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1506; Dec. Dig. § 755.*]

4. EVIDENCE (§ 35*)—JUDICIAL NOTICE—LAWS OF OTHER STATES—FEDERAL COURTS.

The rule applied that in the federal courts the trial court is assumed to know the law of states other than that in which the trial is had, and evidence of such law is immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.*]

Judicial notice of public laws and regulations, see note to *Smith v. City of Shakopee*, 44 C. C. A. 4.]

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by Hattie N. Stokely against John L. Mather. Judgment for plaintiff, and defendant brings error. Modified.

Hollis R. Bailey, of Boston, Mass. (John C. Hammond, of Northampton, Mass., on the brief), for plaintiff in error.

Theobald M. Connor, of Northampton, Mass., and David H. Keedy, of Amherst, Mass., for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a suit at common law brought on the covenants in a warranty deed of lands in Florida. It was tried in the District Court for the District of Massachusetts. The plaintiff, Stokely, declared against the defendant, Mather, on a portion of the covenants in a warranty deed given by the defendant to the plaintiff, which was dated the 1st day of December, 1904. The covenants negatived in the declaration were the following: That the defendant was "lawfully seised in fee simple of a good, absolute, and indefeasible estate of inheritance of and in all and singular the premises described in said deed," and that he did not "have good right, full power, and lawful authority to convey the same in manner and form described in said deed." The declaration also alleged as follows:

"And the defendant was not seised in fee simple of the land described in the said deed, but the same was held adversely by one William McCabe."

The allegations of the declaration correspond with the covenants quoted. Also it is true that William McCabe had an apparently adverse title of record as alleged in the declaration; but neither he nor any one else ever disturbed the possession of the plaintiff with any adverse claim, and, so far as the record shows, the plaintiff had undisturbed possession of the premises from the time the deed was given to the present time, and she has received the rents and profits, so far as there were any.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff paid for her deed \$3,555.82. The verdict was for the plaintiff in the following terms:

"The jury find for the plaintiff, and assess damages in the sum of thirty-five hundred and fifty-five dollars and eighty-two cents (\$3,555.82), and interest thereon at the rate of eight per centum per annum."

Objection was made to the verdict, because it fixed no date from which the interest should run, and also because it fixed the rate of interest at 8 per cent. per annum, while the statutory rate in the district of Massachusetts, where the case was tried, is only 6 per cent. per annum. Subject to objection and exception, however, the court directed interest to be added to the verdict at the rate of 8 per cent. per annum from February 26, 1905, to the date of the verdict. February 26, 1905, was the date that payment was made for the deed; and the court held that, as it had instructed the jury to add to its verdict interest at the rate and for the time named, it was to be assumed that the verdict carried interest accordingly. Judgment was entered on that basis for the amount paid for the deed, plus \$2,006.27, interest thus estimated, according to the directions of the court.

The exceptions were quite numerous, and the errors alleged in the assignment were also numerous. As in many cases where the alleged errors assigned are numerous, many of them were passed over very lightly by the counsel. Therefore, to get at the real issue between the parties, we make the following extracts from the supplemental brief of the defendant in error:

"The plaintiff below put in evidence said deed and proved the consideration therefor, thus making a prima facie case; but the plaintiff below did not rest there. In anticipation of a defense of a paper title derived from Sarah A. Mather, she called the defendant and put in through him a certified copy of a quitclaim deed from said Sarah to him in 1885. She also introduced a certified copy of a deed from one Stanbury to said Sarah in 1869. She then pointed out to the court that the deed of Stanbury to said Sarah was invalid. She showed, further, that neither Sarah Mather nor the defendant below had ever been in the actual occupation or possession of the land. This was going beyond the requirements of a prima facie case for the breach of a covenant of seisin 'of a good, absolute, and indefeasible estate of inheritance.'

"The defendant below offered no evidence that he was in actual possession of the land when the deed in suit was delivered to the plaintiff below. He offered no other evidence of a paper title. He did not contest the invalidity of the Stanbury deed. He offered no evidence of the acquisition of title by himself by adverse possession.

"The defendant below tried his case on the theory that he had constructive seisin of the land, because he had title to the land by virtue of the quitclaim deed from Sarah Mather to him in 1885, because Sarah A. Mather, although having no valid paper title, yet had acquired title by adverse occupation. And so the case turned on the issue whether Sarah Mather had acquired title by adverse occupation. All the evidence of the defendant below came from the defendant himself. All his evidence was submitted to the jury. It was controverted by the plaintiff below, and it failed to satisfy the jury."

On the other hand, the defendant, now the plaintiff in error, furnished us at the argument of the case the following summary:

"The chief points relied on by the defendant, John L. Mather, may be summarized as follows:

"1. The tax deed to Miss Mather in 1869 was valid and gave her a good title.

"2. Said deed, in any event, was incontestable after one year from February, 1872, when the one-year statute of limitations was enacted.

"3. The deputy tax collector was a proper person to give the deed.

"4. The tax deed was *prima facie* evidence of the regularity of the proceedings, and there was no competent evidence of any failure to give proper notice.

"5. The plaintiff, Hattie N. Stokely, having offered the tax deed, was bound by the recitals contained therein.

"6. If the tax title and the one-year statute of limitations did not give the defendant a valid title, then he obtained a good title by adverse possession for seven years, dating from 1869.

"7. The verdict is too vague to support the judgment.

"8. The jury could not allow interest at 8 per cent., the legal rate being only 6 per cent."

Whatever other objections were made, or errors assigned, have not been urged on us. We confine ourselves, therefore, to the points in defense expressly covered by the summary.

[1] We first take up the matter of allowances of interest. One question is whether interest can be computed at the local rate of interest in Florida, being 8 per cent. per annum, for unliquidated damages, which, in the eyes of the law, is allowed only as damages for retention of money without any agreement for the payment thereof. According to the rules of law in the federal courts, the rate of interest under these circumstances is fixed by the law of the forum, which is, in this case, only 6 per cent. per annum. *Goddard v. Foster*, 17 Wall. 123, 143, 21 L. Ed. 589. The plaintiff, now the defendant in error, relies on several decisions of the Supreme Court which she cites to us. While these decisions recognize special circumstances, for example, cases of obligations which stipulate for a special rate of interest, and cases of coupons which are expressly made payable at a specific place, yet, as a whole, they recognize the rule here stated.

[2] The next question is as to the dates from which interest should be paid. The court fixed this date as the date of the payment for the deed from the defendant to the plaintiff. Nobody disturbed the plaintiff's title, or threatened to disturb it, and non constat that it ever will be disturbed. Therefore the only equity was the well-known equity of interest running from the date of the plaintiff's writ, when there is no other demand made. In this case there was no other demand made. It is said in *Rawle on Covenants for Title* (5th Ed. 1887) 281, that, while ordinarily, under these circumstances, interest runs from the date of payment for the deed, this is to compensate the plaintiff for his liability for mesne profits. In this case the record shows that there was such a complete absence of mesne profits that no valuable possession could be held which would afford the basis therefor, and, as we have already said, the plaintiff had an undisturbed possession. The rule, however, has been established as applied by the District Court.

The foundation of the rule within the United States that on a breach of warranty of seisin damages are assessed at the amount of the consideration paid, with interest, seems to have got its final shape in the opinion of Chief Justice Kent in *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229, decided in 1809. He traced the foundation of the rule back to the Year Books; and in the consideration of it in the fourth volume of his Commentaries, commencing at page *475,

he connects it again with the rule of the common law that, on a breach of warranty, the warrantor was to replace the land as to which the covenant of seisin failed, by other land of equal value as of the time the covenant was made. There is a lack of accuracy about this, because at present the exact time by the rule is when payment was made for the land. He states the more modern rule in his Commentaries as follows:

"When personal covenants were introduced as a substitute for the remedy on the voucher and warranty, the established measure of compensation was not varied or affected. The buyer, on the covenant of seisin, recovers back the consideration money and interest, and no more."

The rule of *Pitcher v. Livingston* is a very simple one, namely, the purchaser recovered interest on the consideration money in lieu of anything in the way of improvements which he had lost, or in the way of increase of the value of the land. The same rule was recognized in Massachusetts as early as 1807, in *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61, and it has ever since been the prevailing rule in that state. In 1811, in *Nichols v. Walter*, 8 Mass. 243, 246, speaking of it, it was said by the court that "the rule is settled and cannot be shaken." The damages assessed, it was said, consist of the consideration money and "interest from the time of its payment."

In the present case, the plaintiff was in possession of the land, so far as there was any apparent possession practicable, and was taking the mesne profits, so far as there were any, up to the time of the verdict, and, so far as the record shows, is still in possession of both the land and the mesne profits. Nevertheless, in the general rules stated by Chancellor Kent in *Pitcher v. Livingston*, and also in the rule at common law as explained in 10 Bacon's Abridgment, 407, no account is taken of the intervening improvements, or of the increase or diminution in the value of the land; but reparation is made strictly in accordance with the value at the time when the covenant was made or broken, which times are identical. The foundation of the rule, moreover, was arbitrary, it appearing to be the position that its general enforcement was the way in which justice could probably be better accomplished in the mass. At any rate, on a question of this nature we seem to be bound by the law as held in Massachusetts; and the direction of the learned judge of the District Court to compute interest from the time the consideration was paid, subject, of course, to the rate in Massachusetts already spoken of, must be held to have been correct, and this notwithstanding the defendant has never been called on to give an accounting of whether or not there were any mesne profits, and never may be so called on.

We will add that the extent to which the rule has been recognized and applied will be appreciated by examining the very numerous decisions cited in *Sutherland on Damages* (3d Ed. 1903) vol. 2, notes to page 1706, as supplemented by the same work, vol. 1, pages 302 to 304, with reference to the fact that the recovery of the corpus of either land or personal property, or of the value thereof, carries with it as damages, ordinarily, the equivalent of interest for the intervening period. At any rate, so far as Massachusetts is concerned, the rule has

been so uniformly practiced for more than a century, and so steadily held, that it must be taken to be a fixed rule of law, to which the individual judgments of the court and profession must yield.

[3] One proposition of the plaintiff was to the effect that the title of the defendant rested on a tax deed given by one Stanbury in his own name as deputy tax collector, when, as the law stood at the time the deed was executed, it should have been made by the collector himself in his name. The authorities cited by the plaintiff demonstrate that this proposition is correct; and this meets paragraphs 1 and 2 of the summary we have quoted.

All the propositions submitted to us with reference to the matter of limitations, lapse of time, and adverse possession, and all other matters of that character, were correctly submitted to the jury by the presiding judge; and we find no support for anything else covered by the summary we have quoted.

[4] Incidentally we refer to an exception taken because a witness was allowed to testify as an expert what was the statutory or common law of Florida. We observe merely that testimony of this kind in the federal courts is purely immaterial, as much so as though the testimony was as to the law of the state constituting the judicial district where the trial court was sitting. In each class of cases, the trial court is assumed to know the law.

Inasmuch as the errors in the allowance of interest can be corrected by the record, it is not necessary that the case go back for another trial. Judgment, therefore, will be:

The judgment of the District Court is modified, by amending it to carry interest only as stated in our opinion passed down on the 6th day of January, 1915, and, as so modified and amended, is affirmed, and the plaintiff in error recovers his costs of appeal.

BROWN et al. v. MASSACHUSETTS HIDE CORPORATION.

(Circuit Court of Appeals, First Circuit. January 7, 1915.)

No. 1052.

1. CORPORATIONS (§ 553*)—INSOLVENCY AND RECEIVER—RIGHTS OF PARTIES.

In proceedings in insolvency to liquidate the affairs of a corporation, the rights of all the parties concerned are fixed as of the time of the appointment of the receiver, and all the various equities are to be determined accordingly.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

2. RECEIVERS (§ 77*)—LIEN ON PROPERTY—EXTENT.

Where insolvent imported hides on a credit extended by bankers, the contract providing that the title and right to possession should be in the bankers until any indebtedness or liability in their favor should have been fully paid, *held*, that such credit agreement did not limit the bankers to a lien on the proceeds of each importation for the amount of the credit utilized for that shipment, but that they were entitled to charge, on the importers becoming insolvent, as against a balance in the bankers' hands

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from several shipments, advances made under the credit on other shipments, though they were not due at that time.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 91, 138-144; Dec. Dig. § 77.*]

3. RECEIVERS (§ 77*) — LIENS AND PRIORITY — SALE OF PLEDGED AND NON-PLEDGED PROPERTY—RIGHT TO PROCEEDS.

Where leather belonging to bankers under an importers' credit agreement was sold by the importers, together with other leather not subject to the credit contract, and it was impossible to identify the proceeds of each, the bankers, under the doctrine of subrogation, were entitled to enforce their claim against the entire fund.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 91, 138-144; Dec. Dig. § 77.*]

Appeal from the District Court of the United States for the District of Massachusetts; Geo. H. Bingham, Judge.

Suit by Jeremiah Smith, Jr., as receiver of the Massachusetts Hide Corporation, against Waldron B. Brown and others. From a decree denying in part defendants' claim to certain pledged property, they appeal. Reversed and remanded, with directions.

Joseph B. Warner, of Boston, Mass. (Warner, Warner & Stackpole, of Boston, Mass., on the brief), for appellants.

Howard Stockton, Jr., of Boston, Mass., for appellee.

Before PUTNAM and DODGE, Circuit Judges, and MORTON, District Judge.

PUTNAM, Circuit Judge. The Massachusetts Hide Corporation, and its assets, were put into the hands of Jeremiah Smith, Jr., as receiver, by a decree of the Circuit Court for the District of Massachusetts, on September 13, 1910. Whatever the authority for or purpose of the entry of that decree, so far as the present proceedings are concerned, the appointment and the results thereof are to be treated as insolvency liquidation, and the rights of the parties are to be governed by the equitable principles which adhere to general proceedings in insolvency and bankruptcy, and all titles and liens with reference to the property involved are to be adjusted on that basis. The Massachusetts Hide Corporation had been, and was at the time of the appointment of the receiver, engaged in importing hides, and selling them, in the usual course of business of an importer. It procured its credit for the purchase of hides in foreign parts partly from Brown Bros. & Co., who are the appellants interested in this proceeding. The documentary obligations incurred by the corporation to Brown Bros. & Co., through which these letters of credit were obtained, stipulated for the repayment of advances, with interest at the rate of 5 per cent. per annum, "or at the current rate if it be above that," with a commission of one-half of 1 per cent., increasing by graduated steps to 1½ per cent.

Effacing for all the practical purposes of these transactions Brown, Shipley & Co., of London, who are the foreign branch, or house, of Brown Bros. & Co., who are to be regarded as identical therewith, each of the obligations incurred by the Massachusetts Hide Corporation as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

purchaser of letters of credit from Brown Bros. & Co. contained the following provision:

"And hereby recognize and admit the ownership of Brown, Shipley & Co. in, and their right and that of Brown Bros. & Co., to the possession and disposal of, all goods and the proceeds thereof, for which Brown, Shipley & Co. may enter into any engagements in virtue of this credit, as also to the possession of all bills of lading for and policies of insurance on such goods, until such time as any indebtedness or liability existing as against in favor of Brown, Shipley & Co., or Brown Bros. & Co., under the said credit or otherwise, shall have been fully paid up and discharged. And in the event of either of them hereafter intrusting said goods to for the purpose of sale or otherwise, hereby consent that their right to repossess themselves of the same or any proceeds thereof may be exercised at their discretion. Any proceeds of said goods coming into their hands are to be applied against the expenses of Brown, Shipley & Co., under this credit, or against any other indebtedness of to them or to Brown Bros. & Co., including all expenses incurred by either of them, and commission of sale and guaranty. "This obligation is to continue in force, and to be applicable to all transactions, notwithstanding any change in the individuals composing the respective firms, parties to or concerned in this contract, or either of them, or in that of the user of this credit, whether such change shall arise from the accession of one or more new parties, or from the death or secession of any partner or partners."

The various credits received, and the obligations accompanying the same, were numerous, and succeeded or overlapped each other. The transactions permitted sales by the Massachusetts Hide Corporation of various importations from time to time, and the pledging of the goods imported to commission merchants or others; so that, after such sales or pledges, the equities which belonged to Brown Bros. & Co. were represented by the buyer's obligations in the hands of the Massachusetts Hide Corporation, and by the balances of values in excess of what may have been advanced by purchasers or the commission merchants.

In connection with the commencement of this litigation, all the remaining assets of the Massachusetts Hide Corporation which had been obtained by importations financed in the manner we have pointed out, and all the proceeds, or remnants thereof in excess of the claims of purchasers or commission merchants, arising in the manner we have pointed out, had been gathered together and liquidated, and the results thereof deposited by substitution in the hands of Brown Bros. & Co. as stakeholders, to stand in lieu of the property from which those amounts were gathered together, and this litigation is over the sums thus secured.

[1, 2] In accordance with the settled rules of insolvency proceedings involving general liquidation in insolvency, the rights of all the parties concerned here were fixed as of the time of the appointment of the receiver, and all the various equities are to be determined accordingly. Williams' Bankruptcy Practice (9th Ed.) 211, and sequence. This rule has been applied in full force in *Thomas v. Taggart*, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, in *Zartman v. First National Bank*, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418, and in other familiar cases. The principal question in this case arises from the fact that the outstanding relations were in very different phases at the time the receiver was appointed, especially that there were outstanding obligations to Brown Bros. & Co. which had not been met,

and also other obligations for which payment had been fully made, leaving balances of assets on hand, which balances Brown Bros. & Co. claim were applicable to the unpaid amounts of the obligations to them. The main question thus involved was passed on by the Supreme Court of Connecticut in the New Haven Wire Company Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300. The court there is quoted as using the following language, at 57 Conn. 391, 18 Atl. 273 (5 L. R. A. 300):

"It was the understanding and intention of all parties to these agreements that whenever the absolute title to a particular lot of rods so delivered upon conditions should be necessary to the wire company for the profitable conduct of its business, it should then be possible to it to obtain such title; to obtain it, if need be, contrary to the will of the applicants by a sufficient tender. And as it was the expectation of all parties that importation and conditional sales and deliveries would succeed each other to an indefinite point in the future, and that for these an overlapping succession of acceptances would come into existence, extending to a constantly receding date, it is not within the reasonable interpretation of the contract to say that it contemplated the burdening of each lot of rods with this accumulating indebtedness; nor to say that the applicants required from the wire company the payment of acceptances before maturity as a condition precedent to obtaining title to rods which it had paid for. It is rather to be interpreted as permitting it to obtain such absolute title by paying for the rods, and by paying in addition such other indebtedness from it to them as should then be due."

The above is a very plausible view, and might well have been acceded to under many circumstances. The questions, however, are strictly commercial, involving international transactions and complex conditions, as to which local views are very ineffectual. At any rate, the language of the contracts here is so positive and clear that, as we view it, it cannot be overcome by general considerations such as were urged by the Supreme Court of Connecticut, as eminent as that court may be. In view of the very complex conditions and of the many contingencies to which the business was subject, it seems to us proper to hold that the parties had the right to protect themselves by whatever provisions for emergencies they deemed proper to resort to. Therefore we are compelled to support Brown Bros. & Co. in maintaining the rights to which the language adopted by them apparently gives them a clear title. If this involves any embarrassment of the kind referred to by the Supreme Court of Connecticut, it is one of the parties' own selection, plainly and deliberately entered into. The transactions were evidently done on so close a margin, and the Massachusetts Hide Corporation was given so free a hand in dealing with the business in accordance with the ordinary emergencies of the situation, that Brown Bros. & Co. are entitled to be fully supported in whatever provisions they stipulated for. Commercial transactions of this character need broad support and are entitled to receive it. This solves the proposition that the liens claimed by Brown Bros. & Co. are to be supported in whatever may be the conditions of maturity of various obligations in which they are or may be interested.

This leaves us to consider further only certain conditions with reference to which Brown Bros. & Co. claim support from the doctrines of subrogation, and for the reasons we have stated the effect is that, under these doctrines as applied to insolvency or bankrupt administration of

assets, the rights of the parties are often crystallized at specific periods, independently of any action of the parties, so far as they can be crystallized without prejudice to intermediate accruing interests of innocent parties. We know of no such intermediate accruing interests here involved.

On this branch of the case the question relates to the rights of parties who have been placed in the relation of suretyship, or its equivalent, by implication, to be subrogated by the application of property to which no one has any specific right to the contrary. This right of subrogation is sometimes self-efficient, and may operate without the assistance of any conscious action. The broad principles of the doctrines of subrogation were sufficiently explained for this case by this court in November, 1911, in *Merchants' & Miners' Transp. Co. v. Robinson-Baxter Towing Co.*, 191 Fed. 769, 772, 113 C. C. A. 427, and sequence 194 Fed. 361, 114 C. C. A. 321; 225 U. S. 704, 32 Sup. Ct. 837, 56 L. Ed. 1265. The case there cited of *Wager v. Providence Insurance Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013, demonstrates that these doctrines may rest less on the conscious action of the parties concerned than on the facts as they exist, provided especially that the parties concerned are not innocent sufferers having antagonistic equities.

[3] As incidental to the application of the doctrines of subrogation, the Massachusetts Hide Corporation had consigned some goods purchased on the strength of letters of credit obtained from Brown Bros. & Co., with other goods obtained otherwise, with the consequent result that some of the goods of each class had been disposed of, subject to the claim of Brown Bros. & Co. now made that the proceeds of all the same goods should be applied in exonerating the goods purchased on the credit of Brown Bros. & Co. so far as necessary. It is now said that the sales of these goods are so intermingled that they cannot be thoroughly traced, nor the proceeds thereof particularly identified; but the report of the master states with reference to these mixed accounts as follows:

"I do find, however, that the balances paid over by the several consignees are identified as coming solely from two possible alternative sources and no others, and the identical moneys represented, in whole or in part, either
"(a) Proceeds of leather imported under letters of credit issued by Brown Bros. & Co.; or

"(b) Proceeds of other leather on which the consignees had a lien for the same debt, and in which no one except the corporation, or the receiver representing the rights of the corporation, had any title or interest, either at the date of the receivership or at the date of final liquidation of the consignees' claims for advances," etc.

The findings of the master in these respects apparently are not disputed. Consequently, on those facts he ruled that Brown Bros. & Co. are entitled to these balances, with a single exception of a specific amount of \$759.21 named as disallowed by the master, which is not disputed. As there were no intervening equities, and as the right of Brown Bros. & Co. to be subrogated does not depend on these detailed facts not known, and the debts for which all the goods were pledged

were in each case identical, the ruling of the master was correct, and should have been sustained.

The decree of the District Court is reversed, and the case is remanded to that court to render a judgment in accordance with our opinion passed down the 7th day of January, 1915, and the appellants recover their costs of appeal.

EMPIRE CITY FIRE INS. CO. v. AMERICAN CENT. INS. CO. et al.

(Circuit Court of Appeals, Third Circuit. January 14, 1915.)

No. 1856.

1. COURTS (§ 405*)—JURISDICTION—DETERMINATION OF QUESTION OF JURISDICTION.

The Circuit Court of Appeals is bound to consider the question of jurisdiction on its own motion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

2. COURTS (§ 327*)—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

The G. Company owned property on which policies had been issued by 43 insurance companies and which was destroyed by fire. The companies adjusted the loss and apportioned the amount thereof among the different companies; the share of only one, the E. Company, exceeding \$2,000. The E. Company and certain of the other companies paid their shares by drafts, which insured indorsed to F. & Co., who collected the amounts thereof. The E. Company brought suit, making all of the other companies who had paid their shares defendants, alleging fraud on the part of the G. Company in connection with the adjustment, and that F. & Co. collected the drafts as agent for the G. Company, and with knowledge of the fraud, and praying that the adjustment be set aside, that the amount in the hands of the F. Company be ascertained, and that company enjoined from disposing of it and required to account, that the defendant insurance companies be required to set up their claims on the fund, and that the trustee in bankruptcy of the G. Company, which subsequent to the adjustment was adjudged a bankrupt, be required to set up his claim and be restrained from suing. *Held* that, the suit having been brought in 1910, the amount in controversy was sufficient to give jurisdiction to the United States courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. § 327.*]

Jurisdiction as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

B. ACTION (§ 22*)—FORM—LAW OR EQUITY.

The bill presented a case within the jurisdiction of equity, especially as bankruptcy had supervened and the interest of the trustee in some respects was adverse to that of the insurance companies, there was a question as to the amount in the hands of F. & Co. and how that amount should be apportioned between the insurance companies, and whether the adjustment and apportionment originally made ought not to be set aside, and the bill on its face promised to prevent unnecessary suits and to settle several controversies in one litigation.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-139, 143, 145; Dec. Dig. § 22.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit by the Empire City Fire Insurance Company against the American Central Insurance Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Hartwell Cabell, of New York City, for appellant.

J. McF. Carpenter, of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This bill in equity sought to impose a trust upon a sum of money that came into the hands of A. Friedberg & Co., a firm that is one of the defendants. The money was paid to one or the other member of the firm by the plaintiff and by certain other insurance companies, also among the defendants, and the suit could not succeed unless the firm had been a partner in the business of the G. & K. Trunk Company, a bankrupt Pennsylvania corporation, or unless the firm had received the money with knowledge of a fraud against the plaintiff and its coinsurers that the corporation was charged with perpetrating. The District Court decided the dispute on the merits and dismissed the bill, on the ground that the firm had not been a partner, and had received the money without knowledge of the fraud. Judge Orr's opinion (which has not been reported) is as follows:

"The plaintiff has filed this bill for the purpose of impressing a trust upon moneys in the hands of A. Friedberg & Bro., which plaintiff says belongs to it and to other insurance companies by reason of the fact that the insured fraudulently procured an adjustment of loss after a fire, procured drafts in payment of the loss, and assigned the same, without value, to A. Friedberg & Bro., who had full knowledge of the fraud of the insured.

"By reason of the fact that the plaintiff's claim exceeded the jurisdictional limitation, and by reason of the allegation of facts which, if they had been sustained, would have impressed a trust upon funds and moneys within this district, this court had jurisdiction of the controversy.

"The plaintiff and many other insurance companies had insured the property of the G. & K. Trunk Company, a corporation. The property having been destroyed by fire, the adjusters of the different companies met and agreed upon the amount of loss. The evidence appears to be sufficient to establish the fact that there was fraud upon the part of the officers of the G. & K. Trunk Company. It is not necessary, however, to review the evidence as to this matter, or to elaborate the finding, because the evidence does not disclose the fact, which is most material to the plaintiff's case, that A. Friedberg & Bro., or either of that firm, had knowledge of the fraud perpetrated by the officers of the G. & K. Trunk Company. The fraud consisted of an overvaluation of assets under oath. Plaintiff offered the officers of the G. & K. Trunk Company, who testified that Max Friedberg, and the firm of A. Friedberg & Bro., were to have an interest in the business of the Trunk Company; that Max Friedberg examined the books of the Trunk Company at different times and received statements of the Trunk Company. It is not necessary to urge the point that the witnesses, who were officers of the Trunk Company, are discredited as witnesses in the present case by their connection with the fraud upon the plaintiff and the other companies. It is merely necessary to read the evidence in this case to justify the conclusion that they are not to be believed with respect to their statements as to the interest of Max Friedberg, or the firm of A. Friedberg & Bro. in the Trunk Company. The evidence discloses that Max Friedberg loaned from time to time large

sums of money to the Trunk Company, and that his sole interest with respect to the Trunk Company was that of a creditor. It is immaterial that he had made usurious contracts with the Trunk Company, or with those interested therein. He was nevertheless a creditor to a large amount. And not only this, but he was a creditor of the father of one of the principal officers and stockholders of the Trunk Company, in that he had furnished to the father \$12,000 upon a mortgage executed by the father and delivered to him, of which sum the father had turned over \$10,000 to the officers of the Trunk Company. After the fire occurred Max Friedberg was largely interested in the proceeds of the insurance, to the extent of having it applied to the indebtedness due him and due the father, who was indebted to Friedberg. The drafts as they were received from the insurance companies were indorsed to Friedberg or his firm, and many of them were collected by him. In this way he was reimbursed. It also appears that he cashed other drafts of insurance companies in payment of their shares of the loss as found by and adjusters, taking the drafts and giving the money to the officers of the Trunk Company. So far as appears neither of the Friedbergs, or their firm, have any amounts in their hands to which plaintiff is entitled. The case, therefore, of the plaintiff must fall because of the failure to prove Friedberg's participation in the fraud.

"The bill must be dismissed, at the cost of the plaintiff."

[1] We are not satisfied that the court was mistaken in dismissing the bill for the reasons thus stated, and we shall confine ourselves to the question of jurisdiction—which, of course, we are bound to consider, even on our own motion.

[2] The situation is not altogether easy to present with clearness, but the bill appears to set forth the following case for determination. On July 24, 1909, the Trunk Company was the owner of merchandise, machinery, etc., on which policies of fire insurance amounting to \$75,000 had been issued in varying amounts by 43 insurance companies. Each of these companies was liable only for its proportion of such loss as might occur. On the day named a fire destroyed much of the property, and all the companies were called in to adjust the loss. Of course the amount and value of the goods destroyed were of vital importance, and therefore the Trunk Company submitted to the adjusters various accounts, inventories, etc., from which the parties determined on August 5th that the sound value of the property insured had been about \$48,000, and that the loss sustained was about \$39,000. The amount thus agreed to was then apportioned among the 43 underwriters; of the sums charged against them only one, namely, the share of the Empire State Fire Insurance Company, the plaintiff herein, exceeded the sum of \$2,000—the other shares ranging between \$1,300 and \$520. The bill charges that the amount and valuation of the property insured, and therefore the amount of the loss, had been fraudulently increased by the Trunk Company, and, of course, that the adjustment was necessarily tainted with the fraudulent increase. The Empire State Insurance Company and 13 other companies—all the latter being among the parties defendant—paid their shares by drafts aggregating \$14,000; but these payments were made before any of them had knowledge of the Trunk Company's fraud. The drafts came into the hands of one or both of the Friedbergs, and the bill charges that the money was collected by the firm merely as agent for the company and with knowledge of the fraud. In December the Trunk Company

was adjudged bankrupt, and John D. Evans was appointed receiver, and afterwards trustee. Both the Trunk Company and Evans are also defendants.

In outline these are the facts set forth by the bill, and upon the alignment of parties therein the requisite diversity of citizenship appears, and (since the bill was filed in 1910) the sum in controversy is sufficiently large. It remains to consider the relief sought.

[3] In brief the plaintiff prayed that the adjustment of August 5th should be set aside; that the amount of money in the hands of the Friedbergs should be ascertained, and for an injunction forbidding them to dispose of it; that the 13 insurance companies defendant should be called upon to set up their claims upon the fund; that the trustee in bankruptcy should also be required to set up his claim, and meanwhile should be restrained from suit; and, finally, that the Friedbergs should account for and pay into court for distribution the money found to be in their possession.

We are not concerned with the situation that might be presented after a hearing and the ascertainment of the facts; it is the court's initial right to judge the controversy that is now being considered, and this must depend upon the case made by the pleadings, and not the case made by the proof. There is a good deal of plausibility about the contention that the plaintiff had an adequate remedy at law by an action of assumpsit to recover the money alleged to have been improperly received by the Friedbergs, but we incline to think that under the peculiar circumstances a bill in equity was (at least upon the surface) the more complete and suitable remedy. It must be remembered that the Trunk Company's bankruptcy had supervened, for this introduced a new factor into the situation. The trustee's interest was in some respects the same as the plaintiff's, and in some respects adverse. He was interested to support the position that the money belonged to the Trunk Company, and not to the Friedbergs, but he was also interested to deny the Company's fraud. And this is true also with regard to his attitude toward the 13 companies that were defendant. For present purposes it makes no difference whether they are formally defendants, or should be aligned with the plaintiff. Moreover, there was a question whether the full amount of \$14,000 was still in the hands of the Friedbergs, and, if not, how the amount found to be there should be apportioned. And, still further, there was a question whether the adjustment and apportionment that had been made in August ought not to be set aside as an essential preliminary to further relief. In the decision of this latter question the remaining 29 insurance companies, who are not parties at all, would perhaps be equally interested, although it is a fair inference from the bill that none of them has paid its share, and that all are denying liability in toto. Whether they were necessary parties presented a question that might be important, because, if they were necessary parties and were to be aligned with the plaintiff, the requisite diversity of citizenship would no longer exist—for some of them are Pennsylvania corporations, while the Friedbergs, the trustee in bankruptcy, and the Trunk Company, are all citizens of Pennsylvania. In so complex a situation, this much at least seems clear—that the bill in question promised to prevent unnecessary suits,

and to settle several controversies in one litigation; and on the whole case we think that the District Court was right in entertaining jurisdiction. The controversy might perhaps have been decided against the plaintiff on some other ground, but our only concern at present is whether the court had a right to hear the dispute at all.

The decree is affirmed.

FRISCO LUMBER CO. v. HODGE et al.

(Circuit Court of Appeals, Eighth Circuit. November 30, 1914.)

No. 4154.

1. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—ESTIMATE OF QUANTITY.

Under a contract for the sale of standing timber at \$2.50 per 1,000 feet, which provided that the quantity should be estimated by two competent estimators, one to be chosen by each party, and that their estimate should be the basis for settlement of the purchase price, provided that if they could not agree they should select a third estimator, who should be umpire, and that the estimate or decision of a majority should be binding, where the estimators agreed without selecting an umpire, their decision was binding and was not merely a basis for further negotiations.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. CONTRACTS (§ 284*)—DELEGATION OF QUESTION TO ARBITRATORS—CONCLUSIVENESS OF DECISION.

When the parties to a contract delegate to a third person the ascertainment or decision of some undetermined matter, such as due performance or quantity, quality, or the like, and stipulate that his decision shall be final or binding, his decision, when made, is conclusive in the absence of fraud or such gross mistake as implies bad faith or a failure to exercise an honest judgment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. § 284.*]

3. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—ESTIMATE OF QUANTITY.

While, under a contract for the sale of standing timber providing that the quantity should be estimated by estimators selected by the parties, the authority of the estimators was confined to the subject-matter specified in the contract, and if some element outside of the contract entered into the estimate and was not distinguishable or separable the estimate would not be the one contemplated by the parties and would not be binding, where they estimated separately the timber on each 40-acre tract and their estimate as to the timber on land not included in the contract was easily distinguishable, the inclusion of such timber did not affect the binding force of the estimate as to the timber included in the contract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

4. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—ESTIMATE OF QUANTITY.

Where a purchaser of standing timber, under a contract providing for an estimate of the quantity by estimators selected by the parties, made no complaint or criticism when the estimators completed their work and turned in their report, because of the failure to report on some land covered by the contract, it could not afterwards complain thereof, especially

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as the amount was small and it thereby got the timber without paying the specified price.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

5. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—MODIFICATION BY SUBSEQUENT AGREEMENT.

An estimate of the quantity of standing timber covered by a contract of sale providing that it should be estimated by estimators chosen by the parties was not abandoned and settlement made upon another basis by a subsequent contract for a partial settlement, made and carried out, which expressly provided that, in the event the quantity had already been estimated or decided in compliance with the original contract, nothing therein contained was to be construed as waiving it.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the Frisco Lumber Company against O. E. Hodge and another, partners doing business as Hodge & Hunt. From a decree for defendants, plaintiff appeals. Affirmed.

William T. Hutchings, of Muskogee, Okl., for appellant.

Joseph G. Ralls, of Atoka, Okl., and Joseph D. Barksdale, of Ruston, La. (A. A. Barksdale, of Ruston, La., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. Hodge & Hunt sold the Frisco Lumber Company their sawmill plant, lumber, unsawed logs, and the standing pine timber on about 10 sections of land in Oklahoma. The present controversy relates to the timber only, and for reasons not now material it was presented to the trial court in a suit in equity brought by the lumber company. The special master to whom the cause was referred reported findings of fact and conclusions of law in favor of Hodge & Hunt; the trial court sustained them and rendered a decree accordingly. The lumber company appealed.

[1] Briefly stated, the controversy is whether the parties are concluded by the estimate of the quantity of the standing timber made by two estimators chosen according to the terms of the contract of sale. There is no dispute about the price; the contract fixed it at \$2.50 per 1,000 feet of contents. Hodge & Hunt contend the estimate is conclusive and the trial court so held. The lumber company gives four reasons for the contrary: First, it says, the language of the contract does not sustain the conclusion that prevailed. The contract provided as follows:

"The quantity of said pine timber shall be estimated by two competent estimators; all merchantable timber to be estimated down to eight inches or over in diameter at the top end, one of said estimators to be chosen by each party to this contract, and their estimate shall be the basis for settlement of such purchase price hereinafter as aforesaid. Provided, that if the said estimators cannot agree, then they shall select a third estimator, who shall be umpire, and the estimation or decision of a majority shall be binding on the parties hereto."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On this it is argued that the estimate of quantity was to be merely the "basis for settlement." But even so, it might nevertheless have been intended as conclusive to that extent. The quantity was the only undetermined factor in the transaction, and when it was found there remained but a simple mathematical calculation. The other factor was the price per unit, and it was definitely fixed by the parties themselves. It can hardly be said that by the phrase "basis for settlement" they intended to establish a mere point for argument or further negotiations, especially since by other parts of the contract Hodge & Hunt sold the lumber company their sawmill plant and other property. But the paragraph of the contract above quoted, taken in its entirety, as it should be, clearly shows the estimate made was intended to be binding. If the two estimators could not agree, they were to select a third, and, the contract says, "the estimation or decision of a majority shall be binding on the parties hereto." The two estimators chosen by the parties having agreed, there was no necessity for a third. We can conceive of no reason for making the binding force of the estimate depend upon the contingency of a disagreement and the selection of an umpire. The sense of the provision as a whole is otherwise, and it prevails over the mere placement of the words. It fulfills the requirement that the intention be plain and not rest in implication. *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572; *United States v. Hurley*, 105 C. C. A. 208, 182 Fed. 776.

[2] When the parties to a contract delegate to a third person the ascertainment or decision of some undetermined matter such as due performance or quantity, quality, or the like, and stipulate that his decision shall be final or binding, his decision when made is conclusive in the absence of fraud or such gross mistake as implies bad faith or a failure to exercise an honest judgment. This is the settled rule in the courts of the United States. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Elliott v. Railway Co.*, 21 C. C. A. 3, 74 Fed. 707; *Guild v. Andrews*, 70 C. C. A. 49, 137 Fed. 369; *Roberts, Johnson & Rand Shoe Co. v. Westinghouse, etc., Co.*, 74 C. C. A. 348, 143 Fed. 218. The lumber company charged in its pleading that the estimators were guilty of fraud, or rather that the one chosen by Hodge & Hunt was, and that he imposed upon the ignorance of the other, and the estimate of the standing timber was grossly and fraudulently excessive. There was no proof of fraud in the conduct of the estimators. On the contrary, it was found from abundant evidence that both were capable men of long experience in the work and that they performed their duties with especial care and fidelity. The estimate returned of the contents of the standing timber was 37,810,000 feet. The lumber company offered evidence to show that after the timber was cut the log scales made by it and its mill scales showed a discrepancy of about 11,000,000 feet. This, it claims, disclosed such a gross mistake as to impeach the estimate. Estimates of the board measure contents of standing timber are at the best approximations based on the judgment of experience; accuracy is impossible and is not expected. We know that great tracts of pine timber have been

bought and sold on that basis. It was a custom in the business, and presumably prices were fixed accordingly. Still the discrepancy claimed is out of proportion to the estimate. Hodge & Hunt therefore attacked the figures of the lumber company. The special master and the trial court held that they were made by the lumber company ex parte in view of a threatened lawsuit, and that their accuracy, completeness, and reliability were not shown. They found from voluminous testimony that merchantable timber was left in high cut stumps and in contract dimensions in the tree tops, some whole trees were felled and the logs sawed but left on the ground, some trees were left standing, much merchantable timber was destroyed by fire, some was made into ties and bridge timber, and logs were hauled to another mill and sawed by third parties. Upon a consideration of the evidence on these matters, and giving due consideration to the findings of the master and the approval by the trial court, we do not think the integrity of the estimate was successfully impeached.

[3, 4] The lumber company further urges that the estimate included the timber on 560 acres of land not in the contract. The authority of the estimators was that conferred by the contract, and its proper exercise was confined to the subject-matter specified. If some element outside of the contract entered into the estimate and is not distinguishable, or separable, the estimate would not be the one contemplated by the parties and would not be binding. It appears, however, that the estimators used plats of the land showing each 40-acre tract, and as their work progressed they entered in the platted square of each minor subdivision its timber contents and so reported them to the contracting parties. One of the plats as finally made up was in evidence. The timber lands not in the contract are easily distinguishable. Moreover, the timber on them was not embraced in the recovery. It is therefore unnecessary to consider whether the estimates upon the outside lands are to be rejected because the titles were found defective, a contingency contemplated and provided for in the contract, or were made at the instance and for the private benefit of one of the parties. They were without influence upon the question at issue. It is also said the estimators failed to report on some land covered by the contract. This is evidently an afterthought, as no complaint or criticism was made when the estimators completed their work and turned in their report. Again, the amount was small, the lumber company got the timber, and Hodge & Hunt did not get the price.

[5] Finally, it is claimed that by a subsequent contract the parties agreed to abandon the estimate and to settle upon another basis. There is no merit in this. It was apparent that, whether the estimate was conclusive or not, a large sum of money was due Hodge & Hunt, so a contract for partial settlement was made and carried out. It recited the contentions with respect to the estimate and expressly reserved them from prejudice. One of the several provisions to that effect is as follows:

"And it is understood that in the event the quantity of said timber had already been estimated or decided upon in compliance with said original contract that nothing herein contained is to be construed as waiving same."

The decree is affirmed.

POCAHONTAS DISTILLING CO., Inc., v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1914.)

No. 1258.

1. INTERNAL REVENUE (§ 46*)—DISTILLERIES—ILLEGAL OPERATION.

Evidence held to warrant a finding that the running of beer in a distillery into a slop tank, instead of into the mash and fermenting tubs, was not the result of innocent mistake, but was with intent to defraud the United States to the extent of the revenue on the distillate so improperly run into the tank, in violation of Rev. St. §§ 3259, 3263 (Comp. St. 1913, §§ 5995, 6001), and was therefore sufficient to sustain libel against the distillery.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 117-141; Dec. Dig. § 46.*]

2. APPEAL AND ERROR (§ 966*)—CONTINUANCE—DISCRETION.

Denial of a continuance because of the alleged illness of one of defendant's counsel, in the exercise of the trial court's discretion, is not in general ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

3. APPEAL AND ERROR (§ 977*)—NEW TRIAL (§ 6*)—DISCRETION—REVIEW.

The allowance or refusal of a new trial in a federal court rests in the sound discretion of the trial court, and is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977; * New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

4. INTERNAL REVENUE (§ 46*)—LIBEL AGAINST DISTILLERY—PROOF REQUIRED.

On a libel by the United States against a distillery for illegal operation, the government is only required to establish its case by a preponderance of the evidence, and not by proof beyond a reasonable doubt.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 117-141; Dec. Dig. § 46.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Libel by the United States against the Pocahontas Distilling Company, Incorporated. Judgment for the United States, and defendant brings error. Affirmed.

Robert H. Talley and John A. Lamb, both of Richmond, Va., for plaintiff in error.

Richard H. Mann, U. S. Atty., of Petersburg, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va. (D. Lawrence Groner, of Norfolk, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

KNAPP, Circuit Judge. On July 17, 1913, the United States filed a libel of information against grain distillery No. 2, of the Pocahontas Distilling Company, which is located on the outskirts, but within the corporate limits, of the city of Petersburg, Va. It appears that this distillery had been under suspicion for some time, and closely watched by certain revenue officers, who, on the 14th of June, discovered that a so-called "slop tank," located outside of and on a line with the second

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

floor of the distillery building, was full of beer in a state of active fermentation. After measuring the contents of this tank, taking the gravity of the beer, and securing samples, they stationed a guard at the distillery, which was seized a few days later by the deputy collector. A release bond in the sum of \$3,500 was thereupon given by the owners, and an answer filed to the information. At the trial in October following a verdict was rendered in favor of the United States, and from the judgment entered thereon this writ of error is prosecuted.

In section 3259 of the Revised Statutes it is provided that every person engaged in, or intending to be engaged in, the business of a distiller, shall give notice in writing to the collector of the kind of stills to be used and the cubic contents thereof, the number of mash tubs and fermenting tubs, and the cubic contents of each tub. Section 3263 provides, among other things, that every distiller shall cause to be made an accurate plan and description of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm tub, and receiving cistern, the course and construction of all fixed pipes used or to be used in the distillery, together with every place, vessel, tub, or utensil from and to which any such pipe leads, or with which it communicates, and also the number and location and cubic contents of every still, mash tub, and fermenting tub. It seems to be conceded, and certainly is not open to serious question, that on the night of the 14th of June this slop tank was substantially full of beer in a state of active fermentation, that it was unlawful to use this receptacle for such a purpose, and that its use therefor would enable the distillery to produce a larger quantity of spirits than was possible with the appliances legitimately employed for that purpose, and thereby permit a fraud upon the government to the extent of the revenue upon such excess.

[1] The controlling matter in dispute, therefore, related to the circumstances under which this fermenting beer happened to get into the slop tank where it was discovered. If this resulted from an accident or innocent mistake, the owners of the distillery were not chargeable with wrongdoing, and a verdict should have been rendered for the defendant. On the other hand, if this beer was purposely placed in the receptacle where it was found, and where it had no business to be, with the unlawful intention of utilizing the opportunity to defraud the United States, the act was clearly unlawful, the seizure of the distillery was justified, and the verdict and judgment on the bond should stand. This was the vital question of fact for the jury to decide, and that it was distinctly and clearly submitted will appear from the following instructions of the trial court:

"You are further charged that if you believe from the evidence that the slop tank in question was not designed nor used for the purpose of defrauding the government, and that on the occasion when the beer was found therein, as shown by the testimony, that it was pumped there by the defendant's employé accidentally, and without intent or purpose then or thereafter to be used to defraud, you should find for the defendant."

If we correctly apprehend the evidence, it is virtually undisputed that the apparatus used in this distillery was so constructed and arranged that the mash, after it was cooled and ready for fermenting, could be

pumped directly from the cooling tank into this outside slop tank. But this would be manifestly improper, as seems to be conceded, because the slop tank could not be lawfully used for fermenting purposes, and the only proper course for the beer to take from the cooling tank would be into the fermenting tubs located on the inside of the distillery. The plaintiff in error asserts that the object of this arrangement of pipes was to allow the slops or swill to flow down from the slop tank into the cooler for the purpose of producing fermentation without the use of yeast; but the government contends that this was a mere pretense, and that the real object and purpose of the arrangement was to permit the unlawful use of this outside tank as an additional fermenter, and to thereby secretly produce considerable quantities of spirits which would escape revenue taxation.

The plaintiff in error's theory of accident or mistake finds its sole support in the testimony of its employé, a colored man by the name of Whittaker, to the effect that on Thursday, two days before the discovery of the beer in the outside tank, he had started to pump the beer for that day's run from the cooler into the fermenters; that after the beer had begun to run he discovered that the valves to the fermenters were closed and the valves to the slop tank open; that he thereupon opened the valves to the fermenters and closed the valves to the slop tank, while the rotary pump was still running; that the effect of this was to allow a part of the mash intended for the fermenters to remain in the slop tank; and that afterwards, instead of opening the valves to the slop tank, so that the beer which had been accidentally pumped into that receptacle might run back again into the fermenters, he kept the valves of the slop tank closed and filled up the fermenters with water. It appears, however, that the mash could not be pumped from the cooling tank into the outside tank unless all the valves in the pipes leading to the outside tank were open and all the valves in the pipes leading to the fermenters were closed. This, of course, would be the case, because the outside tank was at a higher elevation than the fermenters, and the beer which was pumped up would therefore go into the fermenting tubs rather than to the upper outside tank. It is also the case that after the beer had been pumped into the slop tank it would not have remained there, unless the valves in the pipe leading to this tank had been kept closed. The testimony of this witness, consequently, involves the statement that the valves to the fermenters were closed when they should have been open; that the valves to the slop tank were open when they should have been closed; that he opened the valves to the fermenters and closed the valves to the slop tank when the pump was in full operation, without assistance, without informing any one of what he was doing, and without being observed by any of the various persons, including the revenue officers, who were then in the distillery; that subsequently he supplied the loss of more than one-fourth of the day's run by adding water to the unfilled fermenters, when by simply opening the valves to the slop tank he could have refilled the fermenters with beer; and that this condition, notwithstanding constant opportunity to correct it, continued unchanged for something like 60 hours.

The record discloses no corroboration whatever of the testimony of

this employé, and the jury evidently regarded it as so improbable as to be wholly unworthy of belief. It was an attempted explanation of the presence of beer in the slop tank, which the jury rejected, because in their estimation it could not have been truthful. The presence of this large quantity of fermenting beer in the slop tank, which was *prima facie* unlawful, the existence of a pipe, whether properly shown on the plan of the building or otherwise, leading to the fermenting tubs below, the fact that the apparatus could be so manipulated as to readily turn the slop tank into a fermenting tub, with the consequent opportunity to distill spirits which evaded taxation, were sufficient evidence, in our judgment, to permit the inference of fraudulent intent, and to justify a finding in favor of the government, in the absence of satisfactory proof that the apparent misconduct resulted from an innocent mistake. In short, we are satisfied that there was sufficient evidence of intention and attempt to defraud to warrant the submission to the jury of the question of fact, and it is the misfortune of plaintiff in error that the jury before whom the witnesses testified, and who had every opportunity to judge of their veracity, refused to accept the explanation which the defendant set up, because they believed that the fact was otherwise.

This conclusion disposes of the contention that a verdict should have been directed for the defendant, because there was no evidence of intent to defraud the government, and it remains to consider the other assignments of error, so far as they seem to require discussion.

[2] Of the refusal of the trial court to grant a continuance of the case because of the illness of one of defendant's counsel, it is sufficient to say that we have carefully considered the evidence relating to this assignment and are satisfied that there was no abuse of judicial discretion. This is made evident by the undisputed facts appearing in the certificate of the trial judge, and we are unable to find in these facts and the connecting circumstances any basis for an exception to the general rule that a motion for continuance is addressed to the discretion of the trial court, and that its denial constitutes ordinarily no ground for the reversal of a judgment.

[3] The same may be said of the refusal to set aside the verdict for alleged misconduct of one or more of the trial jurors. Upon the affidavit of defendant's president, which was filed after the verdict and before entry of judgment, and which alleged facts on information and belief, there was an examination before the court of three of the jurors, seven others being present, and a full investigation of the episode referred to in the affidavit. In the light of the facts and circumstances as they were then developed, it is certainly difficult to see that anything had occurred which tended to influence the jury against the plaintiff in error, or operated in any way to its prejudice. Even if we were inclined to a different opinion, it would be of no avail on this appeal, as the federal rule is well settled that the allowance or refusal of a new trial rests in the sound discretion of the trial court, whose action in that regard cannot be made the subject of review. *Prichard v. Budd*, 76 Fed. 710, 716, 22 C. C. A. 504; *City of Newport News v. Potter*, 122 Fed. 321, 333, 58 C. C. A. 483; *Holmgren v. United States*, 217 U. S. 509, 521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

[4] The court instructed the jury in substance that the government was not required to establish its case beyond a reasonable doubt, but that a preponderance of proof would be sufficient to sustain a verdict. If this proposition has been at any time in doubt, its correctness is now settled by the recent decision of the Supreme Court in *United States v. Regan*, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494.

We have carefully examined the remaining assignments, which relate for the most part to rulings upon questions of evidence, without finding any error which requires a reversal of the judgment or furnishes occasion for special comment.

In our opinion, the case was properly and fairly submitted to the jury, and the judgment upon their verdict should therefore be affirmed.

A. LESCHEN & SONS ROPE CO. v. FULLER et al.
(Circuit Court of Appeals, Eighth Circuit. December 14, 1914.)

No. 4132.

1. TRADE-MARKS AND TRADE-NAMES (§ 17*)—TRADE-MARK—VALIDITY—COLORED STRAND.

"A helical stripe or band of uniform width and distinctive color, this color being usually red and produced by painting one of the strands of the rope," is not a valid common-law trade-mark of a wire rope. A colored strand, not restricted to any color, is not a valid trade-mark.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 20; Dec. Dig. § 17.*]

2. TRADE-MARKS AND TRADE-NAMES (§§ 68, 70*)—UNFAIR COMPETITION—FRAUD.

Fraud is the basis of unfair competition. The deceit or the probable deceit of the ordinary purchaser, so that he buys or probably will buy the articles of one manufacturer or vendor in the belief that they are those of another, is an indispensable attribute of a good cause of action for the simulation of the product of one party by that of another.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 79, 81; Dec. Dig. §§ 68, 70.*]

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to *John H. Rice & Co. v. Redlich Mfg. Co.*, 122 C. C. A. 447.]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit by the A. Leschen & Sons Rope Company against B. A. Fuller and others. From decree for defendants, plaintiff appeals. Affirmed.

James A. Carr and Lon O. Hocker, both of St. Louis, Mo. (James C. Jones, of St. Louis, Mo., on the brief), for appellant.

James P. Dawson, of St. Louis, Mo., and C. F. Howell, of Centerville, Iowa (William E. Garvin, of St. Louis, Mo., on the brief), for appellees.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. This suit is a continuation of the controversy between A. Leschen & Sons Rope Company and Broderick &

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bascom Rope Company over the asserted right of the former, which uses a red strand to mark wire rope of its manufacture, to exclude the latter from the use of a yellow strand to mark wire rope which it makes—a controversy which has received the consideration of the courts at various times since 1903. *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.* (C. C.) 123 Fed. 149; *Id.*, 134 Fed. 571, 573, 67 C. C. A. 418, 420; *Id.*, 201 U. S. 166, 170, 171, 26 Sup. Ct. 425, 50 L. Ed. 710; *Same v. Macomber & Whyte Rope Co.* (C. C.) 142 Fed. 289. By the decisions in the cases cited it has been determined that the registered trade-mark of the Leschen Company, consisting of a red or other distinctively colored streak applied to or woven in a wire rope, which was usually applied by painting one strand of the wire rope a distinctive color, usually red, was void, because it was too broad, in that the Leschen Company sought thereby to monopolize the use, not of one, but of all, colors to mark its rope, and too indefinite, in that the color claimed was not confined to or connected with any symbol or design which might be the subject of a trade-mark. 201 U. S. 170, 171, 26 Sup. Ct. 425, 50 L. Ed. 710; 134 Fed. 571, 67 C. C. A. 418.

The Leschen Company has been making and selling wire rope with one strand colored red since 1886, and the Broderick Company has been making and selling wire rope with one strand colored yellow since 1900. The defendants below, the respondents here, are partners as Hercules Manufacturing Company, and under that name have been making and selling the Hercules stump puller and the necessary equipment, including wire rope, for its operation ever since 1900. They are not and have not been engaged in the manufacture of wire rope, but they purchase such rope of the manufacturers to equip their stump pullers, and sell the latter with their requisite equipment, and also buy and sell wire rope. Since the year 1908 they have been buying of the Broderick Company their yellow strand wire rope to complete the equipment of their stump pullers, and have been selling the stump pullers with the necessary amounts of this wire rope as parts of their equipment. It was in 1906 that the Supreme Court finally affirmed the decree dismissing the suit of the Leschen Company against the Broderick Company for the alleged infringement of its registered trade-mark on the ground that it was void on account of its breadth and indefiniteness. Bowing to the decision in that case the Leschen Company has brought this suit against the defendants for the alleged infringement by their purchase and use of Broderick's yellow strand rope of (1) its common-law trade-mark, consisting of "a helical stripe or band of uniform width and distinctive color, usually red, and produced by painting one of the strands of the rope," called "colored strand rope," or "colored strand cable," or "red strand rope," or "red strand cable"; and (2) its registered trade-mark, "Hercules," which it uses on its reels and on its tags upon its wire rope—and also for unfair competition. The defendants answered that the plaintiff's alleged trade-marks were void, that, if valid, they have not infringed them, that they had not been guilty of unfair competition, and that the plaintiff was estopped by the adjudication in its suit against the Broderick

Company, and by its words and acts from maintaining this suit. A large amount of evidence was gathered, a final hearing was had, the court below dismissed the suit, and the Leschen Company appealed. The plaintiff assigns eight errors.

The first and second specifications are that the court erred in failing to sustain the complaint and to grant the relief prayed therein. They are disregarded now, because they are so indefinite, and because those which follow specifically state the grounds of the appeal.

[1] The third and fourth specifications are that the court erred in that it failed to hold "upon the evidence that complainant's practice of painting red one of the strands of its wire rope created a trade-mark in favor of the complainant," of which the sale by defendants of wire rope having one strand painted yellow was an infringement, in view of the complainant's long-continued practice "of marketing its wire rope with one strand painted red under claim and notice of trade-mark therein." It is not very clear, from the pleadings, evidence, and brief, exactly what this strand trade-mark claimed by the plaintiff is; but it is reasonably certain that it is either (1) "a helical stripe or band, of uniform width and distinctive color, this color being usually red, and produced by painting one of the strands of the rope," as alleged in the complaint, or (2) a red helical stripe or band, of uniform width, produced by painting one of the strands of the wire rope red. If it is the former, it cannot be sustained, because such a stripe, without designation of its distinctive color, is not the subject of a trade-mark. If it were, one party might exclude all others from the use of every color on an article, although he used but one thereon himself. A colored strand, not restricted to any color, is not a valid trade-mark. *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 134 Fed. 571, 573, 67 C. C. A. 418, 420; *Samson Cordage Works v. Puritan Cordage Mills*, 211 Fed. 603, 604, 607, 128 C. C. A. 203. If it was the latter, and if that is a valid trade-mark, it is so because, and only because, it is limited to a red stripe or strand, and that limitation permits the use by others of wire ropes with strands of other colors, and the defendants do not infringe that trade-mark because they use a yellow strand.

The sixth specification is that the court ought to have held and decreed that the word "Hercules" constituted a valid trade-mark of the complainants, and that the defendants had infringed it. About the year 1886 the Leschen Company commenced to use as its trade-mark the word "Hercules" upon the reels containing its wire rope and on tags attached to the rope, and it has continued to do so ever since. It registered this word as its trade-mark of its wire rope under the acts of Congress on September 25, 1888, and again on January 23, 1906. From about the year 1900 to the present time the firm name of the defendants has been Hercules Manufacturing Company, and they have used and are using that name, cast upon various castings, which form parts of their stump puller and its appropriate equipment. From 1900 to 1909 they purchased from the plaintiff the Hercules red strand wire rope, which it manufactured to complete the equipment of their stump pullers. From 1908 until the present time they have purchased

of the Broderick Company the yellow strand wire rope, which it has made for the same purpose.

The complainant's claim of infringement is that, while using this yellow strand rope as a part of the equipment of its stump puller since 1908, the defendant sold and advertised for sale this wire rope and various fittings of its stump pullers, such as take-ups, couplings, hooks, etc., marked with the word "Hercules." The record discloses the fact that from 1900 to 1908, while the defendants were using complainant's wire rope, they advertised it as the Hercules wire rope, and used cuts of it furnished by the complainant for advertising purposes, and that at the same time they advertised and sold their stump pullers as the Hercules stump pullers. During this time the word "Hercules" frequently appeared in the advertising matter of the defendants to describe the red strand cable, and also to describe the stump puller. There is evidence in the record that in a few instances advertising matter was used by the defendants after 1908, while they were buying and selling the yellow strand cable, which tended to designate that cable as the Hercules cable. But, when all the evidence on this subject is considered, it discloses an earnest and persistent endeavor by the defendants to distinguish the yellow strand cable which it was using and selling from all others, and to sell it on its merits, and not on the merits of the Hercules cable.

Conceding that the complainant had a valid trade-mark for its wire rope in the word "Hercules," nevertheless that fact did not deprive the defendants of the right to the free use of that word to designate their firm and their stump puller, for neither the one nor the other was of the same class as the wire rope. Nor did the fact that the complainant had the exclusive right to the use of the word "Hercules" to designate the wire rope it made deprive the defendants of the right to buy, use, and sell, either with or without its stump puller, rope made by others. In view of the established facts that yellow strand wire rope might be lawfully used and sold, and was used and sold, by the Hercules Manufacturing Company as a part of the equipment of their Hercules stump puller, immediately after their use and sale of the Hercules wire rope with those stump pullers, it was natural and almost unavoidable that the name of the Hercules wire rope formerly used should creep, inadvertently for a time after the change, into the advertising of the yellow strand rope; but the evidence produced by the plaintiff falls far short of establishing any deleterious infringement by the defendants of the plaintiff's trade-mark "Hercules," and the sixth specification of error cannot be sustained.

The fifth, seventh, and eighth specifications are that the court erred in that it did not find that the defendants had been guilty of unfair competition by their use of the word "Hercules," by their use of red color, by their use of the words "colored strand," and by their use of the words "Grand Prize" in connection with the wire rope.

[2] The sale of goods by one manufacturer or vendor as those of another is unfair competition, and it constitutes a fraud which a court of equity may lawfully prevent by injunction. The fraud is the basis of the suit for such relief. The deceit, or the probable deceit,

of the ordinary purchaser, so that he buys, or probably will buy, the articles of one manufacturer or vendor in the belief that they are those of another, is an indispensable attribute of good cause for such a suit. The test of the existence of this attribute is whether the simulation of the other manufacturer's or vendor's goods will probably deceive a purchaser who exercises ordinary prudence, and the burden is on the plaintiff to prove the fraud by a substantial preponderance of the evidence. *Centaur Co. v. Marshall*, 97 Fed. 785, 788, 38 C. C. A. 413, 416; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 711, 712, 32 C. C. A. 324, 329, 330. The examination of the evidence relative to the use of the word "Hercules," to which reference has already been made, leaves no doubt that the defendants did not so use that word that it would be likely to deceive purchasers who used ordinary care.

The complaint of the use of red color rests on the fact that, while the defendants were using the red strand rope their advertising matter contained little red color beyond the color of the red strand of the rope in the cuts, while after it commenced to use the yellow strand rope it painted its stump pullers red and used the red color freely in its advertising. These facts, however, are not persuasive of fraudulent simulation, because in that advertising the defendants clearly showed that the rope they were selling was characterized by a yellow strand, and the contrast of the red of the stump puller and of the advertisements and the yellow strand in the rope would serve rather to give notice to purchasers that it was not Leschen Company's rope than to induce them to buy it in the belief that it was such.

Counsel complain of the use by the defendants of the words "colored strand." The Broderick Company, from whom defendants bought their yellow strand rope after 1908, has been making and selling it in competition with the Leschen Company's red strand rope since 1900. The Leschen Company originally advertised their rope as Hercules rope. From 1894 until 1904 they advertised it as "Hercules red strand" rope. From 1904, when they were pressing their suit against the Broderick Company for infringement of their claimed trade-mark, consisting of the distinctively colored streak, until 1912, they advertised it as "Hercules colored strand rope," and thereafter as "Hercules red strand rope." During the years from 1904 until 1908, while the defendants were buying and using the Hercules rope, they advertised and sold it, as did the plaintiff, as "colored strand" rope. After they commenced to buy and sell the yellow strand rope, instead of the red strand rope, they called the yellow strand rope colored strand rope in many of their advertisements and correspondence prior to the year 1912. In the year 1911 they discontinued the use of these words "colored strand" in advertising it, describing it, and corresponding about it. The yellow strand rope, however, was in fact a colored strand rope, the courts had decided that the plaintiff could have no trade-mark in a colored strand which was not restricted to any color, the defendants and their vendors, the Broderick Company, while they were using these words "colored strand," persistently and clearly represented the wire rope they were handling to be the yellow strand rope, both in their advertising matter and otherwise, and the evidence

upon this subject fails to satisfy that the defendants' use of the words "colored strand," when it is considered, as it must be, in connection with the use of all its advertising matter, probably induced, or would probably deceive the ordinary purchaser into, buying the yellow strand rope as the red strand rope of the plaintiff.

It is claimed that the defendants were guilty of unfair competition by reason of their use of the words "Grand Prize." In 1905 the St. Louis World's Fair awarded the Leschen Company a grand prize on "Cables and System of Power Transmission." Thereupon the Leschen Company and the defendants, who were purchasing and using its red strand rope, advertised and sold it as "Grand Prize" wire rope. In some of their catalogues and advertising matter issued between 1908 and 1912, when they were using and selling the yellow strand rope, the defendants represented it to be grand prize wire rope; but at the same time their catalogues and advertising matter clearly disclosed the fact that it was not red strand rope, but was yellow strand rope. Here, again, the court is unable to find from the evidence that the defendants' use of these words ever so deceived, or would probably deceive, an ordinary purchaser as to lead him to buy the yellow strand rope in the belief that it was the product of the plaintiff. Moreover, there is no evidence in the record that the plaintiff ever received a grand or any other prize on its red strand wire rope, and its application for an injunction against the use by the defendants of the probably mistaken designation by the plaintiff of its wire rope as grand prize rope does not appeal to the conscience of a court of equity with persuasive force.

A careful examination of the entire record in this case has led to the conclusion that there was no error or mistake in the disposition of this suit, and the decree below is affirmed.

SEGNA v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1914.)

No. 4058.

1. INDIANS (§ 38*)—INTRODUCING LIQUOR INTO INDIAN TERRITORY—CRIMINAL PROSECUTION.

Act March 1, 1895, c. 145, § 8, 28 Stat. 697, making it a criminal offense to introduce intoxicating liquor into Indian Territory, is still in force in the portion of Oklahoma which was at the time of its passage a part of the Indian Territory, and is enforceable by prosecution in the federal court.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. § 38.*]

2. CRIMINAL LAW (§ 1156*)—APPELLATE PROCEEDINGS—QUESTIONS REVIEWABLE—DENIAL OF NEW TRIAL.

The denial of a motion for new trial in a criminal case in a federal court is not a subject of review in an appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against A. Segna. Judgment of conviction, and defendant brings error. Affirmed.

J. H. Wilkins, of McAlester, Okl., and C. R. Hunt, of Wilburton, Okl., for plaintiff in error.

D. H. Linebaugh, U. S. Atty., and Frank Lee, Asst. U. S. Atty., both of Muskogee, Okl.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. Segna was convicted and sentenced for introducing intoxicating liquor into Latimer county, Okl., from without that state. It was charged that Latimer county was a part of the "Indian country." The only assignments of error are:

(1) The court erred in assuming jurisdiction to try and sentence defendant, since the alleged offense was charged to have been committed within the incorporated city of Wilburton, Okl., wherein the United States has no authority to enforce the statute against the introduction of intoxicating liquors.

(2) The court erred in overruling defendant's motion for a new trial, on the ground that the verdict was not supported by sufficient evidence.

[1] The first assignment cannot be sustained, whether regarded as an objection to the jurisdiction of the trial court or, as probably intended, that the indictment does not charge a public offense. In neither case does the assignment authorize a review of the evidence at the trial. Nor does it recite that any objection to the indictment was made in the court below by demurrer, motion to quash, motion for more particular statement, motion in arrest of judgment, or otherwise. For aught that appears, the objection is made here for the first time, and, in view of the method and time, all defects of form not going to the substance of the charge are waived. Latimer county is in the part of the state of Oklahoma that was formerly Indian Territory. It is well settled that section 8 of the act of March 1, 1895 (28 Stat. 693), is still in force so far as it prohibits the introduction of intoxicating liquor into the former territory from without the state. *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; *United States v. Wright*, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; *United States Express Co. v. Friedman*, 112 C. C. A. 219, 191 Fed. 673; *Schaap v. United States*, 127 C. C. A. 415, 210 Fed. 853; *Archard v. United States*, 129 C. C. A. 83, 212 Fed. 146; *Chambliss v. United States*, 218 Fed. 154, 132 C. C. A. 112, decided at this term. The indictment, aided by the verdict and the accompanying inferences, charges a violation of that statute, and the offense is one of which the trial court had jurisdiction.

[2] As to the second assignment of error: It is a long-established rule of federal practice that the denial of a new trial is not the subject of review in an appellate court.

The sentence is affirmed.

SILVA v. UNITED STATES

(Circuit Court of Appeals, Eighth Circuit. November 4, 1914.)

No. 4097.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against John Silva. Judgment of conviction, and defendant brings error. Reversed.

Guy L. Andrews, of South McAlester, Okl. (Jean P. Day, of McAlester, Okl., on the brief), for plaintiff in error.

Frank Lee, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The plaintiff in error was the defendant in the District Court. He was indicted, arraigned, pleaded not guilty, tried, found guilty, and sentenced for introducing whisky into the Indian country previously known as Indian Territory.

The defendant was engaged in running a grocery store at Krebs, Okl., four miles from McAlester. A deputy United States marshal and a plain clothes man from McAlester, together with two other men, went to the defendant's house and searched it for liquors, and there found in the cellar a jug partially filled with whisky, and about 3½ dozen quart bottles filled with the same commodity, and one or two pints or half pints. The bottles were of various shapes, round, flat, and square, and in general were in gunny sacks covered with newspapers. There was no evidence as to when the liquors were imported into the Indian Territory, but was slight evidence that one bottle had been imported from Ft. Smith, Ark.

The court gave the following instruction: "Now, the possession of whisky which the evidence shows was recently carried into this district, from without the state, not explained by any credible evidence inconsistent with the conclusion that the person in possession of it carried it into this district, is a circumstance pointing strongly to the conclusion that the person so in possession of such liquor carried it into this district." This instruction was without support in the evidence as to the recent importation of the liquor, and, following the case of *Ed Chambliss v. United States*, this day decided, 218 Fed. 154, 132 C. C. A. 112, this case is reversed and remanded, with directions to set aside the verdict and grant a new trial.

SIEBERT v. DAHLBERG.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1914.)

No. 3975.

BANKRUPTCY (§ 404*)—APPLICATION FOR DISCHARGE—FAILURE TO APPLY—SUBSEQUENT PROCEEDINGS.

Where more than six years before petitioner had been adjudged a bankrupt in a like proceeding in another jurisdiction, but failed to apply for and obtain a discharge within the time limited, the fact that whether the bankrupt had committed an act which barred his discharge, or whether the debts were of such a nature as to exempt them, was not affirmatively determined in the prior proceeding, did not render the bankrupt's omission equivalent to a dismissal without prejudice; it being *res judicata*, so as to bar the bankrupt from obtaining a discharge from such debts in a subsequent proceeding.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 679, 681-691; Dec. Dig. § 404.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

In the matter of bankruptcy proceedings of Gustav Adolph Siebert. S. W. Dahlberg having filed objections to the bankrupt's discharge, a limited order discharging him from certain debts was entered, from which he appeals. Affirmed.

Collins, Barker & Britton and A. P. Wagner, all of St. Louis, Mo., for appellant.

Abbott & Edwards, of St. Louis, Mo., for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an appeal by Siebert, a voluntary bankrupt, from a limitation of the order discharging him from his debts. More than six years previously he had been adjudged a bankrupt in a like proceeding in another jurisdiction, but failed to apply for and obtain a discharge within the time limited by the Bankruptcy Act. In the present case the trial court held that this failure to apply for and obtain a discharge operated as a decree by default that he was not entitled to it, and therefore as *res judicata* in respect of the debts then scheduled and provable. It accordingly qualified its order by excepting them. Whether the bankrupt had committed an act which barred his discharge or whether the debts in question were of such a nature as to exempt them was not affirmatively determined in the first proceeding. The trial court attached that consequence solely because the bankrupt failed to move to a discharge.

It is argued that the failure was equivalent to a dismissal without prejudice, leaving the bankrupt free to renew his effort in a subsequent proceeding. There is force in the argument, but it is foreclosed in this court. *Kuntz v. Young*, 65 C. C. A. 477, 131 Fed. 719; *Romine v. Miller*, 89 C. C. A. 664, 163 Fed. 1022. The authorities generally are the same way. See *In re Kuffler*, 80 C. C. A. 508, 151 Fed. 12; *Id.* (D. C.) 144 Fed. 445; *In re Silverman*, 85 C. C. A. 224, 157 Fed. 675; *Pollet v. Cosel*, 103 C. C. A. 68, 179 Fed. 488, 30 L. R. A. (N. S.) 1164; *In re Bacon*, 113 C. C. A. 358, 193 Fed. 34; *In re Weintraub* (D. C.) 133 Fed. 1000; *In re Elby* (D. C.) 157 Fed. 935; *In re Bramlett* (D. C.) 161 Fed. 588; *In re Schnabel* (D. C.) 166 Fed. 383; *In re Von Borries* (D. C.) 168 Fed. 718; *In re Pullian* (D. C.) 171 Fed. 595; *In re Stone* (D. C.) 172 Fed. 947; *In re Levenstein* (D. C.) 180 Fed. 957; *In re Westbrook* (D. C.) 186 Fed. 414.

The order is affirmed.

VAN WIGINTON v. PULITZER PUB. CO.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1914.)

No. 4018.

1. LIBEL AND SLANDER (§ 56*)—PORTRAITS—PUBLICATION—GOOD FAITH—PARTIAL DEFENSE—DAMAGES.

Where defendant published plaintiff's portrait as that of another in connection with an article describing efforts of such other to save her father from suffering the death penalty imposed on him for murder, the fact that the mistake was committed innocently was not a complete defense to plaintiff's action for libel, but bore only on the measure of damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 153-156; Dec. Dig. § 56.*]

2. LIBEL AND SLANDER (§ 123*)—PORTRAITS—PUBLICATION—SPECIAL DAMAGE.

Where defendant innocently published plaintiff's portrait in connection with an article relating to the work of another young woman to save her father from execution for murder, there was an imputation that the original of the picture was the person mentioned in the text; and as this might tend to prejudice the respectable portion of society against plaintiff, it could not be said as a matter of law that she suffered no injury, and hence she was entitled to go to the jury on the question of damages, without proof of special damage.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Myrtle Van Wiginton against the Pulitzer Publishing Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

C. M. Rice, of St. Louis, Mo. (Lewis & Rice, of St. Louis, Mo., Watkins & Vinson, of Little Rock, Ark., and A. T. Dumm, of Jefferson City, Mo., on the brief), for plaintiff in error.

John F. Green, of St. Louis, Mo. (Judson, Green & Henry, of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and POPE, District Judge.

HOOK, Circuit Judge. This was an action by Myrtle Van Wiginton against the Pulitzer Publishing Company for libel. When the evidence was in, the trial court directed a verdict for the defendant.

[1] The defendant published in its newspaper of wide circulation an article from a correspondent in Arkansas under these headlines:

"Girl, 14, Pleads to Save Father from Gallows.

"Lizzie Pierce Interests Little Rock Charity Workers in Her Cause."

The article stated with some detail that one Henry Pierce had been convicted and sentenced to be hanged for the murder of his wife; that his defense was that he discovered she was unfaithful and that the shot that killed her was intended for her paramour; that Lizzie Pierce, his daughter, and stepdaughter of the murdered woman, had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

come from a distance to appeal to the Governor of the state to save him from the death penalty by commuting his sentence to imprisonment for life. Under the descriptive heading, "Girl Working to Save Father from Gallows," was a picture of Myrtle Van Wiginton, the plaintiff, who was in no way related to the Pierces and had nothing to do with the crime or the effort for clemency. She was 17 years of age and just out of school.

The evidence at the trial tended strongly, if not conclusively, to show that the newspaper correspondent acted innocently, but in his effort to obtain a photograph of Lizzie Pierce was deceived by the photographer, who gave him one of the plaintiff instead. For that reason the trial court directed a verdict for defendant. If the misuse of plaintiff's picture in the way indicated is actionable, the lack of knowledge and of bad intent of the defendant and its correspondent bears upon the measure of damages, but is not a full defense. In *Peck v. Tribune Co.*, 214 U. S. 185, 189, 29 Sup. Ct. 554, 555 (53 L. Ed. 960, 16 Ann. Cas. 1075) the court said:

"There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril.' * * * The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false, or are true only of some one else."

[2] The real question in the case is whether the plaintiff, who offered no proof of special damage, was nevertheless entitled to have her case considered by the jury. When the picture of one person is used as that of another, whose character, conduct, or relations are made the subject of a publication, the imputation is that the original of the picture is the person mentioned in the text. In this case the imputation was that the plaintiff was the daughter of a convicted murderer, the circumstances of whose crime and defense were as set forth in the published article. Many statements in writing or print are actionable that would not be so in the case of spoken words. This distinction between libel and slander is well settled, and is due largely to the greater definiteness, wider circulation, and permanence of the former, and because the deliberation which generally precedes it gives more apparent verity to the false accusation and results in more general belief.

In the law of libel the social standing of a person is regarded as of value, and damage is implied from a false and unprivileged publication which tends to impair it, to make him contemptible or ridiculous, or to deprive him of the confidence, good will, or esteem of his fellow men. In determining whether the false imputation tends to impair the social standing of a person, or to affect injuriously his opportunities of social intercourse, the customs and standards of society are to be regarded. In other words, society is to be taken as it is, with its recognized prejudices, without determining whether they

are well founded in reason or justice. For example, all reasonable persons would agree that grave injury might be done by falsely and widely publishing of a young woman of good character that she was the illegitimate daughter of dissolute, criminal parents, though the social prejudice excited against her personally could not be sustained in reason.

It is not essential, however, that all who read the publication should be alike affected. In *Peck v. Tribune Co.*, supra, the libel consisted of an advertisement in defendant's newspaper of a brand of whisky, with a recommendation stated as based on personal experience and use by a woman described as a nurse. Her name and also what purported to be her portrait were given. The plaintiff, whose picture was used without authority, was neither a nurse nor a user of whisky or other intoxicating liquors. It was urged that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable; but the court said:

"If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote."

It was held she was entitled to have her case go to the jury.

It is argued that plaintiff has no stronger case than if her father had been libeled—that the libel of a parent gives no cause of action to a child. But it may be otherwise when, as here, she is individually featured in the publication and the relationship is made prominent. We think it is commonly recognized that the disgrace of a criminal is not infrequently visited upon members of his family, who have gained no independent position for themselves. The social standing of a young woman may be affected to an appreciable degree by the evil repute of her parents. At any rate, it cannot be said as matter of law that she suffers no injury. Nor is it a complete defense that all who were personally acquainted with plaintiff knew she was not the daughter of Henry Pierce. Without more, that would take no account of those who, as in every walk in life, know by appearance only.

The judgment is reversed, and the cause remanded for a new trial

WILLIAMS et al. v. WHITE et al.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1914.)

No. 4138.

INDIANS (§ 27*)—INDIAN LANDS—POSSESSION—RECOVERY—POWER OF ATTORNEY.

A power of attorney, executed by the surviving husband and sole heir of a full-blood Choctaw allottee, himself a full-blood Indian, conferring on the grantees the right to possession, profits, etc., of the allotment, whether valid or invalid, was insufficient to entitle the grantees to maintain ejectment to recover possession in their own names.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Ejectment by Eli P. Williams and others against William R. White and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Napoleon B. Maxey, of Muskogee, Okl., for plaintiffs in error.

J. E. Whitehead, of McAlester, Okl., for defendants in error.

C. C. Herndon, Asst. U. S. Atty., of Muskogee, Okl., in support of the judgment below.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. This was an action in ejectment to recover possession and the rental value of lands in Oklahoma which had been allotted and patented to Mary Charley as a full-blood member of the Choctaw Nation of Indians. The plaintiffs Williams claim under written instruments, called powers of attorney, executed by David Charley, the surviving husband and sole heir of the allottee, deceased, and by them. The trial court sustained a demurrer to their petition, and rendered judgment for the defendants. The question argued is whether the instruments are contrary to the restrictions upon the disposition of such lands contained in the acts of Congress. The government was allowed to present a brief in opposition to the plaintiffs.

The patents to the allottee were issued in 1905. The instruments in question were executed April 20, 1907. Section 15 of the Choctaw Supplemental Agreement provides that lands allotted to members "shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided." Section 16 provides that lands allotted to members, excepting homesteads, shall be alienable, one-fourth in acreage in one year from date of patent, one-fourth in three years, and the balance in five years, for not less, however, than its appraised value, if before the expiration of the Choctaw and Chickasaw tribal governments. Act July 1, 1902, c. 1362, 32 Stat. 641. Section 22 of the act of April 26, 1906 (34 Stat. 137, c. 1876), authorizes the sale and conveyance of inherited allotments by adult heirs, subject to the approval of the Secretary of the Interior in case the heirs are full-blood Indians. David Charley, the heir, was an adult and a Choctaw Indian of the full blood. No approval by the Secretary of the instruments in question appears.

Each of the instruments is in eleven sections. The first section gives the plaintiffs, as agents of David Charley, full, sole, and absolute power to do any and all acts, at any time, that he could lawfully do with reference to the inherited lands. By the second he assigns, transfers, and delivers to them all rights to possession and improvements, and agrees within three years to put them in actual and absolute possession, they to advance him \$50 on the instrument, and should he fail to furnish possession they are authorized to acquire it, and to do what in their opinion is necessary to that end. They agree to rent, manage, and look after the same. They are given full, sole, and absolute authority to col-

lect and receive all moneys, rents, and income, and are to account to him for the same during his life, and to his heirs, executors, and administrators after his death, less expenses and 8 per cent. on collection for services. He agrees not to assign or transfer any part of the income. By section 3 he sells and transfers to them "an absolute interest in fee simple in all of the rents," and in all of the improvements, and he agrees that "this power of attorney is coupled with an interest in all of said rents and improvements." Section 4 is:

"I hereby sell, convey, and transfer to my agents an absolute interest in fee simple in all and any part of said lands that I can lawfully sell or alienate."

By section 5 they are given "full, sole, and absolute power," whenever he would be qualified under the law, to sell and convey the lands in fee simple on such terms and conditions as they see fit, for cash or on time, and to receive the proceeds. By section 6 the instrument is to continue in full force until December 31, 1939, and is not to be terminated by his prior death. Section 7 provides that the survivor or survivors of the plaintiffs shall have sole and absolute power. By section 8 they are given full, sole, and absolute power to bring or defend, in their names or in his, at their option, lawsuits relating to the lands and improvements and the income therefrom, and to dismiss the same. By section 9 it is agreed that the \$1 named in section 1 and the \$50 to be paid under section 2 are valuable and sufficient considerations to make all the parts of the instruments binding obligations upon him, and also upon the lands, improvements, and income. Section 10 provides that, if any one or more of the provisions of the instrument should be declared void or inoperative, the legal force and effect of the balance shall not be affected. In section 11 the instrument is made irrevocable, except upon agreement of all the parties.

It is quite apparent that the instruments contain much that is contrary to the letter and spirit of the acts of Congress. Though following the ordinary form of power of attorney by a person *sui juris*, they attempt to put aside the government's guardianship, to take from the Indian, its ward, the possession of his property, and to deprive him of all voice in its disposition. They even attempt to make their power irrevocable without their consent, as though they had an interest in the estate itself. The allotment of tribal lands in severalty and the restraints upon alienation and incumbrance were intended by Congress to instill into the Indians habits of thrift and industry and a sense of independence, and to protect them in the meantime from improvident contracts. To uphold the instruments as framed would clearly frustrate the object of the legislation which should not be narrowly or shrewdly construed. The plaintiffs evidently intended to go the whole length, if the instruments were not attacked, and, if attacked, then as far as they could. Their validity being questioned, counsel therefore invoke the doctrine respecting the separability of legal from illegal provisions in a contract. We need not consider whether those asserting an instrument of such evident scope and purport can impose upon a court the duty to sift out and sustain for their benefit the features that are

not objectionable. It is sufficient to say that, if any part of the instruments is valid, it would not authorize plaintiffs to maintain in their own names an action like this against the defendants. So many devices had been adopted to defeat the intent of the acts of Congress respecting Indian allotments that by section 5 of the act of May 27, 1908 (35 Stat. 312, c. 199), it was declared:

"That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

The case at bar does not require the application of this statute.
The judgment is affirmed.

BALL et al. v. SHELDON (two cases).

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

Nos. 105, 106.

1. HUSBAND AND WIFE (§ 232*)—ACTIONS FOR INJURIES—EVIDENCE.

Where a married woman's action for personal injuries and her husband's action for expenses incurred and for the loss of her services and companionship were tried together, her testimony as to the number of their children was material on the question of the husband's expenses and therefore properly admitted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 844-848, 981; Dec. Dig. § 232.*]

2. TRIAL (§ 83*)—EVIDENCE—SUFFICIENCY OF OBJECTIONS.

In an action for personal injuries, plaintiff's testimony that her hearing was impaired prior to the accident, but that the condition was stationary, and not progressive, until the accident, after which it became very much worse, was properly admitted over the objection that it was a conclusion, and that it was incompetent, irrelevant, and immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193-210; Dec. Dig. § 83.*]

3. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—MOTIONS TO STRIKE OUT.

Where testimony properly admitted over objection subsequently becomes incompetent, the proper remedy is to ask the court to direct the jury to disregard it, and not to move to strike it out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

4. EVIDENCE (§ 574*)—PERSONAL INJURIES—CERTAINTY—EXPERT EVIDENCE.

In an action for personal injuries, the testimony of an expert witness for plaintiff that plaintiff's increased deafness might have resulted from the accident, but that he could not say so with certainty, did not render incompetent testimony previously admitted as to such increased deafness, as in New York the "reasonable certainty" rule applicable to the testimony of medical experts is confined to developments apprehended in the future, and does not apply to conditions present at the time of the trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

In Error to the District Court of the United States for the Southern District of New York.

C. S. Petrasch, of New York City, for plaintiffs in error.

C. H. Tuttle, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. February 17, 1913, Mabel M. Sheldon, while crossing Broadway at Thirty-Second street, was knocked down at or near the curb on the west side by a wagon coming south down Broadway belonging to Best & Co., the defendants. Two actions were begun in the District Court, one by Mr. Sheldon to recover damages for expenses incurred and for loss of the services and companionship of his wife and one by the wife to recover damages for her personal injuries. Both cases were by agreement tried together. The jury rendered verdicts in favor of the plaintiffs, and these are writs of error to the judgments entered thereon.

[1] The plaintiffs in error contend that the judgments should be reversed because after the court, following *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, sustained an objection to the question addressed to Mrs. Sheldon, "How many children have you had?" she several times thereafter in her testimony referred to the children. The defendants objected on the ground that the testimony was immaterial; but it was material in the husband's case on the item of his expenses, and as both cases were tried together it was properly admitted.

[2] The only other exception we think necessary to consider is that taken to the admission of testimony that the wife's hearing was affected by the accident. It is true that there was no specific allegation in the complaint as to any impairment of hearing, but the testimony was not objected to on that ground. Mrs. Sheldon testified that she had suffered from an impairment of her hearing resulting from an attack of diphtheria many years before her marriage, but said that the condition was stationary, and not progressive, until the accident, after which the deafness in her right ear became very much worse. The only objection taken was that this was a conclusion on her part, and that the testimony was incompetent, irrelevant, and immaterial. These objections were rightly overruled.

[3, 4] Subsequently Dr. Ewing, an expert witness on behalf of the plaintiffs, testified that the increased deafness in Mrs. Sheldon's right ear might have resulted from the accident, although he could not say so with certainty. Thereupon defendants' counsel moved to strike out all the testimony as to impairment of hearing, on the ground that it was not connected with the accident, which the court denied, and the defendants excepted. The correct practice, when testimony properly admitted over objection has subsequently become incompetent, is not to move to strike it out, but to ask the court to direct the jury to disregard it. *Marks v. King*, 64 N. Y. 628; *Holmes v. Moffatt*, 120 N. Y. 159, 24 N. E. 275. However, Dr. Ewing's testimony that the increased deafness might have been due to the accident did not make the testimony previously admitted incompetent. The Court

of Appeals of New York has several times decided that the "reasonable certainty" rule applicable to the testimony of medical experts is confined to developments apprehended in the future, and does not apply to conditions present at the time of testifying. *Cross v. City of Syracuse*, 200 N. Y. 393, 94 N. E. 184, 21 Ann. Cas. 324.

It was quite proper to permit Mrs. Sheldon and other witnesses to say what they had noticed in respect to her hearing after, as compared with it before, the accident. The injuries were chiefly on the right side of her face and head, and the jury were entirely competent to determine whether there was an increase of deafness in the right ear after the accident, and, if so, in view of Dr. Ewing's testimony whether it was due to the accident.

The judgments are affirmed.

JUSTICE v. EMPIRE STATE SURETY CO.

(Circuit Court of Appeals, Third Circuit. December 4, 1914.)

No. 1813.

PRINCIPAL AND SURETY (§ 117*)—BUILDER'S CONTRACT—BOND—FUNDS—FAILURE TO RETAIN—DISCHARGE OF SURETY.

Where a building contractor's bond provided that the owner should make specified payments during the progress of the work, but should retain not less than 10 per cent. of all payments for work performed and materials furnished until the complete performance of the contract, but the owner did not retain the 10 per cent., and prior to the contractor's default he paid \$2,000 more than the advance payments, there was a material alteration of the contract, for which the surety was discharged.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

Discharge of surety on building contract by change in obligation or duty of principal, see notes to *United States v. Walsh*, 52 C. C. A. 427; *O'Neill v. Title Guaranty & Trust Co.*, 113 C. C. A. 214; *United States Fidelity Co. v. United States*, 116 C. C. A. 196.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by George L. Justice against the Empire State Surety Company. Judgment for defendant (209 Fed. 105), and plaintiff brings error. Affirmed.

W. W. Montgomery, Jr., and Sydney Young, both of Philadelphia, Pa., for plaintiff in error.

Hepburn, Carr & Krauss, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

BUFFINGTON, Circuit Judge. In this case George L. Justice, a citizen of Pennsylvania, brought suit to recover some \$5,000 from the Empire State Surety Company, a corporation of New York, as surety

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on a building contract bond given by one Maguire, a contractor, to the plaintiff. The bond stipulated:

"That the obligee shall retain not less than ten per centum of all payments for work performed and materials furnished in the performance of said contract, until the complete performance by said principal of all the terms, covenants, and conditions thereof on said principal's part to be performed."

The proofs showed plaintiff had, during the progress of the work, paid some \$11,700 on his buildings as provided for without retaining the 10 per cent. stipulated for as above. He had also, as the work progressed, advanced \$2,000 to the contractor, which was not payable until the completion of the contract. The contractor then defaulted, and the plaintiff completed the building at a sum in excess of the contract price. On the trial the court, holding that:

"Under the terms of these contracts, as I construe them, the owner has materially varied the terms of the contract. There has been a substantial, material variance of the terms of the contract; and inasmuch as he has not complied with the terms of the contract, I hold the surety is released from any obligation of the contract of suretyship"

—instructed the jury to find for the surety company. This instruction is here assigned as error. In *Prairie State Bank v. United States*, 164 U. S. 233, 17 Sup. Ct. 145, 41 L. Ed. 412, it was held that a stipulation in a building contract for retention of a certain part of the price until completion of the work "raises an equity in the surety in the fund to be created." It was further held "that a disregard of such stipulation by the voluntary act of the creditor operated to release the sureties." In that case the court cited *Polak v. Everett*, 1 Q. B. D. 669, that:

"The surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not. The surety is entitled to remain in the position in which he was at the time the contract was entered into."

And further:

"That it is a thoroughly safe and sound principle that, when the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is sound doctrine, which ought not to be impeached, and cannot be impeached, because it is established by authority."

Holme v. Brunskill, 3 Q. B. D. 495, was also cited:

"* * * That if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that, if he has not so consented, he will be discharged."

The retention of the payments deferred until the completion of the undertaking, and of the 10 per cent. to be retained until the complete performance by the principal of all the terms, covenants, and conditions of the contract, created a fund in the hands of the plaintiff, wherein the surety had an equity, of which it could not be deprived

without its consent. Our own case, *Fidelity Co. v. Agnew*, 152 Fed. 955, 82 C. C. A. 103, is to the same effect.

Moreover, the advancements are so large and substantial that it may be accepted as self-evident that the alteration by the plaintiff proved prejudicial to the surety, if such showing should be deemed important. There was, therefore, nothing to leave to the jury, and we think the judge below was right in giving binding instructions, and holding, as he did, that:

"For the reasons stated in *Prairie State Bank v. United States and Fidelity Co. v. Agnew*, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variation from the terms of the contract."

CHESKO et al. v. DELAWARE & HUDSON CO.

(Circuit Court of Appeals, Third Circuit. December 4, 1914.)

No. 1843.

1. NEGLIGENCE (§ 33*)—INJURIES TO CHILDREN—DANGEROUS PREMISES.

Where plaintiff, a boy of six, wandered from the street through an open door and into defendant's machine shop, and was there accidentally injured, he was too young to be a trespasser.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

2. NEGLIGENCE (§ 25*)—INJURIES TO CHILDREN—DANGEROUS PREMISES—DUTY TO GUARD.

Where defendant railroad company maintained a machine shop on a lot six feet back from a much-traveled street in the city, and the moving machinery was visible from the sidewalk through a wide double door, which was kept open in summer, and such machinery was attractive to children passing the shop, defendant was under a common-law duty to so guard the premises that children should not approach the machinery and be injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 35-38; Dec. Dig. § 25.*]

3. COURTS (§ 365*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where there is no uniform and settled line of decisions of a state court as to the duty of the owner of a dangerous, attractive, and accessible workshop towards a child wandering into it, a federal court has the duty of deciding independently what the common law is.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by Alvin Chesko, by his father and next friend, Thomas Chesko, and by Thomas Chesko, in his own right, against the Delaware & Hudson Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Welles & Torrey, of Scranton, Pa., for plaintiff in error.

Joseph O'Brien, John P. Kelly, William J. Fitzgerald, and James F. Bell, all of Scranton, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUFFINGTON, Circuit Judge. This suit was brought by Thomas Chesko, in his own right, and as the father and next friend of Alvin Chesko, a minor, citizens of Pennsylvania, against the Delaware & Hudson Company, a corporate citizen of New York. It was for damages suffered by said minor coming in contact with the revolving cogwheels of a machine in the machine shop of defendant. At the trial the court denied defendant's request for binding instructions. The jury found verdicts for the plaintiff in his own right and in right of the boy. Judgment being entered thereon, defendant sued out this writ.

The question here involved, as stated by the defendant, is:

"Does defendant, under the facts in this case, owning and operating a machine shop located on a much-traveled thoroughfare, owe any duty to protect an infant, trespassing upon the property, by reason of the operation of dangerous machinery?"

The evidence tended to show that the defendant had a machine shop located about six feet back from a much-traveled street in the city of Scranton. Its moving machinery was visible from the sidewalk through a wide double door. This door was kept open during warm weather, and there was no guard, rail, or screen to prevent the entry of children. The proofs showed that at different times preceding the accident children were permitted to enter through this open door. On the day of the accident plaintiff's son, six years old, Alvin, entered this open door in company with an older lad, and while watching the men at work Alvin's hand was caught by an unguarded revolving cogwheel and injured.

The pleadings alleged it was—

"the duty of the defendant to maintain said machinery so that it might not attract to the same children who might be lawfully passing along said street; to refrain from inviting, permitting, allowing, or suffering children as aforesaid to come at or near said machinery; to maintain said machinery in such condition that it might not injure any person who might be lawfully near the same, and to properly guard said machinery; and to guard the gates, doorways, and entrances to said machine shop, where said dangerous machinery was, in order that children of tender years, like said plaintiff, Alvin Chesko, could not get near, about, upon, and around said machinery."

It will thus be seen that the legal question involved in this case is whether, under the situation here disclosed, it was the duty of the defendant—

"to guard the gates, doorways, and entrances to said machine shop, where said dangerous machinery was, in order that children of tender years
* * * could not get near, about, upon, and around said machinery."

In that respect the court below charged:

"It is but to be expected that a place such as that of the defendant would prove interesting and attractive to children, and, taking into consideration the location and exposure, I will ask you to determine whether the defendant used and exercised such judgment and care under the circumstances as a person of ordinary prudence would use in warding off children and guarding them against the danger that the allurements of the place might offer."

The verdict settled those questions against the defendant. Was the court in error in refusing defendant's point that:

"Under all the evidence in this case, the plaintiff, Alvin Chesko, was a trespasser upon defendant's property, and, there being no evidence that the defendant intentionally or wantonly injured him, your verdict must be for the defendant."

[1] As the injured lad was but six years old at the time, we may say, as we did in *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 8, 94 C. C. A. 369, 376 (40 L. R. A. [N. S.] 367);

"In the case before us it is not necessary to consider at what age an infant may be of such discretion as to be responsible in a case like the present for contributory negligence, or for conduct which, in case of sufficient discretion, would make him or her a trespasser. Fannie Friedman, the plaintiff, at the time of the accident, was only 4½ years old, and there can be no question that, in the eyes of the law, by reason of her age, she lacked that discretion which would make her responsible for her conduct. She was legally incapable of contributory negligence, or of being a trespasser."

[2] The boy's age being such as precluded him being regarded as a trespasser, what was the duty of the defendant to him? This, as said in *Snare & Triest Co. v. Friedman*, supra, is—

"not a question of statute law, or of title to land, or of merely local law or custom, but belongs to that domain of jurisprudence * * * which prevails generally in all states and countries where the common law is recognized, and is so often referred to in the decisions of the Supreme Court."

In view of the common-law duty, as declared by the Supreme Court of the United States in *Railroad Co. v. Stout*, 84 U. S. (17 Wall.) 657, 21 L. Ed. 745, and *Union Pacific R. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the court below committed no error in holding the defendant owed a duty to guard the little boy against the attractive dangers the place presented to his childish interest and curiosity. It is said, however, such view is in conflict with the decisions of the Supreme Court of Pennsylvania on that question. As clearly pointed out by Judge Gray, speaking for this court in *Snare v. Friedman*, supra, where the same contention was made in reference to the decisions on this question by the Court of Errors and Appeals of New Jersey:

The court below "was not bound by the decision of the state court in such a case, although judicial comity might require it to bow to a line of decisions so uniform and well settled, and extending through so long a time, as to establish a rule of conduct which 'it would be wrong to disturb.'"

We are referred to the case of *Thompson v. B. & O. R. R. Co.*, 218 Pa. 444, 451, 67 Atl. 768, 770 (19 L. R. A. [N. S.] 1162, 120 Am. St. Rep. 897, 11 Ann. Cas. 894), where the Supreme Court of Pennsylvania, in 1907, said:

"The doctrine (referring to *Railroad Co. v. Stout*, 84 U. S. [17 Wall.] 657 [21 L. Ed. 745]) is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission. We are of opinion that it is not sound in principle and that it cannot be sustained."

[3] Without entering upon a discussion of the Pennsylvania decisions, and restricting ourselves to referring to the prior decisions of that court, all of which will be found cited at length in the dissenting opinion in the *Thompson Case*, and having in view the subsequent deci-

sions of that court in *Henderson v. Continental Co.*, 219 Pa. 387, 68 Atl. 968, 123 Am. St. Rep. 668, and *Millum v. Lehigh Ry. Co.*, 225 Pa. 215, 73 Atl. 1106, it is clear to us that there is no such line of decisions of the Supreme Court of Pennsylvania, defining the duty of one situated as was this defendant toward a small child wandering into its machine shop, of so uniform, settled, and continuous a character as would be binding upon a federal trial court, or relieve it from the duty of itself independently deciding what the common law was. In that respect the trial judge in substance held that, when one places near a much-used street dangerous machinery calculated to attract children, he thereby subjects himself to the duty of protecting such children against the temptation he places before them, by suitably guarding the place of danger. To so hold is but to follow that maxim which is as old as the law itself, "*Sic utere tuo ut alienum non lædas*"—so use your own as not to injure another.

The judgment below is therefore affirmed.

WELD v. McKAY et al.

(Circuit Court of Appeals, Seventh Circuit. November 6, 1914.)

No. 2133.

1. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS.

The rule that the chancellor's findings will be presumed correct, unless the record shows plain error in considering the evidence, or in applying the law, resulting in manifest injustice, is applicable, though the pertinent issue of fact has been determined solely on the testimony of a single interested witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. BANKRUPTCY (§ 175*)—PROPERTY OF BANKRUPT—TRANSFER TO WIFE—PREFERENCES.

Except as prohibited by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (Comp. St. 1913, § 9585 et seq.), a husband may prefer his wife as a creditor, in the absence of actual or constructive fraud, to which she is a party; and, while such transactions are subject to the keenest scrutiny, they are not ipso facto illegal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

3. BANKRUPTCY (§ 182*)—TRANSFER BY HUSBAND TO WIFE—FRAUD—PRESUMPTION.

The presumption arising against the good faith of a conveyance made by a failing husband to his wife is merely a presumption of fact, there being no presumption of law against the validity of such transfer, which will stand if the bona fide character of the transfer is shown by clear and convincing proof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

4. BANKRUPTCY (§ 303*)—CONVEYANCE BY HUSBAND TO WIFE—BONA FIDES—PROOF.

The bona fide character of a conveyance by a failing husband to his wife may be established by the uncorroborated testimony of the husband or wife.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. BANKRUPTCY (§ 181*)—TRANSFER BY HUSBAND TO WIFE—CHARACTER OF INSTRUMENT—DEED AS MORTGAGE.

A finding that a transfer by a failing husband to his wife to secure his indebtedness to her, though absolute in form, was in fact a mortgage, did not establish that it was fraudulent and illegal as against creditors, where she did not attempt to hold the property or its value, irrespective of the amount of her husband's debt justly due to her.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. § 181.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Creditor's bill by William Weld, administrator with the will annexed of the estate of Theodore B. Casey, deceased, against James R. McKay, individually and as trustee under the will of Elizabeth M. McKay, deceased, James M. McKay, individually and as trustee under the will of Elizabeth M. McKay, deceased, and others. Decree for defendants and complainant appeals. Affirmed.

William D. Elliott, of Rochester, N. Y., and William E. Lamb, of Chicago, Ill., for appellant.

Nathan G. Moore of Chicago, Ill., for appellees.

Before SEAMAN and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

PER CURIAM. Appellant filed a creditor's bill, based upon a judgment for \$62,500, to recover certain lands from the estate of the wife of one of the judgment debtors. The decree denied the prayer of the bill. The chancellor found the material facts as follows:

That on June 17, 1903, said James R. McKay owned lots 12, 13, and 14, and the north one-half of lot 15, in block 51, in Elston's addition to Chicago, situated on Goose Island, Chicago, and on that date conveyed said property, the only consideration therefor being the indebtedness mentioned below, to his wife, Elizabeth M. McKay, by mesne conveyance through Frederick T. Hoyt, subject to a mortgage of \$7,500.

That prior to the time of said conveyance said Elizabeth M. McKay had loaned money to her husband, James R. McKay, on several occasions, as follows: On February 21, 1895, she mortgaged certain property owned by her at 27 East Ohio street, Chicago, and occupied by herself and her husband as a homestead, for the sum of \$10,000, and turned the money over to her husband; on January 24, 1902, she paid off \$2,500 of the principal of said mortgage; and on February 1, 1902, she paid off \$2,500 of the principal of a \$10,000 mortgage indebtedness of her husband's, secured by a mortgage on his aforesaid Goose Island property. Out of said transaction an indebtedness arose from said James R. McKay to his wife, which on June 17, 1903, was a valid and subsisting indebtedness for the principal sum of \$12,500, with interest as hereinafter provided, which it was understood between them, at the time of said transactions, was to be paid out of the proceeds of said property.

That said James R. McKay made said conveyance in view of his liability on said Chapin Brokerage Company contract, and because of it, and said conveyance left said James R. McKay insolvent and unable to pay the whole, or any substantial part, of his indebtedness to said Theodore B. Casey.

That said conveyance was not made or accepted as a present satisfaction of the aforesaid indebtedness, and after the conveyance of said property said James R. McKay kept up all interest payments on the \$7,500 mortgage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on said property, and also on the \$7,500 mortgage on his wife's Ohio street property, until the death of his wife in May, 1905, but all taxes on said premises after said conveyance were paid by said grantee.

That said conveyance was made to protect and secure his wife for the aforesaid indebtedness, with the intention that as soon as said property was sold the proceeds should be applied in satisfaction of said indebtedness. That said conveyance was a lawful preference given to Mrs. McKay as a legal creditor of her husband, and was not illegal, fraudulent, or void as to the complainant, as alleged in the bill of complaint; but complainant is entitled to the surplus proceeds of said property, if any, over and above the amount required to reimburse the estate of Mrs. McKay the principal of said advances by her, the charge created by her on her own property for his benefit, as herein stated, all subsequent carrying charges, with interest thereon, and interest on such advances and payments, the amount thereof to be determined upon an accounting as hereinafter provided.

[1] The facts found by the chancellor will be presumed correct, unless the record shows an egregious blunder in the consideration of the evidence, or an error in the application of the law, resulting in manifest injustice. *Beamer v. Werner*, 159 Fed. 99, 86 C. C. A. 289; *Harper v. Taylor*, 193 Fed. 944, 113 C. C. A. 572.

The pertinent issue of fact was determined solely upon the testimony of James R. McKay, and counsel urges that the foregoing rule applies only where there is a conflict in the evidence. This is not so. The evidentiary facts may all be made known from the mouth of a single witness, and yet the ultimate fact as determined by the chancellor is just as persuasive as if the evidentiary facts had come from many witnesses.

[2] It is also urged that (conceding this court will not disturb the findings of fact of the trial court) a question of law is involved; that under the law of Illinois there is a presumption of law against the validity of conveyances from husband to wife, where the husband is in failing circumstances. Here, too, counsel are in error. It is lawful, in Illinois and elsewhere (save as prohibited by the Bankruptcy Law), for a failing debtor to prefer one or more of his creditors to the exclusion of the others. It is also lawful for a husband to prefer his wife as a creditor, in the absence of fraud, actual or constructive, to which she is a party. Such transactions, it is true are subject to the keenest scrutiny; but they are not ipso facto illegal.

[3] There is, perhaps, a presumption against the bona fides of a conveyance made by a failing husband to his wife; but it is merely a presumption of fact, negating the idea of a valid consideration, and the burden is upon the wife to support her right by clear and convincing proof. But, that done, the transaction is purged of all corruption. There is no presumption of law against the validity of such a transfer which will stand against established facts to the contrary.

[4] Moreover, the facts may be shown by the uncorroborated testimony of the husband or wife. Otherwise, in such cases they would be incompetent witnesses. There is no statute or principle of law which prevents them from testifying.

At the trial evidence was offered tending to prove a valid consideration for the transfer which was attacked, and nothing to the contrary.

[5] The finding that the transfer, though absolute in form, was a

mortgage, does not stamp it as fraudulent and illegal as against creditors. Such is never the case, save possibly where the grantee, with knowledge of that fact, attempts to hold the property to its full value, irrespective of the amount of the debt justly due.

Only questions of fact are presented by the assignment of errors in this case, and no error appearing in the application of the law, and no serious mistake appearing to have been made in the consideration of the evidence, the finding of the chancellor will not be disturbed.

The decree must be affirmed, with costs against the appellant; and it is so ordered.

WOODWARD et al. v. THISSELL et al.

(Circuit Court of Appeals, Sixth Circuit. December 16, 1914.)

No. 2504.

1. DEEDS (§ 129*)—CONSTRUCTION—ESTATES CREATED—LIFE ESTATES.

Under Ky. St. § 2342, providing that unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will without words of inheritance shall be deemed a fee simple or such other estate as the grantor or testator has power to dispose of, a deed from an unmarried woman to her unmarried brother, containing no words of inheritance and no habendum clause, and containing a recital that in consideration of the reduced price paid the brother wished the land to revert to his sister at his death, when construed in the light of the attending circumstances and the relation of the parties, passed only a life estate, as this was apparently the intention of the parties, and while the deed was not signed by the brother, he by accepting it became bound by its provisions.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. § 129.*]

2. DEEDS (§ 90*)—CONSTRUCTION—RULES OF CONSTRUCTION.

In Kentucky the controlling rule in construing a deed is that the intent is to be ultimately determined upon a consideration of the whole deed and with the endeavor to give every part of it meaning and effect, and while the rules that a conveyance in fee is not to be overthrown by a subsequent proviso, and that a deed is to be construed strongly against the grantor are recognized, they are merely aids to the application of the controlling rule mentioned.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.*]

3. DEEDS (§ 90*)—CONSTRUCTION—RULES OF CONSTRUCTION.

Where a deed was apparently inartificially drawn, it was entitled to a liberal construction in determining the intent of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.*]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action by Virginia C. Thissell and husband against Dorothy W. Crutchfield Woodward and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George Du Relle, of Louisville, Ky., for plaintiffs in error.
James Quarles, of Louisville, Ky., for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. [1] The defendant in error, Virginia Thissell, before her marriage conveyed to her brother, J. S. Crutchfield, also then unmarried, a tract of land in Kentucky for a stated consideration of \$1,210. The granting clause of the deed is in these words: "And by these presents do grant, bargain, sell and convey to the party of the second part the following tract or parcel of land lying and situated," etc. The deed contained no words of inheritance and no habendum clause. Following the description of the premises and preceding the attestation was this clause: "In consideration of the reduced price paid for this land, J. S. Crutchfield wishes it to revert to his sister at his death." The sister referred to was the grantor. Upon the grantee's death, the grantor and her husband brought this action against the grantee's widow and children to recover the land described in the deed, upon the theory that it conveyed an estate for the life of the grantee only, with remainder to the grantor. The only question presented is whether the deed conveyed a fee or merely a life estate. The trial court held that a life estate only was conveyed, and rendered judgment for plaintiffs accordingly; hence this writ of error.

There can be no doubt that at common law, the deed would have passed a life estate only, from the lack of words of inheritance, to say nothing of the specific clause quoted; but section 2342 of the Kentucky Statutes provides that:

"Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of."

The controlling question thus is whether a purpose to create an estate other than a fee appears "by express words or necessary inference."

[2] Among the rules of construction recognized by the courts of Kentucky are that a conveyance in fee is not overthrown by a subsequent proviso,¹ and that a deed is to be construed strongly against the grantor. *Kentucky D. M. & D. Co. v. Kentucky T. D. Co.*, 141 Ky. 97, 99, 132 S. W. 397, Ann. Cas. 1912C, 417. But these rules are merely aids to the application of the controlling rule that the intent is to be ultimately determined upon a consideration of the whole deed and with the endeavor to give every part of it meaning and effect.²

"When the intention can be arrived at, a rule of construction that

¹ See *Ratliffe v. Marrs*, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876, 10 Ky. Law Rep. 134; *Humphrey v. Potter*, 70 S. W. 1062, 24 Ky. Law Rep. 1264; *Barth v. Barth*, 38 S. W. 511, 18 Ky. Law Rep. 840; *Cox v. Anderson*, 69 S. W. 953, 24 Ky. Law Rep. 721; *Ray v. Speers*, 65 S. W. 867, 23 Ky. Law Rep. 1338.

² *Atkins v. Baker*, 112 Ky. 877, 882, 66 S. W. 1023, 23 Ky. Law Rep. 2224; *Dinger v. Lucken*, 143 Ky. 850, 852, 137 S. W. 776; *Wilson v. Moore*, 146 Ky. 679, 681, 143 S. W. 431; *Harkness v. Meade*, 148 Ky. 565, 147 S. W. 10; *Bain v. Tye*, 160 Ky. 408, 411, 169 S. W. 843.

will defeat it should not be applied." *Todd's Guardian v. Todd's Administrator*, 155 Ky. 209, 212, 159 S. W. 702, 703. The deed before us contains no words of inheritance and no express language creating a fee; this fact distinguishes it from several of the cases relied upon by defendant, including *Ratcliff v. Marrs*, *Humphrey v. Potter*, and *Ray v. Speers*. The instant case is also readily distinguishable from *Cox v. Anderson* and *Barth v. Barth*. The important features presented here are: First, that the grantor and grantee were brother and sister; second, the grantee was unmarried; third, the parties agreed in the instrument that the conveyance was for less than the value of the land; fourth, the lack of express words of inheritance or of creation of a fee, and of a habendum clause; fifth, the deed expressly states the grantee's wish that it should, at his death, revert to the grantor.

We think the necessary inference from all these considerations (for the deed must be construed "in the light of attending circumstances and the relation of the parties to the contract")³ is that both parties intended that merely a life estate should pass. *Dinger v. Lucken*, supra, and *Harkness v. Meade*, supra, are generally in point. True, the deed containing the clause relating to reversion is not signed by the grantee; but, by accepting the deed, he was as much bound as if he had signed it. It is also true that the deed states merely that the grantee "wishes it" to revert to his sister at his death; but the language used is, in our opinion, practically expressive of an intent that such should be the effect of the conveyance, and is substantially as persuasive of such intent as were the words employed in *Atkins v. Baker*, 112 Ky. 877,⁴ 66 S. W. 1023, under which, in spite of the fact that the deed contained the clause "to have and to hold unto said Lucy Atkins, forever, with covenant of general warranty" it was held that the grantee took a life estate only with remainder in fee to her husband.

[3] The deed here in question was apparently inartificially drawn, and so is entitled to a liberal construction in determining the question of intent (*Bain v. Tye*, supra), although, in our opinion, we have applied no unusual liberality of construction in reaching the conclusion arrived at.

The judgment of the District Court is affirmed, with costs.

³ *American Nat'l Bk. v. Madison*, 144 Ky. 152, 155, 137 S. W. 1076, 1077 (38 L. R. A. [N. S.] 597).

⁴ The language referred to in the deed in *Atkins v. Baker* is: "This conveyance, at the request of said Lucy Atkins, is made to her for and during her life, and at her death to go to her husband," etc.

In re CHOTINER.

FREDERICK v. WASHINGTON REAL ESTATE CO.

(Circuit Court of Appeals, Third Circuit. December 17, 1914.)

No. 1901.

1. BANKRUPTCY (§ 443*)—ADMINISTRATION—INTERLOCUTORY ORDERS—REVIEW.

Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), providing for the review of orders in bankruptcy proceedings, does not require the Circuit Court of Appeals to revise every interlocutory order that may affect the course of a bankruptcy proceeding, regardless of its nature or scope, nor does it require the court to answer questions not arising in a proper appellate proceeding, but only requires a review of such orders or decrees as have a certain degree of definiteness and finality.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 443.*]

2. BANKRUPTCY (§ 443*)—REVIEW—INTERLOCUTORY ORDERS—REFUSAL TO CONFIRM SALE.

An order of the District Judge sitting in bankruptcy, reversing a referee's order confirming a sale of the bankrupt's property, thus leaving the same still in the hands of the trustee, is not reviewable by the Circuit Court of Appeals on a petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 443.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Petition to Review Order of the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of bankruptcy proceedings of one Chotiner. Petition by Elliott Frederick, trustee in bankruptcy, to review order (216 Fed. 916) reversing an order of the referee confirming a sale of the bankrupt's property to the Washington Real Estate Company. Dismissed.

Lowrie C. Barton, of Pittsburgh, Pa., for petitioner.

Charles H. Sachs, of Pittsburgh, Pa., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] The opinion of the District Judge in this case is reported in 216 Fed. at page 916. We recognize the desirability of deciding the conflict of opinion in this circuit on the point in dispute (Re Codori [D. C.] 207 Fed. 784), and we regret that this record presents no reviewable question. Section 24b does not require us to revise every interlocutory order that may affect the course of a bankruptcy proceeding, whatever the nature or scope of the order may be; and we need hardly add that it is not part of our duty to answer questions, unless they arise in a proper appellate proceeding. Under section 24b we can only be asked to review such orders or decrees when they have a certain degree of definiteness and finality. Moreover, there must always be numerous minor matters of administration in which the District Court should be allowed to exercise a sound discretion that will ordinarily not be disturbed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] In the case before us the court has taken no positive, affirmative, step in the cause, and has done nothing to affect definitely the rights of the petitioner. The record discloses merely an order by the District Judge reversing an order of the referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee. Collier (9th Ed.) 530; Black, § 52; Sturgiss v. Corbin (C. C. A., 4th Circ.) 141 Fed. 1, 72 C. C. A. 179.

In our opinion we are not called upon to revise such an order; and, as we do not revise reasons, unless they are connected with a reviewable order, the petition must be dismissed, at the costs of the petitioner. It is so ordered.

**PEPPER v. SPRINGFIELD INSTITUTION FOR SAVINGS et al.
SPRINGFIELD INSTITUTION FOR SAVINGS et al. v. PEPPER.**

(Circuit Court of Appeals, First Circuit. January 7, 1915.)

Nos. 1080, 1081.

1. BANKS AND BANKING (§ 248*)—NATIONAL BANKS—INSOLVENCY—ASSESSMENT ON STOCKHOLDERS.

Where an assessment of 100 per cent. had been levied on the stockholders of a national bank, a subsequent assessment of 49 per cent. could not be sustained while the original assessment continued in force.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

2. BANKS AND BANKING (§ 250*)—NATIONAL BANKS—INSOLVENCY—ASSESSMENT ON STOCK—REVOCATION.

The Comptroller of the Currency having found a national bank insolvent and made an assessment of 100 per cent. on its stock, such assessment was not vacated or annulled by a letter written by the Comptroller to the directors, approving a contemplated sale of bonds held by the bank, and stating that, if such sale was made, he did not hesitate to say that there would be no necessity for an assessment on stockholders, unless an unlooked-for shrinkage in the value of the assets should occur, which was highly improbable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.*]

Appeals from the District Court of the United States for the District of Massachusetts; George H. Bingham, Judge.

Suit by Ellis S. Pepper, as receiver, etc., against the Springfield Institution for Savings and others. From a judgment in favor of defendants, plaintiff appeals, and the Springfield Institution for Savings and others prosecute a cross-appeal against the receiver. Affirmed.

Charles G. Gardner, of Springfield, Mass. (Gardner & Gardner, of Springfield, Mass., on the brief), for plaintiff.

Boyd B. Jones, of Boston, Mass. (William H. Brooks, of Springfield, Mass., on the brief), for defendants Springfield Institution for Savings and others.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PUTNAM, Circuit Judge. The propositions submitted to the court at the trial of this case suggested the necessity of determining whether we could be required to make offsets or rebates, involving any such troublesome questions as grew out of the failure of the Pacific National Bank, some of which appeared in *Delano v. Butler, Receiver*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. An examination of this record, however, shows that the case was disposed of by the District Court on a very simple proposition, which enables us to affirm the results reached in that court without concerning ourselves at present about what may hereafter follow.

[1] It seems there were two assessments on the stockholders of a failed national bank, the first one being for the full amount of the par of its stock, and the second one being for 49 per cent. of the same par. There was an incomplete attempt to annul the first assessment of the par of the stock, and the present proceedings were instituted on the second assessment of 49 per cent. As we have said, there was an attempt to annul the first assessment and hold the second assessment valid; the court conceding that both assessments, which amounted to 149 per cent., could not stand together, citing in support of that proposition *Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528. It is not apparent that *Studebaker v. Perry* ruled this particular point; but we have no occasion to cite authorities in reference to it, because it is too plain a proposition that assessments of \$149 a share would not be valid under the statute to require any citation of authorities in reference thereto.

The attempt to invalidate the first assessment was put on the following grounds by the court below. Our references to what was thus said do not require us to go into dates, or any details except those which we give, as follows:

[2] After the assessment of \$100 per share was laid, an arrangement was entered into by which the creditors of the bank, and perhaps some others, arranged to take up a mass of bonds held by the insolvent bank, issued by the American Writing Paper Company, on terms which it was thought would make the insolvent bank solvent. Thereupon the Comptroller of the Currency sent to the directors of the insolvent bank a letter, of which the following is a copy:

"The Board of Directors, Pyncheon National Bank, Springfield, Mass.

"Gentlemen: In view of the effort now being made by the directors and stockholders of the Pyncheon National Bank of Springfield, Mass. (insolvent), to dispose of to the stockholders a large number of the first mortgage bonds of the American Writing Paper Company, I wish to say to your board that this will effect a settlement of the affairs of this bank that will be eminently satisfactory to all interests, and one which I am very hopeful will be accomplished.

"I am just in receipt of the report of the special examination of this trust, made by an official of this department, sent to Springfield for that purpose, and I am quite satisfied if this sale of bonds is effected the receiver will be able to pay out to the creditors one hundred (100) cents on the dollar, and that within a very few months.

"I wish further to say that after this examination it is very plain that there will be no escape from an assessment of 100 per cent. against the stockholders, if the receiver had to put the Writing Paper bonds on the market at 65 or thereabouts.

"The receiver and the special examiner report most confidently that if these bonds are taken at ninety-five (95), the trust will pay out in full, and I do not hesitate to say there will be no assessment necessary against the stockholders, unless some unlooked-for shrinkage in value of assets should happen, which, of course, is highly improbable.

"I trust that you, gentlemen, will use every possible effort to effect this most satisfactory settlement of these matters.

"Respectfully,

Wm. B. Ridgely, Comptroller."

This letter was written by the Comptroller in good faith, and with the expectation that it would be shown, and it was shown, to the shareholders, including the savings banks, parties to these proceedings. Those banks made certain payments to the receiver, which were not directly by way of purchasing any portion of the bonds of the American Writing Paper Company aforesaid, but were intended to make up certain deficiencies which came from disposing of some of those bonds to other parties, so as to leave the receiver in the same condition in which he would have been if the savings banks, parties to these proceedings, had taken these bonds on the same terms that other stockholders took them. These details we need not go into further, because the case as we leave it does not rest there. Thereupon, however, the enforcement of the first assessment of \$100 on each share was suspended; but subsequently, for reasons which were not explained to us, it was thought necessary to make this other assessment of \$49 per share, which other assessment forms the basis of the present litigation, the primary question as to which is whether or not this assessment can be enforced.

So far as we can discover, the action of the Comptroller about not enforcing the first assessment was in pursuance of the letter which we have copied into this opinion. Neither that letter, nor anything which followed it, in terms annulled the first assessment; and all that can be said about it further is that no attempt was made to enforce it. The agreed statement which makes a part of the record states as follows:

"Said letter of the Comptroller of the Currency addressed to the board of directors related to an effort then being made by the directors, stockholders, and the receiver to procure the purchase from the receiver of said American Writing Paper Company bonds at the price at which they had been bought by the bank. Said directors and the receiver were then of the opinion that if said purchase upon said terms could be effected it would provide sufficient funds to enable the receiver of said bank to pay its debts in full, thereby obviating the necessity for the payment of said assessment or the enforcement of any personal liability whatsoever on the part of the stockholders."

We find nothing further in the record, or in the opinion of the District Court, which shows any definite action in reference to the first assessment. Neither the record nor the opinion of the District Court assumes to discuss the question whether or not the assessment of \$100 per share, laid by the Comptroller, could be annulled, or in any way disposed of, in this informal manner. The history of the statutes of the United States on this topic, and their nature, are well shown by *Kennedy v. Gibson*, 8 Wall. 498, 505, 19 L. Ed. 476; *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598, and *Studebaker v. Perry*, *ubi supra*, at various points through the opinion. These citations show that the duty of the Comptroller in this connection was a quasi judicial one, with the result that any findings, though *ex parte*,

were absolutely binding on the shareholders, and were of a character which involved an accounting and a solemn record on the part of the Comptroller's department. It is not credible that the solemn findings of the Comptroller of such a character should be nullified and wiped out by a mere letter such as we have quoted, followed by the mere inaction of the kind we have described. However this may be, there is no thorough discussion in the record, or in the opinion of the District Court, which enables us to ascertain that the first assessment of the par of the stock was ever annulled. The correspondence merely shows an intention not to enforce it. On this account, we agree without hesitation that the decree of the District Court dismissing the receiver's bill for the enforcement of the assessment of 49 per cent. was correct; and, as the fate of the cross-bill here necessarily follows the fate of the original bill, the dismissal of the cross-bill was also correct.

The decree of the District Court refused any costs on the cross-bill, and the relations of the parties, on the whole, relieve us from the necessity of determining any right to costs on these appeals. Therefore the judgment will be as follows, in each appeal:

The decree of the District Court is affirmed, without costs.

LUNG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 4, 1915.)

No. 2312.

1. CRIMINAL LAW (§ 510*)—TESTIMONY OF ACCOMPLICES—NECESSITY OF CORROBORATION.

In the federal courts the testimony of a confessed accomplice need not be corroborated to support a conviction, though such testimony should be received with suspicion and with the greatest care and caution, and not taken as that of an ordinary witness of good character, generally and *prima facie* supposed to be true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.*]

2. COURTS (§ 337*)—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

The federal courts in criminal cases are not governed by state statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 908; Dec. Dig. § 337.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICES—NECESSITY OF CORROBORATION.

On a trial for conspiring to bring certain Chinamen into the United States contrary to law, evidence *held* to corroborate the testimony of accomplices sufficient to support a conviction, assuming that corroboration was essential.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.*]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Frank R. Rudkin, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—52

C. W. Lung was convicted of an offense, and he brings error. Affirmed.

McKeeby & Redd, of Los Angeles, Cal., for plaintiff in error.
Albert Schoonover, U. S. Atty., of San Diego, Cal., and Duke Stone, Asst. U. S. Atty., of Los Angeles, Cal.

Before GILBERT and ROSS, Circuit Judges, and DIETRICH, District Judge.

ROSS, Circuit Judge. We have examined the record in this case with care, and are of opinion that the assignments of error are without merit. The plaintiff in error was charged by indictment, together with Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand, and Arthur Daly, with having unlawfully conspired together to bring into the United States from Mexico certain Chinamen, contrary to the provisions of the statutes of the United States in that behalf enacted. Upon his trial for that alleged offense he was convicted by the jury and sentenced by the court below. On the trial the guilt of Manuel Mendoza and of Noel was conceded, and they were the principal witnesses against the plaintiff in error—in their testimony going into the details of the unlawful transactions and directly connecting the plaintiff in error, Lung, therewith, for whom, according to their testimony, the prohibited Chinese were smuggled into the country by them. The main point on behalf of the plaintiff in error is that, as those witnesses were co-conspirators, the plaintiff in error could not be legally convicted without corroborating evidence, and that there was no such evidence.

[1, 2] In the first place it may be said that, while many of the states have statutes to the effect that no one can be legally convicted of a conspiracy on the testimony of a co-conspirator without independent corroborating evidence, there is no such statute of the United States. That the federal courts, in criminal cases, are not governed by state statutes, is well settled. The testimony of a confessed accomplice, as said by the Supreme Court in *Crawford v. United States*, 212 U. S. 183, 204, 29 Sup. Ct. 260, 268 (53 L. Ed. 465, 15 Ann. Cas. 392) however, is—

“not to be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and *prima facie* supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.”

The instructions of the court below to the jury in the present case not being contained in the record, and there being no complaint in regard to them, the presumption is that the jury was so instructed.

[3] Nor is the contention on behalf of the plaintiff in error that there was no corroboration of the testimony of the co-conspirators well founded. The Chinese in question were, according to the testimony of Mendoza and Noel, brought into the United States by them by means of automobile from places in Mexico near Tia Juana, situate a little south of San Diego, Cal.—three trips being made by the smug-

glers, the first up the coast to Los Angeles, on which trip two Chinamen were brought and delivered to Lung in Los Angeles; the second, by what is spoken of in the record as the inland route, passing a place called Temecula, and on which trip the co-conspirators brought three Chinamen, two of whom were disguised as women, and all of whom were delivered to Lung in Los Angeles; and the third trip being made by the coast route, on which, in addition to the Chinamen, certain opium was also smuggled into the country by Mendoza and Noel, and on which last trip they were apprehended by officers of the government.

Even if corroborating evidence was essential, it is abundantly shown in the record. It will be enough to refer to one or two instances. It was shown by the testimony of the co-conspirators that on the inland trip, when they reached a point near Temecula, one of the wheels of the machine was broken, and that they telephoned from Temecula to San Diego for another wheel. The witness Walling testified on behalf of the government that at the times in question he was in the automobile business in San Diego, and hired an automobile to Noel, for which he paid him, and with which machine he made two trips; that on the night of December 7 or 8, 1911, he got a telephone message from Temecula—

"that they had broken a wheel, and for me to bring one out to them, which I did, and delivered it to them at Temecula, and then came back to San Diego."

And the witness Escallier testified as follows:

"I remember seeing Mr. Noel and Mr. Mendoza near Temecula in December, 1911. They were in an automobile, about two miles beyond Temecula. I saw another Mexican, and one sitting in an automobile, and two others down below. The other two I spoke of were dressed as women. They sent me back to Temecula to have the garage man there come up. These two persons who were dressed as women were about 30 or 40 yards from me when I saw them. I never was any closer than that, and could not tell whether they were Mexicans, or what nationality they were. This was about 4 o'clock in the afternoon."

The plaintiff in error, Lung, it appears from the testimony of the co-conspirators, lived in Los Angeles, where he had a place of business, and it was there that Mendoza and Noel delivered the Chinamen to him. The government witness Barnard testified, among other things, as follows:

"I am the official who arrested the defendant C. W. Lung, which arrest took place in San Diego, Cal., at about the hour of 8:10 of the morning of December 14, 1911. (Witness shown two railroad tickets purchased from the Atchison, Topeka & Santa Fé Railroad Company for transportation from Los Angeles to San Diego and return, offered in evidence by the government and stipulated by the attorneys for respective parties that the same were purchased by the defendant C. W. Lung, concerning which witness testified.) I took this ticket, showing date of purchase December 12, 1911, the validating stamp December 14, 1911, from the possession of the defendant C. W. Lung when I made the arrest. (The other ticket in evidence shows that it was purchased on December 5, 1911, bearing validating stamp of December 7, 1911, San Diego, California.)"

The witness Jones testified, among other things, as follows:

"I reside in the city of San Diego, state of California. By occupation I am a United States immigrant inspector, and was such in December, 1911. I am acquainted with Martin Mendoza and Wm. Noel, and was present on the occasion of their arrest on the 13th day of December, 1911. They were arrested at a place known as Point San Juan, on the coast road, about halfway between Los Angeles and San Diego. On the occasion of their arrest they were going in the direction of Los Angeles. This occurred about the hour of 1:30 a. m., I should judge. Myself and Inspector Allison were together at the time. We were looking for these defendants, Noel and Mendoza. We had been watching at that certain place for three nights. They had made one trip before this, which was about the 7th of the month, or about a week before their arrest. I saw them on that trip going north towards Los Angeles, but was not looking for them on that occasion. I was at that time stationed at Elsinore, and was called from Elsinore over to Fall Brook. On the night of their arrest, about December 13, 1911, we were out watching for this outfit. I had the number of the car, and their names, and also a description of the car. About 1 or 1:30 I saw a light of a machine coming about three miles down the road. We camped on the beach, and I placed a lantern in the middle of the road, right at the top of the grade, and wrapped a red bandana handkerchief around it. It was tolerable steep there, so they slowed down with their machine. I asked whose machine it was, and Mr. Noel said it belonged to Mr. Walling in San Diego. I told him we were looking for that machine. In the machine we found the Chinaman and 12 cans of opium. The Chinaman was covered over with blankets, and the opium piled in the tool box."

There are various other items of corroborating evidence in the record, unnecessary to be stated.

We find no error in the record justifying a reversal of the judgment, which is therefore affirmed.

STORY v. EVANS et al.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1914.)

No. 1270.

SHIPPING (§ 84*)—INJURIES TO STEVEDORE—DEFECTIVE ROPE—INSPECTION—NEGLIGENCE.

Where a rope of the size of that used to make a sling in unloading a vessel, if in good condition, would be strong enough to hoist three or four times the weight put on the rope in question, which broke and injured a stevedore, and there was evidence that there were defects in the rope which could have been readily discovered by proper inspection, but that it was furnished for use without inspection, a finding of actionable negligence was justified.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Libel in admiralty by William L. Evans against the steamship Atlantic City and the Clarence Cottman Company, Incorporated. Judgment for libellant, and William Story, master and claimant, appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harry N. Abercrombie, of Baltimore, Md. (Jacob France, of Baltimore, Md., on the brief), for appellant.

Arthur D. Foster, of Baltimore, Md. (Daniel B. Chambers and John Henry Skeen, both of Baltimore, Md., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. We are of opinion that the decree of the District Court should be affirmed, and will briefly state the reasons for this conclusion. The case is primarily one of fact and is discussed as such in the argument of appellant. No error is alleged in the rulings on questions of pleading or evidence, and the applicable principles of law are well settled and familiar. It must therefore be held, if the proofs warranted an inference of negligence, that no sufficient ground for reversal has been made to appear.

The appellee Evans was a stevedore employed by the Clarence Cottman Company, which was engaged, under contract with the consignee, in unloading a cargo of niter from a steamship in the port of Baltimore. The tackle used for this purpose was furnished by the steamship. The niter was in bags, weighing about 200 pounds each, stowed in the hold, and the process of unloading was this: A long loop of rope, called a "sling," was laid on the floor of the hold on which eight bags of niter were placed, constituting a load. The ends of the loop were then brought together around the bags, one end being passed through the other, and tightened so as to hold the bags firmly. The free end of the loop was then placed on a hook attached to a cable, which was let down through the hatch, and the load hauled up by steam power. Evans was one of a number of men who were placing bags on the slings, and there were several slings in use at the time. One of them broke while a load was being drawn up, and the bags of niter fell on Evans, inflicting injuries which are severe and to a degree permanent, and for which damages in the sum of \$2,500 have been awarded.

Obviously the case turned upon the condition of the rope that broke, and the cause of that condition. The facts in that regard are summed up in the following extracts from the opinion of the trial judge which present, in the language of appellant's brief, "the meat of the case":

"There was no testimony that the rope before being put in use had been inspected. The boatswain who had made up the slings was not produced as a witness. The ship had furnished the rope. If it was defective, the ship was liable unless the defect was latent and not discoverable on reasonable inspection. If it had been free from patent defect, it would have been easy for the ship to prove it."

"If the libellant's witnesses are right that an unusually small rope was used, that circumstance would have explained the accident, and would have made the ship liable. I think they probably are wrong, and that the rope produced by the mate was that actually used. It ought not to have broken if it had been well made, and according to all the defendant's witnesses could not. As produced in court, it appeared to be defective. This defect was obvious to any one who had made such an inspection of the rope, as the ship was bound to make before putting it in use."

For the purposes of this appeal, we may assume that the rope produced in court was the one that broke; that it was of the size ordi-

narly used for such a purpose; that it was a new rope of standard manufacture which was purchased on the morning of the accident or the day before from a reputable dealer; and that such a rope was strong enough, or should be, to hoist three or four times the weight put on the sling in question. But against this was the obstinate fact that it did break under a moderate load; that its failure to carry this load safely was not explained; that when produced in court it disclosed another defect which could be readily discovered; and that it had been furnished for use without inspection.

This was sufficient, in our judgment, to support a finding of negligence as charged in the libel, and it would serve no useful purpose to restate the established rules of law which govern in such case.

The decree appealed from will, accordingly, be affirmed.

CORSICANA NAT. BANK v. JOHNSON.

(Circuit Court of Appeals, Fifth Circuit. January 5, 1915.)

No. 2597.

1. BANKS AND BANKING (§ 254*)—ACTIONS AGAINST OFFICERS—FORM OF REMEDY.

Under Act June 22, 1906, c. 3516, 34 Stat. 451 (Comp. St. 1913, § 9761), providing that the total liabilities to any national banking association of any party for money borrowed shall at no time exceed one-tenth of the capital stock and surplus, and Rev. St. § 5239 (Comp. St. 1913, § 9831), providing that, if the directors of any national banking association shall knowingly violate or permit the violation of any of the provisions of that title, every director who participated in or assented to the violation shall be liable for all damages which the association, its shareholders, or any other person shall sustain, an action by a national bank against an officer for a loss sustained on a loan in excess of the statutory limit in which he participated was one at law, not cognizable by equity, in the absence of a showing of the inadequacy of the legal remedy, and the fact that the bank had received from the bankrupt estate of one of the borrowers certain corporate stock did not give jurisdiction to equity, as the abatement in damages on account of this stock could be made at law as well as in equity.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950-957; Dec. Dig. § 254.*]

Personal liability of directors, see note to Robinson v. Hall, 12 C. C. A. 680; Warner v. Penoyer, 33 C. C. A. 230.]

2. ACTION (§ 37*)—NATURE AND FORM—CHANGE OF CHARACTER OR FORM.

Under the express provisions of equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), where a suit commenced in equity should have been brought at law, it should have been transferred to the law side of the court, instead of dismissing the bill.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 311-319; Dec. Dig. § 37.*]

Appeal from the District Court of the United States for the Northern District of Texas; Edw. R. Meek, Judge.

Bill by the Corsicana National Bank against Samuel Wistar Johnson. From a decree dismissing the bill, plaintiff appeals. Remanded, with directions to modify.

Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex., and Richard Mays, of Corsicana, Tex., for appellant.

W. J. McKie, of Corsicana, Tex., and Cullen F. Thomas and Henry C. Coke, both of Dallas, Tex., for appellee.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

WALKER, Circuit Judge. [1] The bill in this case charged the defendant, who had been an officer of the plaintiff bank, with liability for the loss sustained by the bank on a loan of its funds in an amount which exceeded one-tenth of the amount of the bank's paid-in capital and surplus, the ground of the asserted liability of the defendant being his alleged participation in and responsibility for the violation of the statutory prohibition of such a loan. 5 Fed. Stat. Ann. 139, 34 Stat. 451. The suit was the assertion of the right of the bank to hold the defendant liable in his personal and individual capacity for all damages sustained by the bank in consequence of the defendant knowingly violating the provision of the above-mentioned statute. Rev. Stat. U. S. § 5239. Plainly a suit to recover damages so sustained may be maintained at law, and is not cognizable by a court of equity, in the absence of any showing of the inadequacy of the legal remedy which is available. *Cockrill v. Cooper*, 86 Fed. 7, 29 C. C. A. 529; *Stephens v. Overstolz* (C. C.) 43 Fed. 465.

In the case at bar no fact was alleged or proved which tended to show any inadequacy of the legal remedy to which the plaintiff might have resorted. The plaintiff's claim was that it had lost the total amount loaned, less what had been and what might yet be realized from certain corporate stock which it had received in a settlement of the bankrupt estate of one of the insolvent borrowers. The holding of that stock by the plaintiff constituted no ground for a resort to a court of equity. The bank's claim was subject to be reduced by the amount already realized on that stock and by the reasonable value of it, if it still represents anything of value. This abatement of the amount of damages recoverable could be made in a court of law as well as in a court of equity. It was simply a matter of showing the actual loss sustained by the plaintiff as a result of the forbidden loan. It was not made to appear that in a court of law there was any obstacle in the way of proving and recovering the damages sustained. In short, we discover no equitable feature in the claim sought to be enforced. It was a simple legal demand for damages, to be assessed in a judgment for money. The suit in equity could not properly be maintained because the case was one where a plain, adequate, and complete remedy may be had at law for the wrong complained of. *Southern Pacific R. R. Co. v. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507; *Smyth v. N. O. Canal & Banking Co.*, 141 U. S. 656, 12 Sup. Ct. 113, 35 L. Ed. 891.

[2] The trial court, in the decree rendered, expressed the correct conclusion, that there was no equity in the bill. But a dismissal of the bill did not properly follow from that conclusion. The case is one calling for the application of equity rule 22 (198 Fed. xxiv, 115 C. C. A.

xxiv). The decree, instead of dismissing the bill, should have ordered a transfer of the suit to the law side of the court, to be there proceeded with pursuant to the requirement of the rule mentioned.

The cause is remanded, with directions to modify the decree as above suggested; the costs of the appeal to be taxed against the appellant.

C. A. SMITH TIMBER CO. et al. v. AULD et al.

(Circuit Court of Appeals, Eighth Circuit. November 25, 1914.)

No. 4117.

1. COURTS (§ 406*)—CIRCUIT COURT OF APPEALS—REVIEW—QUESTIONS OF FACT.

The Circuit Court of Appeals must take the disputed facts as found by the jury on substantial evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. § 406.*]

2. TRESPASS (§ 31*)—CUTTING AND REMOVING TIMBER—LIABILITY.

The P. Company, having a contract to furnish a timber company a large quantity of logs, contracted with S. for a part of them. S. wrongfully cut timber from plaintiffs' land, drove the logs part of the way down a stream and delivered them to the P. Company, which also drove them a part of the way and delivered them to the timber company, which drove them to its mills. S. knew that he was a trespasser, and the P. Company and the timber company had notice before the logs were moved. Both S. and the P. Company knew the destination of the logs. *Held* that, though their acts of dominion over the logs were successive, instead of contemporaneous, all of the parties were jointly responsible for the trespass, and could be jointly sued by plaintiff.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 70; Dec. Dig. § 31.*]

3. COMPROMISE AND SETTLEMENT (§ 20*)—NONPERFORMANCE OF ATTEMPTED SETTLEMENT—EFFECT.

Where, after defendant wrongfully cut logs on plaintiffs' land, negotiations for a compromise ensued, but defendant never performed as agreed, there was no sale of the logs to him, preventing a recovery for the trespass and conversion, since, to be effective, a compromise must be followed by a settlement or performance of the terms, and an accord must be followed by a satisfaction.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 83-88; Dec. Dig. § 20.*]

4. TRESPASS (§ 52*)—MEASURE OF DAMAGES—PLACE FOR FIXING VALUE.

Where one of the defendants willfully cut logs on plaintiffs' land for the other defendants, and the other defendants, with notice, received the logs and drove them down a stream to the mills of one of them, plaintiffs were entitled to recover the value of the logs at the mills, as in case of intentional trespass and conversion the owner may pursue and reclaim his property wherever he can find and identify it, and as against those who are guilty he can fix the time and place for asserting his remedy for the property itself or its value, and those participating in the conversion, with notice, subject themselves to the same measure of damages, at least while the property retains its original character.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.*]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by Harry M. Auld and another against the C. A. Smith Timber Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Burt F. Lum, of Minneapolis, Minn. (John R. Van Derlip, of Minneapolis, Minn., on the brief), for plaintiffs in error.

R. J. Powell, of Minneapolis, Minn. (Powell & Simpson and Ernest C. Carman, all of Minneapolis, Minn., on the brief), for defendants in error.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. The Aulds recovered judgment against the defendants C. A. Smith Timber Company, Potter-Casey Company, and George Sands for the value of logs wrongfully cut from their land in Cass county, Minn., and driven down the Willow and Mississippi rivers to Minneapolis, in that state. The defendants say: (1) They acted independently of each other, and there was no joint liability, even if there was a conversion of the logs; (2) the plaintiffs made a completed sale of the logs to Sands shortly after the trespass and before they were driven; (3) there was an accord and satisfaction; (4) the measure of damages applied was wrong.

[1, 2] The arguments on these points are in part arguments against the verdict of the jury on conflicting evidence. The trial court submitted to the jury the determination of the disputed questions of fact and instructed them upon the rules of law applicable to the several contentions. The jury found for the plaintiffs, and in each case there was substantial evidence supporting their conclusion. We must therefore take the facts against the defendants. The Potter-Casey Company, having a contract to furnish the Timber Company a large quantity of logs, in turn contracted with Sands for part of them. Sands wrongfully cut timber from plaintiffs' land, banked the logs on the Willow river, an upper tributary of the Mississippi, and when the ice went out in the spring drove them to the mouth of the Willow river and delivered them to the Potter-Casey Company. The Potter-Casey Company drove them down the Mississippi river to and over the Brainard dam, and the Timber Company received them below the dam and had them driven to its mills at Minneapolis. When the logs were cut by Sands, the brands and marks of the Timber Company were placed on them. The Timber Company had a representative in the woods, not to determine where the logs should be cut, but to see that the dimensions and markings were as required by its contract with the Potter-Casey Company. When the logs started down the Willow river, they moved progressively after the fashion of log-driving to Minneapolis, which both Sands and the Potter-Casey Company knew from the outset was their destination. In other words, there was no new transaction between the parties, or with others, which broke the continuity of transportation. Sands knew he was a trespasser, and had no right to cut the timber from plaintiffs' land, and both the Potter-Casey Company and the Timber Company had notice of it before the logs were moved in the Willow river. In

these circumstances the plaintiffs had a right to sue all of them jointly. All knew or had notice of the initial trespass and the destination of the logs, and all took part in their movement. That their acts of dominion were successive, instead of contemporaneous, does not destroy their joint responsibility. *Smith v. Briggs*, 64 Wis. 497, 25 N. W. 558; *Mashburn & Co. v. Dannenburg Co.*, 117 Ga. 567, 44 S. E. 97; *Cram v. Thissell*, 35 Me. 86.

[3] Upon being notified of Sands' trespass, one of the plaintiffs went to Minnesota and found the logs cut from their land lying on the ice and along the bank of the Willow river. Negotiations for a compromise ensued between him and Sands. Defendants claim they amounted to a sale of the logs to Sands, whether he gave the consideration or not. The jury found, and we think rightly, that there was no sale, but an attempt at compromise. To be effective, a compromise must be followed by settlement or performance of the terms. Defendants argue that, if there was no sale of the logs, there was an accord and satisfaction; but, similarly to a compromise, an accord must be followed by a satisfaction. *Shubert v. Rosenberger*, 123 C. C. A. 256, 259, 204 Fed. 934, 45 L. R. A. (N. S.) 1062. One of the disputed questions of fact was whether Sands performed as agreed, and the jury found by its verdict that he did not.

[4] It was shown that the logs cut from plaintiffs' land were driven to the mill of the Timber Company at Minneapolis. Defendants were held for their value at that place. The charge of the trial court correctly set forth the measure of damages, if the jury believed Sands' trespass and conversion were due to mistake or inadvertence; also the measure, conformably to the rule in *Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, if Sands acted willfully, but the other defendants had no notice; and, finally, the rule if he acted willfully, and they had notice before the logs were driven. As already indicated, the jury found Sands' conduct was willful. If the other defendants had acted without notice, their liability would have been the value of the logs at the time they received them respectively; but, having been notified, as the verdict implies, they were not entitled to that limitation of their liability. In case of intentional trespass and conversion, the owner may pursue and reclaim his property wherever he can find and identify it (*Liberty Bell Gold Mining Co. v. Mining Co.*, 122 C. C. A. 113, 125, 203 Fed. 795), and as against those who are guilty he can fix the time and place for asserting his remedy for the property itself or its value (*E. G. Beechwood Ice Co. v. American Ice Co.* [C. C.] 176 Fed. 435). Those who with notice participate in the conversion or removal subject themselves to the same measure of damages, at least while the property retains its original character. Defendants also claim that plaintiffs were estopped from maintaining the action, but we find nothing on which an estoppel could rest.

The judgment is affirmed.

MYGATT et al. v. SCHAFFER (two cases).

(Circuit Court of Appeals, Second Circuit. November 16, 1914.)

Nos. 27, 28.

1. PATENTS (§ 46*)—DESIGNS—SUBJECTS OF DESIGN PATENTS.

Under Rev. St. § 4929, as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (Comp. St. 1913, § 9475), which provides that "any person who has invented any new, original and ornamental design for an article of manufacture" may obtain a patent for such design, a design patent may be for an article of manufacture itself, if it is ornamental, as well as useful.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 54, 55; Dec. Dig. § 46.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR LAMP REFLECTOR.

The Mygatt design patent, No. 37,967, for a design for a prismatic glass reflector, is for a proper subject of a design patent, was not anticipated, and is valid; also *held* infringed by a reflector which differs only in that there is a slight change in the contour.

3. PATENTS (§ 252*)—INFRINGEMENT—PATENT FOR DESIGN.

It is not necessary that the alleged infringing article should be an exact copy of that of the patent, to sustain a charge of infringement of a design patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. § 252.*]

4. PATENTS (§ 328*)—ANTICIPATION—DESIGN FOR LAMP REFLECTOR.

The Mygatt design patent, No. 40,182, for a design for a prismatic glass reflector, *held* void for anticipation by design patent No. 40,140 to the same inventor.

5. PATENTS (§ 120*)—PRIORITY—SIMULTANEOUS APPLICATIONS.

Where applications for two patents for essentially the same invention were filed by the same applicant on the same day, the date of issue determines the priority, and the fact that the application for the later patent bears the lower serial number is immaterial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 172; Dec. Dig. § 120.*]

6. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LAMP REFLECTOR.

The Mygatt patent, No. 939,062, for an integral shade reflector of glass having an upper and lower portion, the latter forming a skirt with substantially vertical walls and composed of a translucent medium, was not anticipated and is valid; also *held* infringed.

7. PATENTS (§ 312*)—SUITS FOR INFRINGEMENT—DEFENSES—BURDEN AND MEASURE OF PROOF.

A defendant in a suit for infringement, who sets up prior use and want of novelty as defenses, has the burden of proof to establish such defenses beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

Ward, Circuit Judge, dissenting in part.

Appeals from the District Court of the United States for the Southern District of New York.

There are two suits between the same parties, brought for the infringement of certain patents and asking for an injunction, an accounting and damages.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit No. 1 involves an appeal from a decree of the District Court of the United States for the Southern District of New York, made on December 31, 1913, adjudging that design patent of the United States No. 37,967, for a prismatic glass reflector, granted to Otis A. Mygatt on April 24, 1906, is invalid, and dismissing the bill of complaint.

Suit No. 2 involves cross-appeals from a decree of the District Court for the Southern District of New York, made on December 31, 1913, adjudging that mechanical patent of the United States No. 939,062, for skirting reflectors, granted to Otis A. Mygatt on November 2, 1909, are valid, and that the defendant, Max Schaffer, had infringed upon claims 2 and 4 of the said letters patent, and issuing a perpetual injunction against the said Schaffer restraining him, his agents, clerks, workmen, and employes, and all claiming or holding under or through him, from making, using, or selling, or in any way disposing of, without the license of the complainants, prismatic glass reflectors embodying the invention or improvement contained in letters patent of the United States, No. 939,062, and awarding damages and an accounting; also adjudging that design patent of the United States, patent No. 40,182, for a reflector, granted to Otis A. Mygatt, is invalid, and dismissing the bill of complaint so far as it is based upon said patent No. 40,182.

Otis A. Mygatt is a citizen of the United States residing in the borough of Manhattan, city of New York, and state of New York. The General Electric Company is a corporation organized and existing under and by virtue of the laws of the state of New York. Max Schaffer is a resident and inhabitant of the borough of the Bronx, city of New York, and state of New York.

The United States having granted to Otis A. Mygatt letters patent No. 37,967 for a prismatic glass reflector, the said Mygatt granted to the General Electric Company a sole and exclusive license under the said letters patent to make, use, and sell articles embodying the invention aforesaid.

The said Mygatt and the said General Electric Company brought suit against the defendant, Schaffer, and alleged that the latter had wrongfully used, sold, and exposed for sale within the Southern district of New York reflectors of prisms made according to and containing and embodying the design or colorable imitation of the complainant's patent without their license or consent. A decree was asked establishing the validity of the patent, and restraining the defendant, his servants, agents, attorneys, and employes, from making, using, selling, or offering for sale any reflectors embodying or containing the invention set forth in letters patent design No. 37,967. The bill also asked an accounting and damages.

The complainants also brought a second suit against the defendant, alleging an infringement of letters patent design No. 40,182, issued by the United States to the said Mygatt on July 27, 1909, as well as an infringement of letters patent of the United States No. 939,062, issued to Mygatt on November 2, 1909. In this suit the complainants sought a decree establishing the validity of the patents, an injunction, an accounting, and damages.

The answer in each of these suits denies the validity of the complainant's patents and denies infringement. The two suits were argued in this court at the same time and will be considered together.

Howard Taylor and John G. Jackson, both of New York City, for appellants.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., Messimer & Austin, of New York City (J. H. Lee, of Chicago, Ill., of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The Constitution gives Congress the power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. In pursuance of that authority Congress in 1790 passed an act

providing for the issuance of letters patent, and since that time has passed various other acts which have made provision for securing to inventors a right of property in their inventions. And Congress in its legislation respecting patents has provided for the issuance both of mechanical and design patents, although in England designs are protected by copyright, and not by patent. The patents involved in the two suits now before us relate to a mechanical patent and to design patents.

The design patents were issued since 1902, and so are subject to the act of Congress passed May 9, 1902, amending section 4929 of the Revised Statutes so as to read:

"Sec. 4929. Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor." 32 Stat. pt. 1, p. 193.

The mechanical patent was issued since 1897, and so is subject to the act of March 3, 1897, amending section 4886 of the Revised Statutes (Comp. St. 1913, § 9430), so as to read:

"Sec. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, * * * and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, * * * and not in public use or on sale * * * for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor." 29 Stat. 692.

The first suit involves design patent No. 37,967 and will be first considered. In holding this patent invalid the court said:

"There is always, as the basis of the idea of design patent, the idea of ornamentation; the thing must have been made for the purpose of ornament, or at least a useful article must have been made in such a way as to make it ornamental."

The court found nothing ornamental in the reflector in suit and thought:

"That the man who made them was not at work with any artistic idea of producing a thing of beauty; he was at work with a combination of prisms to produce an article of use. Incidentally the shade looks well lighted, like almost any other bulb."

As the idea of ornamentation was not present to the eye of the District Judge the patent failed.

[1] We have given careful consideration to the opinion of the court below, but we find ourselves unable to concur with it in thinking that glass reflectors which are organized so as to discharge a useful mechanical function, and which present attractiveness of appearance and make a pleasing impression upon the eye, are not properly the sub-

ject of a design patent. It is a mistake to assume that a patent for a design applies only to certain ornamentation upon an article of manufacture, and that it cannot properly apply to the article of manufacture itself as that article of manufacture is designed and produced.

In 1902 Congress amended the act, making it read that "any person who has invented any new, original, and ornamental design for an article of manufacture" may obtain a patent for such design. Before that amendment the act permitted a design patent to issue for "any new, useful and original shape or configuration of any article of manufacture." After this amendment was made the argument was advanced that Congress intended by the amendment that design patents for mere shape or configuration of an article of manufacture should no longer be granted. But in *Theo. W. Foster & Bros. Co. v. Tilden Thurber Co.*, 200 Fed. 54, 118 C. C. A. 282 (1912) the Circuit Court of Appeals in the First Circuit held that it could not accept any such view of the matter. The court said:

"We are not prepared to accept this view. Though the amendment has dropped the word 'useful' and the express provision that a new shape or configuration given to an article of manufacture shall be patentable as a design, we are unable to believe it intended by these changes that no design for any article of manufacture shall be considered 'new, original, and ornamental,' within the meaning of the section as it now stands, if the ornamental character consists merely in a new and original shape or configuration given to the article. It is, of course, still true, as was held before the amendment, that 'design patents refer to appearance, not utility.'"

And it was held in that case that a clothes brush is a proper subject for a design patent.

Prior to that decision, and after the amendment of the act made in 1902, we sustained in *Ashley v. Samuel C. Tatum Co.*, 186 Fed. 339, 108 C. C. A. 539 (1911), a design patent for "the ornamental design for an inkstand as shown," there being no written description of the invention, and in the opinion, written by Judge Lacombe, the court said:

"The manufacture of glass inkstands of this general character has been going on for very many years, and the chance of any broadly new design being produced would seem to be slight. Nevertheless the exhibits in the case indicate that complainant's design shows a radical and distinctive change in type from those which preceded it; its dominant feature being the contour and relative proportions of parts, rather than the presence or absence of any applied ornamentation."

In that case we sustained a design patent, notwithstanding the absence of any applied ornamentation.

It may be conceded that there is nothing novel in the shape of these reflectors or in the principle of their construction by the use of prisms. The fact that it was old to cut prisms in shades and reflectors was not denied; neither was the claim made that novelty existed in the shape. But the fact that no such claims were made, or could be made, does not put these complainants out of court. In *Washbourne & Dunn v. Webster*, 195 Fed. 522, 115 C. C. A. 432 (1912), each element of the patented design considered separately was old, and sometimes two or more of them appeared combined in the prior art, and yet we held that these

facts did not invalidate the patents, unless it appeared that they were so assembled as to form the designs of the patents then in suit. And we then stated that it was the design as a whole which had to be considered; that the situation in this respect was analogous to machines made up of old elements. It sufficed that the machine produced a new result, or the design a new impression upon the eye.

It is the design of the whole thing as it appears in use which is the test in cases of the class in suit. It is not necessary in the case of a design patent that the thing to be patented should have been made for the purpose of ornament. It is sufficient that a useful article has been made in such a way as to make it ornamental. In this case the inventor has produced a reflector which is handsome when in use and which rises to the dignity of a design patent. In *Dominick & Haff v. R. Wallace & Sons Manufacturing Co.*, 209 Fed. 223, 126 C. C. A. 317 (1913) this court, speaking through Judge Coxe, said:

"A design patent necessarily must relate to subject-matter comparatively trivial and the courts have looked with greater leniency upon design patents than patents for other inventions. The object of the law is to encourage those who have the industry and genius to originate objects which give pleasure through the sense of sight."

And that is what Mygatt has done. He has originated reflectors "which give pleasure through the sense of sight." We think that design patent No. 37,967 should have been sustained. The rule governing design patents was expounded by the Supreme Court in *Gorham Co. v. White*, 14 Wall. 511, 524, 20 L. Ed. 731 (1871), and it was said:

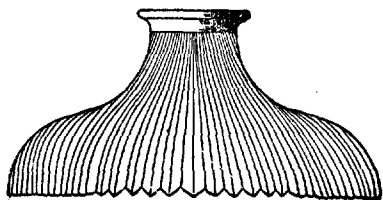
"The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that not an abstract impression, or picture, but an aspect given to those objects mentioned in the acts. It is a new and original design for a manufacture, whether of metal or of other material; a new and original design for a bust, statue, bas relief, or composition in alto, or basso-relievo; a new or original impression or ornament to be placed on any article of manufacture; a new and original design for the printing of woolen, silk, cotton, or other fabrics; a new and useful pattern, print, or picture, to be either worked into or on any article of manufacture; or a new and original shape or configuration of any article of manufacture—it is one or all of these that the law has in view. And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. * * * It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or both conjointly, but in whatever way produced it is the new thing, or product, which the patent law regards. To speak of the invention as a combination or process or to treat it as such, is to overlook its peculiarities."

[2] Mygatt under his design patent No. 37,967 produced a new reflector, the appearance of which attracted attention and called out favor. It is that appearance, no matter by what agency caused, that constitutes the contribution to the public which the law deems worthy of recompense and to which it extends its protection. The fact that complainants have sold over 500,000 of the reflectors manufactured

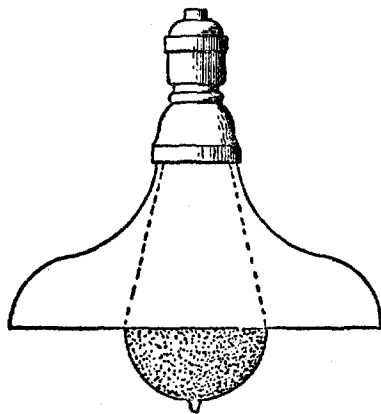
under this patent affords some indication that the thing they have produced has been of pleasing appearance and of utility.

The defendant seeks to defeat the patent, however, by calling attention to a prior patent, also granted to Mygatt, which is alleged to show exactly the same contour. The patent thus relied on is the Mygatt patent, No. 37,809, which was granted on February 6, 1906. Certain other patents are also relied upon as having been previously granted and as showing a like configuration. But of all the patents thus relied upon the one which comes the nearest to showing anticipation is patent No. 37,809. The contours of the two reflectors—No. 37,809 and No. 37,967—are closely alike. In the former no prisms are used and the end of the glass is frosted, whereas in the latter prisms are employed and the end of the glass is not frosted. The completed articles produce quite a different effect on the eye, especially when illuminated. We are satisfied the defense of anticipation is not made out. As the Supreme Court said in *Gorham Co. v. White*, 14 Wall. 511, 526, 20 L. Ed. 731, "We think the controlling consideration is the resultant effect." And the resultant effect of the two reflectors under discussion is quite different.

A drawing of complainant's design patent No. 37,967, which is alleged to have been infringed, is here reproduced:

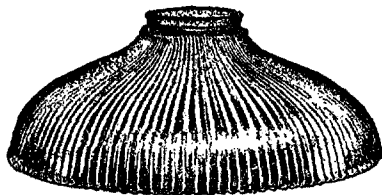


A drawing of prior design patent No. 37,809, which is claimed to anticipate design patent No. 37,967, is here reproduced:



A drawing of defendant's reflector, alleged to infringe design patent No. 37,967, is here reproduced:

[3] Upon the question of infringement there is less difficulty. The defendant's reflector is a palpable imitation of that of the complainants. It is true that the one is not a Chinese copy of the other, but



it is not necessary that the one should be an exact copy of the other to

sustain a charge of infringement. The act of Congress of February 4, 1887 (24 Stat. 387 [Comp. St. 1913, § 9476]), c. 105, § 1, forbids "any colorable imitation as well as a reproduction of the design." Slight differences and changes in construction do not suffice to defeat a charge of infringement, when the combination and purposes intended and the purposes accomplished are the same. *Hale, etc., Mfg. Co. v. Oneonta, etc., Co.* (C. C.) 124 Fed. 514, 517 (1903). In the case at bar the defendant's device has a slightly lower neck or flatter bell than has the complainant's. But the defendant's reflector is the complainant's reflector; the slight change in the contour does not avoid infringement.

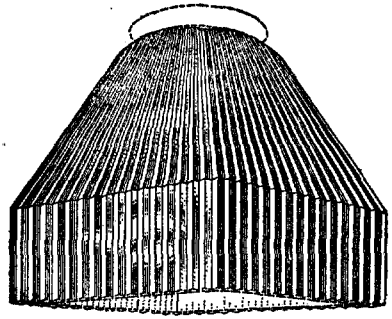
In 1910 the complainants brought suit against the same defendant, alleging an infringement of design patent No. 37,983, issued May 1, 1906. In that suit the trial court found in favor of the complainants. *Mygatt v. M. Schaffer-Flaum Co.* (C. C.) 186 Fed. 343 (1911). But upon appeal to this court the case was reversed, and we sustained the defendant's contention that the complainant Mygatt had been guilty of double patenting, and that the patent upon which that suit was brought was anticipated by the design patent No. 37,967, which is one of the patents now in suit, and which had been issued a few days prior to the issuance of the other. *Mygatt v. Schaffer-Flaum Co.*, 191 Fed. 836, 112 C. C. A. 350 (1911).

In the present suit the suggestion is made for the first time that the invention is fundamentally not of the character that should be the subject of a design patent. The fact that the suggestion originated with the trial court, and not with the defendant's counsel, is not important, except as indicating that in the study of the case it apparently had not occurred to counsel that it was worth while to interpose such an objection. In holding that No. 37,983 was anticipated by No. 37,967, we in effect held that No. 37,983 would infringe No. 37,967. Since defendant's design here complained of is substantially the same as the design shown in No. 37,983, it also infringes No. 37,967.

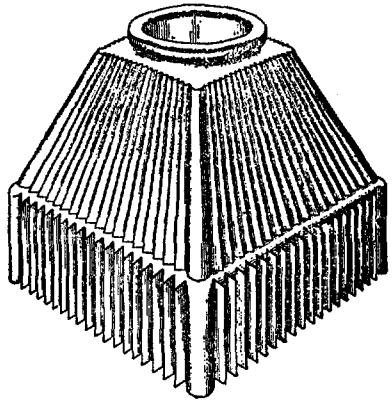
In the second suit two patents are involved—design patent No. 40,182, granted to Mygatt on July 27, 1909, and mechanical patent 939,062, granted to Mygatt on November 2, 1909. The first of the two patents was granted for a prismatic glass reflector, and the second for a skirting for reflectors. The court below held the design patent void, for the same reason which it assigned for the invalidity of the design patent involved in the first suit; and the mechanical patent was held good, and a perpetual injunction was decreed, enjoining the defendant, his agents, clerks, workmen, and employes, and all claiming or holding under or through him, from making, using, or selling, or in any way disposing of, without the license of the complainants, prismatic glass reflectors embodying the invention contained in patent No. 939,062.

[4] The reason given for the invalidity of patent No. 40,182, being the same as that assigned in the first suit for the invalidity of patent No. 37,967, has already been considered in the earlier part of this opinion, and need not be repeated here. But the court below, regarding the reflectors embodied in No. 40,182 as inherently unpatentable, did not inquire whether or not they were anticipated in the prior art.

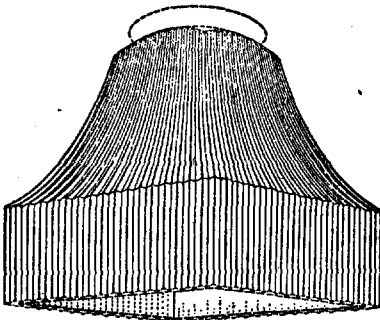
But as we regard such reflectors as not inherently unpatentable, it is necessary to consider the question of anticipation. We deem it important to refer to two only of the patents which may be regarded as anticipating No. 40,182. A drawing of this design patent is here reproduced:



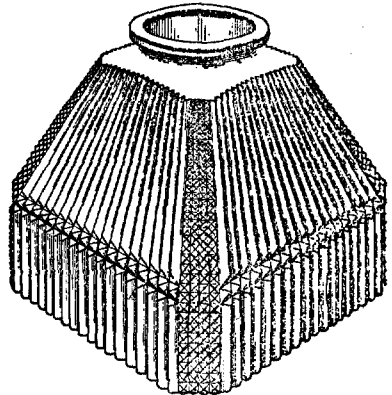
The two patents which need to be considered in connection with it are the Kappler patent, No. 39,964, granted on May 4, 1909, something more than two months prior to the issuance of No. 40,182, and the Mygatt patent, No. 40,140, issued two weeks prior thereto. A drawing of the Kappler patent, No. 39,964, is here reproduced:



And a drawing of Mygatt patent, No. 40,140, is here reproduced:



And a drawing of the design of the defendant's reflectors is likewise reproduced:



Prior to the issuance of the patents No. 40,182 and No. 40,140 the attention of the Commissioner of Patents was specifically called, in connection with these patents, to the Kappler patent on the ground of a possible interference, but in the opinion of the examiner of the Patent

Office Mygatt's invention was not regarded as the same with Kappler's and in this view we concur. We, however, believe that No. 40,140 must be regarded as an anticipation of No. 40,182, if it is to be regarded as having priority over it, a question to be presently discussed.

In each case the shade comprises a neck or bead for attachment to a holder, a frustro-pyramidal body portion, and a vertical rectangular skirt portion; the external surface being completely covered with vertical reflecting prisms. The only difference we discover is that the inclined corner lines are straight in patent No. 40,182, while slightly incurved in patent No. 40,140. There is thus a slight change in the contour of the two patents. But the two designs so closely resemble each other that we are unable to discover that a patentable difference exists between them. It was never intended, as Mr. Justice Bradley said in *Atlantic Works v. Brady*, 107 U. S. 192, 200, 2 Sup. Ct. 225, 27 L. Ed. 438 (1882), that a monopoly should be granted for "every shadow of a shade of an idea." To do so would be unjust in principle and injurious in its results. The change made in design No. 40,182 from the design No. 40,140 shows no originality and adds no beauty to the device.

[5] But so far we have assumed that design No. 40,140 is to be regarded as prior in time to design No. 40,182. The facts concerning these two patents are as follows: The application for each was filed on June 5, 1908, and while No. 40,140 was issued on July 13, 1909, and that of No. 40,182 on July 27, 1909, the latter patent had an earlier serial number, 437,019, while the earlier patent had a later one, 437,021. Does the fact that design No. 40,182 has the earlier application number entitle it to priority over design No. 40,140, with its later application number, but which was issued two weeks earlier than the other? A lower serial number of a patent, however, cannot be regarded as indicating the older patent, where the patent bearing a higher serial number was issued, not on the same, but on a different, day. We had the matter before us in *Crown Cork & Seal Co. v. Standard Stopper Co.*, 136 Fed. 841, 846, 69 C. C. A. 519, 524 (1905), and we then said:

"Notwithstanding the application for this patent was the earlier one, we are of the opinion that it was a later patent, and what was described and claimed in it has no bearing upon the validity of the claims of the patent in suit. Where two patents are issued on the same day by the Patent Office, and there is no other evidence of seniority between them than such as appears from their several numbers, the earlier in number must be regarded the senior and the earlier in publication."

We also said in that case:

"What is described in an earlier patent to the same inventor has no greater efficacy in defeating the novelty of the subject-matter of a later patent to him than it would have if it had been described in an earlier patent to a different inventor. In either case such descriptive matter has no effect upon the patentable novelty of the earlier invention. If, however, the invention of the later patent is patented by the earlier one, the earlier must, of course, invalidate the later, for there cannot be two valid patents, for the same invention, and the later patent is therefore void."

The Supreme Court in *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76 (1865), had laid down the principle that where two patents, showing the same invention or device, were issued to the same party, the later

one was void, although the application for it was first filed, thereby deciding that it is the issue date, and not the filing date, which determines priority to patents issued to the same inventor on the same machine.

Holding, as we do, that design patent No. 40,182 is invalid, having been anticipated by No. 40,140, it becomes unnecessary to inquire whether defendant's reflector infringes upon the patent sued upon, No. 40,182.

[6] We come now, in conclusion, to consider the last patent involved, mechanical patent No. 939,062, which the defendant is also charged with infringing. No. 939,062 was issued to Mygatt for making reflectors of an integral piece of glass of which the upper part, or body part beneath the collar portion, was to be composed of a specular reflecting medium reflecting most of the light out of the open mouth of the reflector, and the lower or flared mouth part, composed of some interceptive light-diffusing or shading medium.

The complainants in this suit rely only on claims 2 and 4 of the patent. Claim 2 reads as follows:

"2. An integral shade reflector of glass, the upper portion of which is provided with a specular reflecting medium, the lower portion being formed into a skirt with substantially vertical walls, the skirt being composed of a translucent medium."

And claim 4 reads as follows:

"4. A glass open-mouthed reflector shade having prisms thereon reflective of light and a substantially vertical portion integral therewith interceptive of some of the light rays."

At the time this patent was applied for the reflectors in common use were so made that when in use, with an artificial light inside, the rays from the light, or the downward side rays, reached the eye direct, thus causing discomfort to the eyesight. In order to overcome this drawback, it was common to cover reflectors with hanging fringe, either of silk or of bead glass, to protect the eyesight from the direct rays of the light contained within the reflector. And, as the inventor stated in his application, his present invention was intended to embody in a one-piece glass article the reflecting qualities of a specular reflector and the light-shading or light-softening qualities of the protecting fringe used for such a purpose.

A large number of patents were offered in evidence for the purpose, we presume, of establishing a lack of novelty. But there are only four of them we deem it necessary to consider. All four were granted to Mygatt, one of the complainants. They are mechanical patents No. 687,848, granted December 3, 1901; No. 762,926, granted June 21, 1904; No. 821,308, granted May 22, 1906; No. 804,253, granted November 14, 1905. No. 687,848 was for an improvement in prism glass globes, the specification stating that:

"The object of the invention is to make prism-glass globes which will concentrate and diffuse light in a downward direction and which will be little affected by dust and dirt accumulated thereon."

It is not an integral article, but a two-piece article. The inside of the upper piece or portion of the globe is smooth, and so constructed as to reflect the light rays received thereon. The outer face of the lower

portion is smooth, and the inside is ribbed. It is clearly distinguishable from the open-mouth reflector shade of patent No. 939,062, which it is said to anticipate.

In No. 687,848 the lower half of the reflector is intended to receive and does receive practically all the light which does not go through the place left for inserting the lamp. It is the most brilliant part of the device. On the other hand, No. 939,062 provides for sending most of the light down and out of the open mouth of the reflector, at the same time shading the eyes from the light source. The one is not an anticipation of the other.

No. 821,308 is a device or method of decorating glass shades. The decoration is effected by providing the interior of the device with either raised or depressed forms of any desired size, shape, number, or color, preferably avoiding colors which interfere with the transmission of light and such ornamentation as frosting. The decorative features are impressed into or raised from the otherwise smooth inner surface of the reflector, and their effect is to break up the light rays to such an extent that the decorations are visible through the sides of the device. It is clearly distinguishable from No. 939,062.

In No. 821,308 the prisms are not concentrating prisms. They do not concentrate light, so as to send it down and out of the mouth of the reflector. They are diffusing prisms, and send the light upward to a large extent. It cannot be regarded as anticipating No. 939,062, which is clearly distinguishable.

The object of No. 762,926 is:

"To produce an integral shade and reflector of glass which shall reflect the light rays which would otherwise go upward or in an undesirable direction and afterwards diffuse such rays as well as the direct rays."

The device is a globe, and not an open reflector. The light is concentrated on the lower half of the inclosure, making a diffusing device of high intrinsic brightness. Its lower portion comes into direct contact with the eye, and about 80 per cent. of all the light of the lamp is concentrated on the lower half of the globe, virtually making it take the place of the naked lamp itself. This does not anticipate No. 939,062.

No. 762,926 calls for a device which does exactly the opposite of what is called for in patent No. 939,062. In No. 762,926 the light is made very intense, by concentrating it on the lower portion, instead of softening the light, as is the case in No. 939,062. There is no anticipation.

No. 804,253 is intended to produce a shade reflector of glass, in whole or in part composed of layers, and in which the main part of the reflection of light rays, which would otherwise escape upwardly or in other than useful direction, is effected by double-reflecting prisms, while the diffusion of light which would otherwise be too intense in downward or desired direction is effected by ground glass or similar surfaces. We have failed to discover in it an anticipation of No. 939,062.

The prior patents cited are, as the court below found, all bulb patents, concentrating the light from one part above upon the bulb and in the part below, making a very intense light, which is quite different from the effect of light thrown down into the open mouth of the reflectors

embodied in No. 939,062. In the latter patent, as the expert testified, the skirt portion of the device operates to soften the light which reaches it from the lamp, and to spread or diffuse it. These prisms operate in the way distributing prisms operate. And there is diffusion of light as a result of the position of the prisms with respect to the light source. The prisms on the skirt portion of the device are of precisely the same character, so far as mechanical construction goes, as the prisms on the upper portion of the reflector; but they act in an entirely different manner from the prisms on the body portions of the reflector, the reason being that the incident light rays from the lamp happen to be differently placed with respect to the skirt. The prisms in the upper part of the reflector are almost totally reflecting prisms, only 10 or 15 per cent. of the light escaping. The prisms on the lower part, the skirt, are not used to concentrate light below and send it all down and out of the open mouth of the reflector, but they are used to spread the light over the surface, diffuse and soften it, and save the eyes from the direct rays from the incandescent filament of the lamp. They send the maximum flux of the light from the lamp down and out of the open mouth of the reflector, at the same time shielding the eyes from the side flux, the side rays, and the downward side rays. They produce an effect which is almost exactly the opposite to what is produced by the reflectors, where the mouth of the reflector is not wide open, and where there is, instead of this skirt portion, either a curved portion, curving inwards, or an actual globe. The device required the exercise of the inventive faculty, and a new and better reflector has been created, which has new capacities, and performs new functions, and has not been anticipated in the prior art.

[7] The defendant in a suit for the infringement of a patent, who sets up prior use and want of novelty as a defense, has under the decisions of the Supreme Court the burden of proof upon him to establish the facts beyond all reasonable doubt. *Cantrell v. Wallick*, 117 U. S. 689, 695, 696, 6 Sup. Ct. 970, 29 L. Ed. 1017 (1886). The defendant, so far as patent No. 939,062 is concerned, has not shown beyond a reasonable doubt, or even by a preponderance of the evidence, the anticipation in the prior art upon which he relied.

As respects the first suit, the decree of the court below, holding design patent No. 37,967 invalid and dismissing the bill of complaint, is reversed, and the court is directed to grant the complainants an injunction and an accounting.

As respects the second suit, the decree of the court below, sustaining mechanical patent No. 939,062 and granting an injunction, and declaring patent No. 40,182 invalid and refusing an injunction, is affirmed.

WARD, Circuit Judge, concurs in the conclusion of the majority as to design patent No. 40,182, but dissents as to design patent No. 37,967 and mechanical patent No. 939,062, on the ground that neither involves invention.

STILLWELL v. McPHERSON, Highway Com'r.

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

No. 30.

PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—CORRUGATED METAL CULVERT.

The Watson patent, No. 559,642, for a corrugated metal culvert, discloses patentable invention and is valid; also, *held* infringed.

Appeal from the District Court of the United States for the Northern District of New York.

On appeal from a decree of the District Court for the Northern District of New York dismissing the bill which was filed for the infringement of letters patent granted to James H. Watson of Crawfordsville, Ind., for a corrugated metal culvert. The patent is dated May 5, 1896, and expired May 5, 1913. A demurrer to the bill was sustained by the Circuit Court (172 Fed. 151), but this decision was reversed by this court (183 Fed. 586, 106 C. C. A. 354). The decision on final hearing is reported in 207 Fed. 837.

Wallace R. Lane and Clarence J. Loftus, both of Chicago, Ill., for appellant.

Risley & Love, of Utica, N. Y., and Bond & Miller, of Canton, Ohio, for appellee.

Before LACOMBE, COXE and ROGERS, Circuit Judges.

COXE, Circuit Judge. The Watson patent has been so thoroughly discussed in the opinions of the District Court and of this court that it will serve no useful purpose to repeat in detail what is there said regarding the patent and the disclosures of the prior art. The patent is for a corrugated metal culvert. It is unusually plain and simple in its description and drawings and, for the purposes of this decision, is sufficiently described in the single claim, which is as follows:

"A culvert constructed of sheet metal and comprising connected cylindrical sections provided with circumferential corrugations extending to the extremities of the sections, each section terminating at one end in a flared and at the other end in a contracted portion of a corrugation, whereby the contracted extremity of one section is adapted to fit into the flared extremity of the adjoining section to interlock the terminal corrugations, and means, as bolts, engaging the overlapping extremities of the corrugations for securing the sections together, substantially as specified."

It is apparent from the record that the question of patentability is evenly balanced upon the proof. The District Judge was of the opinion that the patent was invalid for lack of invention but the record shows that other judges entertained a different view. In brief, the claim is for a sheet metal culvert composed of connected cylindrical sections having circumferential corrugations extending to the extremities of the sections. Each section terminates, at one end in a flared and at the other end in a contracted portion of a corrugation, so that two sections may interlock, the ends being held in place by bolts or similar means. The corrugations greatly strengthen the culvert and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the doubling of the corrugations at the joints braces and adds stability to the structure. In short, the patented culvert is cheap, strong, durable, easily transported, quickly laid down and easily repaired. We cannot believe that the man who gave such a structure to the world should be denied the title of an inventor.

If, in 1895, a farmer, finding that water had settled on the high side of the road through his farm, had dug a trench across the road and inserted therein two or three lengths of stove pipe to drain off the water and had then filled in the trench and covered the pipe with earth; no one, we apprehend, would think of classing this farmer as an inventor. It required no exercise of the inventive faculties to do this, even though for a time the pipe successfully disposed of the water.

But suppose, further, that after a few weeks of trial, the pipe had collapsed, being unable to stand the strain of heavy loads driven over the road; would the ordinary farmer attempt to remedy the difficulty or would he give up the problem as incapable of successful solution and build an old stone or cement culvert in its place?

We think the farmer or a mere mechanic would give up in despair, but the inventor would appreciate the difficulties and overcome them as they arise. In short, the successful solving of such a problem marks the difference between the inventor and the mechanic. The mechanic would reason that by replacing the pipe by a thicker and stronger one the ultimate collapse would only be delayed. He might attempt to strengthen the culvert by internal bracing, but it would soon appear that this would cause grass, leaves and other material to lodge on these obstructions and choke the passage. Again, he might try heavy earthenware or steel pipes, but here, again, he would find that the cost of production, transportation and installing would probably form an unsurpassable barrier and he would abandon the idea of attempting to improve on the culvert which had collapsed. The inventor, on the other hand, would look at the problem with a far wider range of vision. He would perceive the importance of retaining the metal pipes and would strengthen them by adding the corrugations and the double thickness of metal at the joints. These changes would impart the needed strength without increasing the cost or adding materially to the expense of manufacture or transportation. The inventor would see the advantage of a metal culvert and would work upon the problem until he had solved it. The fact that Watson, during the early years of his patent, was almost invariably repulsed by those interested in the art because they thought his device empirical, inefficient and perishable, is persuasive to the conclusion that his improvement was not obvious. In view of the phenomenal success of the patented pipe after the public became aware of its advantages, and the strength and durability which it has developed after years of trial, we are of the opinion that any doubt as to patentability should be resolved in favor of the patent. The practical and commercial success of the Watson culvert is so clearly shown that we find it difficult to believe that a mere mechanic could have produced a culvert

which has so revolutionized the art—a culvert which has shown a durability which no one at the time of the invention thought possible.

We have here not only the circumstance that the new device has commended itself to the public and gone into extensive use. This sometimes happens because of judicious advertising and clever business methods. The early history of the patentee's experience is illuminative. For years after the issue of the patent he labored unsuccessfully to introduce his culvert. The persons whom he urged to try his device, persons engaged in road building and under-draining, declined to do so because it seemed to them very doubtful whether it would endure, and opposition was overcome only after he had actually built a few culverts and demonstrated their capacity to remain efficient after years of use. This circumstance indicates that, simple though it is, the Watson culvert is a device which would not have suggested itself to the ordinary road builder.

Infringement is clearly shown, the two structures are almost identical and the only differences are of form and not of substance. The defendant passes the rivets through the metal at a point farther from the ends of the section by less than an inch than in the complainant's structure. The difference is trivial and nothing functional is produced thereby.

The decree is reversed with costs and the cause is remanded to the District Court with instructions to enter a decree for the complainant in the usual form.

CROMPTON & KNOWLES LOOM WORKS v. STAFFORD CO.

(Circuit Court of Appeals, First Circuit. November 24, 1914.)

No. 1041.

PATENTS (§ 328*)—ANTICIPATION—WEFT REPLENISHING MECHANISM FOR LOOMS.

The Smith patent, No. 692,935, for a weft replenishing mechanism for looms, is void, as disclosing no new principle of operation or patentable improvement over the device of the Northrop patent, No. 600,016.

Appeal from the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

Suit in equity by the Crompton & Knowles Loom Works against the Stafford Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 205 Fed. 925.

W. K. Richardson, of Boston, Mass. (J. L. Stackpole, of Boston, Mass., on the brief), for appellant.

Wilmarth H. Thurston, of Providence, R. I., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This bill charges infringement of claims 13 and 14 of letters patent No. 692,935, issued to Harry W. Smith on February 11, 1902, for a weft replenishing mechanism for looms. The claims in suit are as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"13. In a loom the following instrumentalities: A filling-changing mechanism, a lay, a detecting mechanism, including two feeler-fingers adapted to enter the shuttle and feel for the filling, and mechanical means under control of said feeler-fingers for operating the filling-changing mechanism to supply fresh filling when that in the shuttle has become nearly exhausted.

"14. In a loom the following instrumentalities: A filling-changing mechanism, a lay, a detecting mechanism, including two independently-movable feeler-fingers adapted to enter the shuttle and feel for the filling, and mechanical means under control of said feeler-fingers for operating the filling-changing mechanism to supply fresh filling when that in the shuttle has become nearly exhausted."

The District Court dismissed the bill, with an opinion passed down on June 25, 1913, reported in 205 Fed. 925, on the ground that the claims in question were anticipated by a patent issued to one James H. Northrop on March 1, 1898, No. 600,016. Thereupon the complainant appealed to us.

The patented device is a detecting mechanism in a refined art, by which, through the operation of two fingers in connection with a bobbin, the fact may be shown in advance as the bobbin becomes nearly exhausted, so the same can be replaced seasonably by a full one. It will be seen by the claims in suit, and by the specification of the patent, that the fingers are independently movable, that both enter the shuttle, and that while one contacts with the filling on the bobbin, and as that becomes reduced in amount assumes a series of different positions, the other contacts with the base of the bobbin without being so changed in position. It is the change in relative position of the two fingers that finally, when the filling is nearly exhausted, releases the "filling-changing mechanism" which supplies fresh filling.

With Northrop, there was also a combination in a detecting mechanism of two fingers, one a feeler-finger and the other an actuating-finger—the latter, as in the patent, not contacting with the filling. It is true that the two fingers were not independently movable, but were parts or branches of a swinging-arm, the change in position whereof, due to the fact that the feeler-finger had to enter further and further into the shuttle before it could contact with the filling, finally set the "filling-changing mechanism" in operation. It is true also that, with Northrop, while one of the fingers contacted with the filling, the other contacted, not with the base of the bobbin, but with the shuttle-body. It is true also, as we have said, that the art involved is a refined one; but though the device of the patent is a mechanical improvement over Northrop, the most that can be said about it, as compared with Northrop's in the above respects, leaves us of the opinion that no new principle of operation and no new result of any kind is involved, but, at the most, only more or less skillful mechanical devices, such as are ordinarily regarded as indicating no patentable novelty.

The two feeler-fingers mentioned in each claim, whether "independently movable" or not, are to be "adapted to enter the shuttle and feel for the filling." But we find nothing new in "feeling for the filling," nor in the other instrumentalities included by the claims with the feeler-fingers. Entering the shuttle by both fingers is thus the only novelty claimed.

The argument of the appellant, that having entered the shuttle one finger contacts with the bobbin while the other feels for the thread, thereby assuring greater accuracy in operation than is possible where one finger contacts with the outside of the shuttle instead of the bobbin, lacks sufficient basis in anything set forth in the claims. There is nothing in either of them requiring either finger to contact with the bobbin (as between it and the filling upon it), nor does either claim necessarily involve such contact to justify calling either finger a "bobbin-feeler."

We therefore accept the conclusions of the learned judge of the District Court that the claims in suit point out no mechanical differences from Northrop that are substantial or patentable.

Claims 13 and 14 came into the patent in suit by amendment; and the respondent claims that the patent must be invalid because the amendment was made without any new oath in reference thereto. We do not find it necessary to investigate this question, or to express any opinion in reference to the proper answer to it.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

MITCHELL et al. v. KEMP & BURPEE MFG. CO.

(Circuit Court of Appeals, Third Circuit. January 7, 1915.)

No. 1873.

1. WORDS AND PHRASES—"WAIVER."

A "waiver" is a voluntary surrender of a right. It exists when the party does not insist on or gives up some advantage which, but for the waiver, he would have enjoyed. It may be established by acts, conduct, declarations, and even by the silence of a party, as well as by his express consent and approval, and of necessity may be proven by parol. While it is not in a proper sense a species of estoppel, yet if a party to a transaction induces another to act on the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist on such rights, remedies, or objections to the prejudice of the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

2. PATENTS (§ 216*)—TERRITORIAL RIGHTS—WAIVER.

Complainant company, manufacturing manure spreaders including a patented device, sued the K. Company for infringement, and in December, 1902, settled such suit, and afterwards licensed the K. Company generally to use the patented device upon its manure spreaders. Thereafter, with full knowledge of the license, complainant gave to defendant M. the exclusive right to sell its spreaders in a prescribed territory, he having accepted the contract without knowledge of the K. Company's license; but a similar contract was made by complainant with M. for the year 1904, and with M. & Son for the years 1905 and 1906, with full knowledge on their part of the license. *Held*, that defendants, M. and M. & Son, having renewed their contract with such knowledge, waived the right to claim damages by reason of the sale of the K. Company's spreaders in such territory.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Benjamin C. Mitchell, individually, and Benjamin C. Mitchell and another, trading as B. C. Mitchell & Son, against the Kemp & Burpee Manufacturing Company. Judgment for defendant (215 Fed. 935), and plaintiffs bring error. Affirmed.

J. Barton Rettew, of Philadelphia Pa., for plaintiffs in error.

Stewart F. Hancock, of Syracuse, N. Y., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The Kemp & Burpee Manufacturing Company, which will hereafter be referred to as the Manufacturing Company, instituted an action against the copartnership of B. C. Mitchell & Son to recover a balance due for merchandise sold under a contract. Mitchell & Son admitted the amount due, but in avoidance of payment made a counterclaim for damages arising out of alleged breaches of the contract by the Manufacturing Company, which, in addition to being presented as a defense to the action instituted against them by the Manufacturing Company, was alleged as the cause of action in suits instituted by Benjamin C. Mitchell, individually, and by Mitchell & Son, copartnership, against the Manufacturing Company. There then existed several actions involving various phases of the same controversy, which afterward were consolidated, and referred to a referee "to settle all differences, claims, and demands existing between the parties." Upon this comprehensive submission the referee made an award, in affirmance of which the District Court entered judgment, which, upon writ of error, is now before this court for review.

The Kemp and Burpee Manufacturing Company was a corporation engaged in the business of manufacturing and selling a certain type of manure spreaders. It owned and used in connection therewith a certain invention or device covered by letters patent, being a sleeve upon the beater driving mechanism of a manure spreader, and for a considerable period prior to December, 1902, it was in litigation with a rival concern, known as the J. S. Kemp Manufacturing Company, hereinafter referred to as the Kemp Company, for infringement of the patented device. On December 6, 1902, the infringement suit was settled, and under stipulations of the parties a decree was entered establishing the validity of the patent and fixing an amount of damages sustained by the Manufacturing Company because of the infringement. Upon the same date, and pursuant to the same stipulation, the Manufacturing Company entered into an agreement with the Kemp Company, whereby it licensed the Kemp Company to make and sell on royalty, in territory which included that hereinafter described, the device covered by the letters patent. It is important to observe that by the license the Kemp Company was not authorized to make and sell manure spreaders of the type made and sold by the Manufacturing Company, but was authorized to make and use upon its own manure spreaders the appliance or device covered by the patent.

On January 1, 1903, in full knowledge of the license granted in the month preceding, the Manufacturing Company entered into a contract with B. C. Mitchell, whereby, in terms similar to contracts that previously existed between them, it gave to Mitchell the exclusive right to sell its manure spreaders in a restricted territory, which included the state of New Jersey and certain counties in the states of Pennsylvania, Delaware, and Maryland. A similar contract was made by the Manufacturing Company with Mitchell for the year 1904, and with Mitchell & Son for the years 1905 and 1906.

At the hearing before the referee, the Manufacturing Company claimed the whole amount of its book account admitted by Mitchell & Son to be due (except for the damages claimed), and urged that in granting the license to the Kemp Company it did not violate the provisions of the contracts with Mitchell or Mitchell & Son, conferring upon them the exclusive right to sell in the territory designated, because, first, the license contract extended only to the use and sale of a patented device upon manure spreaders manufactured by the Kemp Company, and not to the sale of manure spreaders manufactured by the Manufacturing Company; and, second Mitchell and Mitchell & Son made their contracts for the years 1903, 1904, 1905, and 1906 in full knowledge of and acquiescence in the license referred to. Mitchell and Mitchell & Son made a counterclaim for damages, upon the ground that when they entered into the contracts they were ignorant of the outstanding license which brought a part of the machine of the Manufacturing Company in competition with them in the territory which had been granted exclusively to them.

The referee admitted evidence of the knowledge on the part of Mitchell and Mitchell & Son of the outstanding contract of license at and before the dates upon which they entered into their several contracts with the Manufacturing Company, and found that at the time Mitchell entered into the contract for 1903 he was ignorant of the outstanding license and at the time Mitchell and Mitchell & Son, respectively, entered into the contracts for 1904, 1905, and 1906, they knew of the outstanding license and acquiesced in the same. Counsel for Mitchell and Mitchell & Son objected to this evidence, and as error assigned that it was admitted to alter and vary the unambiguous terms of the written contracts, and that upon the evidence the referee gave to the contracts a construction different from that which their terms import. The referee held that the evidence was admitted to show knowledge of and acquiescence in the outstanding license by Mitchell and Mitchell & Son when they entered into the contracts, and that by their words showing knowledge, and by their conduct showing acquiescence, they waived the right conferred upon them by certain of the contracts to exclusively sell in the territory designated manure spreaders with the appliance covered by the letters patent.

We do not consider the question presented in this case to be one of the construction of the contracts entered into, for the plain terms of the contracts leave nothing to be construed; nor do we find that either in admitting or considering evidence pertaining to the knowledge

and conduct of Mitchell and Mitchell & Son, respecting the outstanding license, the referee or the court below construed or attempted to construe the contracts in suit. In fact they admitted that the contracts meant what they said, when by their terms they gave to Mitchell and Mitchell & Son, respectively, the exclusive right to sell manure spreaders made by the Manufacturing Company in the territory prescribed. The question presented and decided was whether Mitchell and Mitchell & Son waived any rights or advantages to which, by the terms of the contract, they were entitled.

[1] Tersely stated, a waiver is a voluntary surrender of a right. It exists when a party does not insist upon or gives up some advantage which, but for the waiver, he would have enjoyed. It is an election by one to dispense with something of value or to forego an advantage he might have taken or insisted upon, and which he has voluntarily relinquished or surrendered. 40 Cyc. 252.

"Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is precluded from claiming anything by reason of it afterwards." Bishop on Contracts, § 792; *Pokegama Sugar Pine Lumber Co. v. Klamath R. L. & I. Co.* (C. C.) 96 Fed. 34.

Waiver of a right or a benefit may be established by the acts, conduct, declarations, acquiescence, and even the silence of a party, as well as by his expressed consent and approval, which, of necessity, may be proved by parol. *Hyde v. Kiehl*, 183 Pa. 414, 38 Atl. 998; *Allen v. Sowerby*, 37 Md. 410.

"While a waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled." *Marine Iron Works v. Wiess*, 148 Fed. 153, 78 C. C. A. 279.

[2] The referee found that when the contract for 1903 was entered into, Mitchell was ignorant of the existence of the outstanding license, and therefore, under that contract, did not waive his exclusive right to sell the products of the Manufacturing Company within the restricted territory, and allowed the damages claimed, which of course is not assigned as error. But the referee found that the contracts for 1904, 1905, and 1906 were entered into with full knowledge on the part of Mitchell and Mitchell & Son of the existence of the license to the Kemp Company, and of the fact that the Kemp Company was manufacturing manure spreaders with the device under the license, and selling the same in their restricted territory, and that Mitchell and Mitchell & Son, by their acts, conduct, and declarations, waived their right to claim damages for the alleged breaches of the contracts by failing seasonably to assert the same, by making payments under the contracts without making claims or deductions for damages, and by failing to claim damages or to give notice of an intention to claim damages until years after the breaches were alleged to have occurred, and until after the Manufacturing Company severed business rela-

tions with them. The District Court, in approving the award of the referee, found that the evidence clearly and decisively established this conclusion, and with this view we concur.

The judgment below is affirmed.

KARL KIEFER MACH. CO. et al. v. UNIONWERKE, A. G.

SAME v. HEYMAN.

(District Court, S. D. New York. December 17, 1914.)

Nos. 9-276, 10-84.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FILTER PULP PACKING MACHINE.

The Kiefer reissue patent, No. 12,455 (original No. 797,122), claims 9 and 10, for a filter pulp packing machine for pressing filter cake for beer filters, *held* valid, but not infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BEER FILTER.

The Kiefer patent, No. 993,780, for a filter for straining beer and ale, claim 1, is valid, but in view of the prior art is entitled to only a narrow construction; as so construed, *held* not infringed.

3. PATENTS (§ 328*)—VALIDITY—BEER FILTER.

The Kiefer patent, No. 1,015,326, claims 14 to 17, inclusive, and 19 to 22, inclusive, for a filter for straining beer, etc., which were introduced by amendment pending the application, without any supplementary affidavit, are void for lack of description; certain of the elements claimed therein being entirely absent in the proceedings up to that time, not only from the specification, but also from the drawings and claims. Claims 23 to 25, inclusive, for a filter cake as a new article of manufacture, also *held* invalid, for want of novelty.

4. PATENTS (§ 328*)—VALIDITY—BEER FILTER.

The Kiefer patent, No. 1,023,254, for a filter for straining beer and ale, is void for lack of novelty in view of the prior art.

In Equity. Suit by the Karl Kiefer Machine Company and Karl Kiefer against Unionwerke, A. G., and against Nathan H. Heyman. On final hearing. Decrees for defendants.

Henry D. Williams, of New York City, for complainants.

Wetmore & Jenner, of New York City, for defendants.

SANBORN, District Judge. Infringement suits on three patents for a filter for straining beer and ale, including also claims for the filter cake itself, and on one reissue patent on a press for packing the filter cake. There is also included in the Heyman case a cause of action for the repeal of a later patent issued to defendant Heyman as assignee of Benno Danziger. The patents involved are:

Reissue patent No. 12,455, to Karl Kiefer, dated February 20, 1906 (original applied for June 12, 1905, No. 797,122).

Patent No. 993,780, to Karl Kiefer, applied for April 16, 1906, issued May 30, 1911.

Patent No. 1,015,326, to Karl Kiefer, applied for February 12, 1906, issued January 23, 1912.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Patent No. 1,023,254 to Karl Kiefer, applied for April 23, 1907, issued April 16, 1912.

The Danziger patent, No. 1,029,915, sought to be repealed as an interfering one, was applied for July 12, 1911, and issued to Nathan H. Heyman June 18, 1912. It is alleged that this application was for the improvements in filters covered by the Kiefer application, resulting in patent 1,023,254, and that the patent was issued by inadvertence or mistake.

In addition to the defenses of lack of novelty and noninfringement, several relating to certain of complainants' patents are pleaded and relied on. These are specifically mentioned in this memorandum in connection with the discussion of the respective patents. Seventy-five prior art patents are pleaded in the answers, and many prior publications. Thirty-two of these patents are particularly relied on as anticipations in whole or part, as well as several exhibits of filters, filter frames, and filter cakes.

In the manufacture of beer it is necessary to filter out certain waste matter after fermentation, particularly what remains of the yeast, and to be efficient the process must be rapid. It is done by forcing the liquid through compressed wood pulp or cotton fiber of a density sufficient to retain the impurities, but allow the clear liquid to be forced or drawn off. This is called the racking-off process. In modern filters a barrel per minute can be thus purified. After use for a certain time the machine and filter plates must be thoroughly cleansed, and the pulp or fiber cakes broken up into "filter mass" and washed for repeated use in other cakes, to be again pressed and used in future filtering. The following further description is taken from Mr. Jenner's brief:

"In order to use pulp as a filtering material it is necessary to compress it, more or less, which closes up the interstices between the fibers and renders the mass capable of restraining the impurities which it is desired to remove from the liquid and permit the liquid to pass through. The completeness of this removal, and hence the efficiency of the filtration in this respect, depends upon the degree of compression; the greater the compression, the closer the fibers lay together, and the more difficult for impurities to pass through. At the same time, the denser the material, the slower the liquid passes through for a given pressure, and the greater the pressure the speedier the filtration. The compression, therefore, of the layer of pulp will depend upon those two conditions, the degree of clarification, and the speed of filtration which may be desired, and to meet these varying requirements the degree of compression is left to the judgment of the operator. The conditions mentioned will vary in different cases, but for such a liquid as beer an average must exist in actual practice, to meet which the degree of compression and degree of density may be standardized. In the trade and in some of the patents the pulp is called 'filter mass.' In some of the early patents the filter mass was compressed in the filter itself; in others the filter mass was compressed outside of the filter itself, in a press adapted to compress the filter mass into the form of layers or cakes, suitable to be put into the filter, or in frames which, when aggregated, constitute the filter. From the beginning marginal compression of the filter layer was effected in order to produce a gasket effect and prevent leakage of the unfiltered liquid around the edge of the filter layer, without going through the filtering medium itself. This was, of course, a necessary precaution."

In modern practice the pulp is not used as a gasket, but the round filter cakes are placed in the filter somewhat like coins in a portable

savings bank. On each side of the cakes (top and bottom) are the flat circular disks or filter plates, with means for allowing the liquid to escape through their edges and centers, or edges alone, under pressure. A silver dollar would be a small copy of the filter cake, if its edge were compressed to half the thickness of the center portion.

Mr. Kiefer has taken out a number of patents for filters and filter cake presses. He entered the field in 1897, and has had applications in the Patent Office much of the time since. He was accustomed to do his own soliciting, and acquired a considerable degree of skill in that line, in spite of the fact that he was educated in Germany, and has not fully mastered the English idiom. He was his own expert witness, and showed a thorough knowledge of the filtering art.

It may fairly be said, I think, that the filtering art was pretty well developed when Kiefer began applying for patents, especially by 1901, when one of his earlier inventions was applied for; the first patent in suit dating from 1905. Most of the things which Kiefer introduced in his combination claims were already known, so his work was mainly improvement, by a more exact or refined application of old principles. *Adams & Westlake Co. v. Peter Gray & Sons* (D. C.) 206 Fed. 303. Defendants put in evidence parts of a German filter found in Everard's brewery, New York City, known as the Enzinger machine, and drawings of all the filter parts. Apparatus of this kind was brought from Germany in 1893, and used down to 1905. A later and stronger form, called the "Mammut," was brought over in 1905. The press in which the pulp plate was made is shown in Enzinger's German patent, No. 69,405, of 1893, and his American patent, No. 605,706, of 1898.

In order to properly value what Mr. Kiefer has contributed to the beer-filtering art, a brief description of the Enzinger press and filter may be profitable. It is obvious that the Mammut type, so far as it is merely heavier and stronger and has the same mode of operation, is a mere development of the early kind. It is of the battery type, where the frames are brought together in a vertical position and screwed up, so that the filter, when fully put together, is horizontal in its position. This may be illustrated by likening the frames to wire screens for windows, with the wire in the center plane of the screen, and having the wooden frames very thin. Suppose a number of them are set up vertically and juxtaposed, and holes are bored through two opposite corners of the frames, so as to make two continuous channels through all of them. Obviously one channel may be used to introduce liquid to the inside of the frames, and the other to take it out, provided slots or holes be made from the inner sides of the channels into the frames. The frames being clamped up tight, and both ends of the battery or row of frames being made water-tight, the liquid forced from the channel into the inlet slots must go through the frames sidewise, and escape from the outlet slots on the opposite side. Now, if each alternate frame be covered on each side of the woven wire with a thin filter pulp cake it may be seen that the liquid may be so introduced that it must run through the filter cake before passing out through the outlet slots, and leave its impurities behind in the pulp. This may be taken as a rough description of the Enzinger filter, although in that there are four channels, two

at alternate corners of the plates, so that the cloudy and clear liquid is put in and taken out through parallel channels at one corner only; the channels at the opposite corner being used for the escape of air and gas.

In order to prepare the alternate frames with a filter pad or cake on each side of the centrally located wire screen, it is necessary to have a press, consisting of a drum or container into which the frames will fit tightly, and means for exerting pressure. A thin mixture of water and pulp is poured into the drum (which is provided with a perforated bottom), then a frame, and then an equal amount of the fibrous mixture. Pressure being applied, the water escapes through the perforated bottom, and through the piston or top and sides (both perforated), until the cake is pressed to the proper thickness. The side walls of the container just opposite the completed cake are made impervious to water. The pulp frame (or stuff frame) is then taken out and placed in the filter rack, with an alternate empty frame, then another is made, and so on until the filter of 10 or 20 frames is complete. Rubber gaskets were placed between the flat sides of the edges of the plates, so they would make a water-tight battery when clamped together, with impervious end plates, leaving openings only at the channels for the liquid and gas.

Presses and filters, such as attempted to be described, were in quite general use when Mr. Kiefer entered the field, and are fully described in four or five Enzinger patents, some of which were issued before 1897, the time of Kiefer's first application, and all before he applied for the eldest patent in suit. Other inventors, also, like O'Hanlon and Theurer, brought out filters prior to 1900.

The wire screen mentioned as an illustration was, like all of the Enzinger frames or "grids," perforated, and the screen fine enough to keep the fibers of the filter mass from passing through it; that is, it was both "perforate" and "fibre-retaining." Some of the Enzinger grids were fiber-retaining, and others light open frames, with variously perforated centers. Curiously enough, Mr. Kiefer's first patent application, filed in 1897, as well as the claims allowed, call for an imperforate frame or grid, which is made an important element of a later patent now in suit. In this first patent, No. 579,586, issued to Karl Kiefer March 30, 1897, it is stated that he obtains a more simple construction, an even, homogeneous pulp layer, and simplifies the filtering operation. These objects he obtains principally by the specially constructed filter plate, which is shown as imperforate, and having intercommunicating channels, also claimed in one of the later patents in suit.

Mr. Kiefer's second application was also for a filter, and was applied for April 29, 1901, patent issuing January 10, 1905, No. 779,607, containing 62 claims. The gist of the disclosure is that coarse wire cloth between the filter cakes may be profitably used for the inlet conductors, and coarse wire cloth covered with fine wire cloth for the outlet conductors; the fine cloth with meshes of an eighth of an inch being fiber-retaining. In this patent several of the elements of patents in suit are either explained or referred to, such as marginal

compression, nonhomogeneous filter cake, telescoping of filter elements, and the notion of compressing the filter layers outside the filter. As to most of these means for producing the effect referred to are also shown.

Another application by Mr. Kiefer was filed March 6, 1903, patent issued February 20, 1906, No. 812,931, for improvements in liquid conductors or filter plates. The patent covers marginal compression and a new form of imperforate plate. It is called a pan having a plane imperforate bottom.

A little later in 1903 an application for a press patent was filed, issued January 10, 1905, No. 779,548. Its object was to keep a wire outlet conductor properly centered in the pulp while compression was going on. It has no relevancy to this suit.

A single further application for a filter patent was made before the first of the patents in suit, on April 7, 1904, issued February 20, 1906, No. 812,932. This application, however though filed 11 months before that of the original press patent, uses a number of the same drawings, and seems to have been a companion application, one for the press, the other for the filter. It will not, therefore, be treated as an anticipation of No. 12,455, reissue. As to the three others in suit, it contains edge compression, and assumes that the filter cakes have been previously formed for insertion in it.

Other inventors besides Kiefer had also added something to the art prior to Kiefer's application for the first patent in suit. J. F. Theurer, of Milwaukee, had taken out several patents. In two issued in 1899 he shows edge compression. He says the pulp is compressed between rings to such an extent that no liquid can pass around the edge of the cake, and the same element is claimed in his patent No. 618,965.

[1] *Validity of the Press Patent.* On June 12, 1905, Mr. Kiefer applied for a patent on a press or pulp-packing machine, and it was issued August 15, 1905, No. 797,122. A few months later he applied for a reissue, and it was granted February 20, 1906, No. 12,455. The gist of this patent is the production of a nonhomogeneous filter cake, being one more compressed in its center than in other parts. The idea is that the thin pulp, suspended in water, should be kept even throughout its whole extent; that is, without any lateral movement of the fibers, which might make it uneven and so imperfect. This is to be secured by permitting the water to escape only through the filter plates at the top and bottom of the filter mass, and not at the sides of the cylindrical container. Then, in order to secure the edge compression, central hubs, ring-shaped projections or protuberances are attached to the respective tops and bottoms of the inside edges of the filter plates, so placed that the distance between these hubs is only half what it is between the plates. That part of the cake between the hubs will be compressed to half the thickness of the rest. Mr. Kiefer's theory is explained in his specification as follows:

"If the perforated plate 13 and also the perforated plate attached to the cover 12 have central and ring-shaped projections 14 and 15, as shown in Figs. 3, 4, and 5, the filter mass will be more compressed at the center than at any other part, as shown by the increased number of dots. In fact, it may by these projections be compressed to perfect dryness and impositivity. I will

explain the reason why this is the case. It is made possible in one operation by the fibrous nature of the filter pulp and facilitated by pressing the water out in two opposite directions only—namely, top and bottom. If the filter pulp would be an absolutely plastic material, the result would be a perfect homogeneous pulp layer. Now the plasticity of the pulp disappears with the loss of its moisture, and while it is still compressible up to dryness it is not perfectly plastic or ductile in all directions. In the position shown in Figs. 3, 4, and 5 the fibres around the center cannot escape from their place during pressure, as would be the case with a perfectly ductile material; but by reason of the interlacing of the fibers they have to remain at their places. By expressing the water in two opposite directions only—namely, top and bottom—I keep the fibers in a relative position of rest within the pulp layer horizontally, and a perfect nonhomogeneous filter layer is the result, while if I were to extract the water from the sides of the cylinder the fiber would move in radial directions, following the flow of the water, and the result would be an imperfect layer. While at each place of the filter layer the same amount of fibers is compressed, the ratio of compression in the filter layer may vary from one to two to one to four up to imperviousness."

This theory, which Mr. Kiefer says is not yet believed in, is supposed to be corroborated by a later patent to Loew, No. 959,021, where it is said:

"I have discovered * * * that if the inner tube is perforated, and the outer drum is substantially not perforated, the filter mass will be packed more tightly against and around the perforated surfaces than the imperforate or less highly perforated surfaces."

Claims 9 and 10 of the reissue patent are in question:

"Claim 10. In a filter pulp packing machine, the combination of (1) a container, of (2) a plane bottom and (3) a plane cover to such container, (4) means of approaching both of them so as to express the liquid from the pulp within the container, of (5) protuberances attached to the bottom and top adapted to produce a stronger compression upon the filter pulp in contact with said protuberances than is produced upon the rest of the filter pulp."

In claim 9, element 5 reads thus:

"(5) Means producing during such approach a materially stronger compression to some parts of the pulp than to others."

Whether or not Mr. Kiefer's theory is correct is impossible to find out, but he was the first to produce in filter cakes a high degree of edge compression, and transferring these cakes from the ring-shaped projections of the press to the like projections of the filter. There is a new mode of operation and an improved result. Edge compression was not new, but Kiefer gets more of it, and a more convenient operation. The perforated protuberances were new, and may have some effect. Kiefer made a forward step, so, if the reissue is valid, the patent should be sustained.

Was the Reissue No. 12,455 Authorized? I think that the invention shown in the first application was not broadened in the reissue, because both specifications and drawings show the perforated protuberances. Under the rule of *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, the commissioner's decision on inadvertence, accident, or mistake is not reviewable by the courts, except in plain cases. Kiefer having originally shown protuberances, and perforations in them, but not having clearly claimed either in the first patent, it would seem he was within the reissue statute, even though his

motive or reason may have been that another application for a non-homogeneous filter layer was disallowed in the Patent Office.

I think, therefore, that although the notion of marginal or medial compression was not itself new, that of the fiber movement was, and that when Kiefer put them together, with the other combined elements, in claims 9 and 10, he made a forward step. The means mentioned in claim 9, in view of the specification, signify perforations in the rings. The reissue is valid, and it should be so decreed.

Infringement. The only thing really new in the reissue is the perforated protuberances, which defendants do not have. In the main they took their press from Enzinger, with improvements suggested by the state of the art, to which Kiefer had contributed his share. They use a perforated circular drum or container, while that of the patent is impervious. Means and operation are different, though result may be the same.

Mr. Kiefer's theory of infringement is as follows: The upper two-thirds of defendants' circular container is perforated to allow lateral escape of the water, and the lower one-third, opposite the compression rings, is imperforate. During the first part of the compressing operation the water escapes through the side holes, carrying with it some of the adjacent fibers, until by the lowering of the compression plate the perforations are passed and the lower imperforate part is reached. The testimony then continues:

"Q. And by that time you have got such a consistency of the mass that the fibers are interlaced by that flow? A. By that time I have reached the lower part—let us say, quarter—of the piston, and I have such a consistency of the pulp in the cylinder that the fibers do not move any more with the water; that means they would not move any more following any particular flow of water, but they are fixed in a horizontal direction; they cannot move sideways any more, but they can still be compressed."

On the theory here expounded, defendants obtain a better result by different, and, as I think, not equivalent, means. While the Kiefer press has been commercially successful, this, of course, is no evidence that defendants use it. I think they do not.

[2] *Validity of the First Filter Patent.* The Kiefer patent, No. 993,780, was applied for April 6, 1906, forfeited, renewed February 23, 1911, and patent issued May 30, 1911. There has been no commercial use of the invention. The only claim in suit follows:

"Claim 1. In a filter, the combination with (1) filter layers of compressed moist pulp, of (2) a nonwoven, imperforate liquid conductor of a single manufacture between them and in direct contact with the fibers of said pulp, (3) with means for the admission of the cloudy liquid and for conducting the clear liquid away."

We quote from Mr. Williams' brief as to this invention:

"This patent for the first time in the filter art discloses a unitary non-woven imperforate liquid conductor arranged between and in direct contact with the fibers or filter layers of moist compressed pulp. A perforate liquid conductor thus arranged had been used before, but no one had discovered how to produce an imperforate liquid conductor capable of such use. An imperforate conductor has very substantial advantages in strength, in ease of manufacturing, in cheapness of manufacture, as well as in ease of cleaning. A filter is a device for catching dirt, and every part must be

capable of thorough cleaning, and ease of cleaning is a desideratum of daily advantage in the brewery in the cleaning of large numbers of plates."

On the hearing it was substantially agreed by witnesses and counsel on both sides that the imperforate grid operates the same as the perforated or open one. If so, there is little substantial difference between this and Enzinger. Kiefer's first patent, No. 579,586, as well as 812,931, shows an imperforate conductor; also the earlier English patent of Capillery, No. 1,307, of 1890. As to the substitution of a perforate for an imperforate bottom for a caramel holder, see *Glen Rock Co. v. American Caramel Co.*, 209 Fed. 619, 126 C. C. A. 579.

The patent should be narrowly sustained, but held not infringed. Defendants' pan is not just like it. The fact that theirs is made of three pieces riveted together is of no consequence. "Single manufacture" means use without any screen or cloth.

[3] *The Filter Claims of 1,015,326*. The narrowest claim is 15, and the broadest 19.

"Claim 15. In a filter, the combination of (1) a flat disk-shaped filter layer of moist, fibrous pulp, and (2) a plate having a thick outer marginal part and a thinner interior part (3) having an annular channel around inside the thick marginal part, and (4) having transverse channels intercommunicating through said annular channel, (5) said filter layer being previously compressed extraneously of any filter structure with which it is in contact during filtration, (6) with its outer marginal part more highly compressed than its interior, to correspond with the thick marginal part of the plate, and (7) its interior less compressed part being supported across said annular channel from the thicker marginal part to the thinner interior part, and across the transverse channels of the interior part, leaving said annular channel and said transverse channels open."

"Claim 19. In a filter (1) a liquid conductor with intercommunicating channels, and (2) a filter layer composed exclusively of moist, fibrous pulp, previously compressed extraneously of any filter structure with which it is in contact during filtration, (3) with its fibers in direct contact with said liquid conductor."

All the elements of claim 15, except the fifth, are found in some form in Enzinger, and in Kiefer's earlier patents. This element not only calls for extraneous manufacture of the cake, but also using it without any supporting structure. The patent law covers "any new and useful art, machine, *manufacture* or composition of matter," without any regard to where it is made. Consequently the function performed by the filter cake, and not whether it was made in the filter or in an outside press, is the proper matter of inquiry. If a filter cake "made in Germany" works better than one made in the filter itself, and sustains a different relation to the other filter elements, the combination so limited might be a good one.

This limitation refers to the practice both of using the filter as press and a filter, and that of forming the cake in a press and transferring the frames without removing the cake, as in Enzinger and in Kiefer re-issue. The language of this element is very rigidly limited:

"Said filter layer being previously compressed extraneously of *any filter structure with which it is in contact during filtration*."

So if defendants in any way supported their filter cake, by a wire screen or a piece of both, they would not be within these claims. They

do not use any such support. Enzinger is also excluded because he removes from his press into his filter both the layers and the filter frames on which they are formed.

The extraneous compression referred to is made functional by the claims and description. In his argument for allowance, of October 20, 1911, Mr. Kiefer makes this quite plain. He says:

"These corrugated plates that applicant discloses cannot be successfully used with layers compressed directly in the plates. Extraneous compression is essential. If such a plate be placed in a press, like that of my reissue patent, cited, and wet pulp poured upon the plate and compressed in it, the filter mass will be pressed into the corrugations, and no filtering combination will result. Extraneous compression, bringing the layer into the right shape, and into the right consistency in its filtering region, before it comes into contact with the corrugations of the plate it is to be used with, is, therefore, absolutely necessary. This should make it clear that the use of pulp filter mass, as disclosed in the Kiefer patents cited, would not teach anything to guide the user of corrugated plates, to combine them with a pulp layer that would operate with them.

"The cloth of Sperry would support itself across the corrugations, but it did not have the filtering qualities of pulp, any more than did it impose the conditions that pulp does, in the use of it. Had I used the Sperry plate plus the Sperry cloth, and pressed against this cloth the wet filter mass, as shown in the Kiefer patents cited, the examiner would, with small doubt, be right. I would have used a Sperry plate with the old Kiefer pulp layers. But I would have used the cloth as a fiber-retaining screen, and as a supporting structure across the corrugations. I would not have dispensed with the supporting structure—the cloth.

"However, the present invention not only allows the pulp layer to be used free from all protecting and reinforcing structures, but also allows it to be produced independently from the filter apparatus or appurtenances with which it is to be used during the filtering operation. A pulp layer is, therefore, by my disclosure, used as if it were really a cloth sheet, so far as preliminary handling is concerned. But this layer, with these new properties, shown for the first time, should therefore be patented.

"This assertion is also supported by other circumstances. Filters such as Sperry's, using cloth sheets with various plates, are at least 40 years old in the art, and pulp layers, in one form or another, date back at least 30 years. Had it been so simple, as the examiner implies, to merely substitute a pulp layer for a cloth layer, it would most probably have been done long ago.

"For one familiar with filtering, it is hardly necessary for me to dwell upon the importance of simplifying a pulp layer to the extent of making the use of strong, simple, sanitary plates possible, while doing away with cloths or screens. This I have done, and I believe my claims now express my invention correctly, and they should be allowed."

It will be noticed that elements 3 and 4 are an annular channel around inside the thick marginal part, and transverse channels intercommunicating through the annular channel. Both of these elements appear for the first time in the renewal claims filed after July 13, 1911. Neither is mentioned in the specifications, original or final. Defendants insist that the patent is void for lack of description, and because new matter was put into the renewal claims without any supplementary affidavit. The channels claimed can be made out from the drawings if Figure 3, which was introduced after renewal, is compared with Figure 2. As Mr. Waterman says, "Figures 2 and 3, taken together, make the matter clear." From Figures 1 and 2 alone it seems impossible to determine whether the portion of the plate just inside the thick marginal part is intended to be deep enough, or of a shape or form, to make

any channel at all, or whether it is to communicate with the other channels. Something may probably be inferred from the arrows shown on Figure 2, but even with them the annular channel is not clearly shown. So we have the case of renewal claims covering elements entirely absent in the original proceedings up to the renewal—absent, not only from the description, but also from drawings and claims. These channels perform the important function of circulating the liquid, and when they appear for the first time in the renewed application cannot be otherwise than new matter.

The statute requires written description. As Mr. Justice Brown said in the *Incandescent Lamp Patent Case*, 159 U. S. 465, 474, 16 Sup. Ct. 75, 78 (40 L. Ed. 221):

"It is required by Rev. Stat. § 4888 [Comp. St. 1913, § 9432], that the application shall contain a written description of the device 'and of the manner and process of making, constructing, compounding, and using it in such full, clear, concise, and exact terms as to enable any person, skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound, and use the same.' The object of this is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid."

There is a multitude of decisions construing this provision. While the courts are reluctant to avoid a grant for failure to describe it, especially where the grantee has occupied territory under it, they have often been compelled to do so. If an invention has gone into general use, and skilled workmen have been able to construct the device or machine in an acceptable form, defects in description will often be overlooked. The *Grant Tire* litigation is a curious illustration. *Grant* did not explain how the two parallel wires should be put on, those which hold the tire in place, and whose tension secures the oft-mentioned "side-tipping function." But the device took a certain form, universally employed for properly setting the tire. The patent was sustained in this circuit (*Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co.* [C. C.] 91 Fed. 978; *Consolidated Rubber Tire Co. v. Diamond Rubber Co.*, 162 Fed. 892, 89 C. C. A. 582), and held void in the Sixth (*Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.*, 116 Fed. 363, 53 C. C. A. 583). Judge Lurton said that the tipping capacity was not even pointed out, so that no mechanic, following the specifications, would know how tight the wires were to be put on. Finally the Supreme Court took the case on certiorari to the Circuit Court of Appeals of this circuit, and affirmed its decision upholding the patent. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. This liberal rule should not apply, and never has been applied, to a patent which has not had a pronounced success.

Counsel for defendants cite a number of decisions upon the necessity of a full and clear description, and that new matter requires a supplemental oath. *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Eagleton Mfg. Co. v. West*, 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493; *Steward v. American Lava Co.*, 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139; *L. H. Gilmer Co. v. Geisel* (C. C.) 187 Fed. 606, affirmed

187 Fed. 941, 109 C. C. A. 620; Hestonville, M. & F. Pass. R. Co. v. McDuffee, 185 Fed. 798, 109 C. C. A. 606; Motion Picture Patents Co. v. Independent M. P. Co., 200 Fed. 411, 118 C. C. A. 563; Ney Mfg. Co. v. Swineford Co. (D. C.) 211 Fed. 469; General Subconstruction Co. v. Netcher, 174 Fed. 236, 98 C. C. A. 144. Others are referred to, and many more could be. Cases relating wholly to the sufficiency of description are Gunn v. Savage (C. C.) 30 Fed. 366; Windle v. Parks & Woolson M. Co., 134 Fed. 381, 67 C. C. A. 363; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 C. C. A. 185.

The Filter Layer Claims of 1,015,326. Three of the claims are for the filter cake as a new article of manufacture, which is quite clearly described in the original specifications. Claims for this appear only in the renewed application. The invalidity of claims unsupported by a sufficient description, or introduced as new matter without an additional oath, does not affect those introduced in the renewed application, which are supported by a sufficient description. So the only question here is anticipation.

Mr. Kiefer's idea is to claim a self-supporting filter layer, made so by a strong edge compression, which will form a gasket sufficient to prevent liquid from getting through it. Claim 23 reads:

"With a more compressed outer marginal gasket-forming part, and a less compressed interior filtering part, whereby it is self-supporting."

It seems that Mr. Waterman is correct in saying that, if a filter cake is compressed to be gasket-forming, it is compressed to be self-supporting.

In his argument with the examiner Mr. Kiefer says:

"As regards claims 23 to 25, inclusive, for novel pulp layers, I have amended the claims to express clearly the important fact that these plates are made and handled entirely apart from reinforcing or supporting structures. My machine, shown in reissue patent No. 12,455, it is true, may be used, with certain modifications, to make my new pulp layers, as disclosed in this application. But the new pulp layer was not shown in that patent, nor suggested, either by that patent or by any other disclosure. In both of my patents cited, the pulp layers are confined within surrounding frames, or protected by wire screens, so far as support, outside or inside the filter, is concerned.

"Now, by my new invention, we have a pulp layer that is independent. The process may be old, so far as disclosed in the reissue patent; the modifications of the device for producing the layer, even, may be obvious, after it is seen what kind of a layer is wanted; but the article itself is new. It was not previously disclosed, even though the means for producing it, possibly, were at hand. Patents are unquestionably granted for novel articles of manufacture, regardless of the simple mechanical ability required to produce them. They frequently derive merit, through the ease with which they may be produced by some well known means. It is the nature of the article itself, not the process or apparatus for making it, that must be considered.

"But it is clearly permissible to specify in a claim how an article has been produced, although the means of producing thus specified may be old, if such specification, in the claim, makes clearer what the nature of the article is. In this case, the extraneous compression of the pulp layer is essential, as has been explained. Each of the claims sets forth a novel structure, with new properties, and is limited to the details of the structure by which such new properties are attained.

"The reissue patent, notwithstanding its close relation, concerning a means of producing a new filter layer, cannot have any bearing on the article itself. The very fact that the reissue patent, in Figs. 4 and 5, shows a contrivance for reversing the layer, after making it, without disruption, is conclusive as to the circumstances surrounding the disclosure of this reissue patent. From the condition of affairs there exhibited I have made a marked advance step, as disclosed in this application. That contrivance, as well as the screens in the middle of the layer, are rendered obsolete by my present invention, so far as concerns the user of the new type of filter, which type I now make possible."

This is a frank and clear brief for these claims, narrow as they seem to be. When we consider the Stockheim German patent, No. 76,103, issued July 10, 1894, in connection with the Kiefer reissue, it seems quite doubtful whether these three claims can be sustained as patentable. Practically the only difference between Stockheim and Kiefer is correctly stated by Mr. Waterman:

"They are pressed of wet pulp and the patent is devoted to showing how the cake can be pressed of wet pulp, dried, and still have the porosity, so that it is instantly wet by the liquid going into the filter; then the cakes are kept in a sterile condition, put into the filter when needed and they are dry at that moment, if that is what you mean. Then as soon as the liquid is turned on they get wet. Q. They get wet, yes? A. Yes; and the significant part of the specification to the patentee is his disclosure of how to make them so that they are capable of being dried without becoming boardy and nonporous."

Mr. Kiefer's answer to this statement is as good as could be made. He says:

"I do not think it has any reference to these cakes which are here in question. The purpose of these dry cakes in that patent was that they should actually be used, actually put in the filter; they are made of a special porosity, which at great length is described how to be attained, so that the material would be filtered, should go through it and filter, so that the cakes made up as they were could be put into the filter in a dry condition and used as disks. It is very similar to the assemblage of sheets of paper. The structure of dry material also becomes a different one, even if made moist again afterwards. When the filter mass is in a moist condition, it mixes readily with water; but, if once dried out, it is very hard to be softened."

Defendants' filter cakes as shown by Exhibits 12 and 14, seem to substantially answer the Kiefer claims. When they leave the press the cakes are $1\frac{1}{4}$ inches thick, with their edges compressed to one-half inch. They are piled up on the floor, and gradually swell until they are $2\frac{1}{4}$ inches thick, and the edges $1\frac{1}{2}$ inches. After they get into the filter, they are compressed about an eighth inch in the center and nine-sixteenths inches at the edge. Thus they have a much greater compression when they leave the press than they ever have again. I have not overlooked the testimony of Mr. Heyman and Mr. Waterman on this point. What Mr. Heyman says is not inconsistent with the exhibits. Mr. Waterman says defendants' cake certainly is not self-supporting. After being out of the press for a few minutes, they cannot be picked up and held horizontally, in one hand. The workmen, he says, take the press ring out of the press with the cake in it, and with a dextrous movement revolve it, throwing the cake out on a flat table, from which it is then taken with both hands and turned into a vertical position, and then carried near to the filter and

piled up on the floor. While being carried, it sags somewhat, but does not lose form. From these facts, and observation in the brewery, it is inferred by the witness that the cakes are not self-supporting, because they can be handled only by special dexterity.

While there is something new here, in that no one had produced filter layers of *moist* pulp which were made outside the filter, and independent of any filter structure, yet it is not everything new that involves invention. *Faultless Rubber Co. v. Star Rubber Co.*, 202 Fed. 927, 121 C. C. A. 285. If a patented product is new, and goes into extensive use without being unduly pushed, it should rarely be held unpatentable; but in this case Stockheim made a self-supporting cake, partly by his method of making it and partly by drying it. The inventive idea was different, but not greatly so. Moreover, only a slight change in the Kiefer press of the reissue patent is necessary to make the filter cake just like that of 1,015,326. Defendants' press is not an infringement of the reissue patent. They had the right to make and sell that press. It produces filter cakes like those of this patent. While it might be technically possible for one to have the right to make and sell a machine whose product was such an infringement as to require absolute prohibition of such product by injunction, yet such right would then be of no value, and should be held to include the incidental advantage of using the product. If a process be decided valid, the product could not be suppressed without putting an end to the process.

Under the "Domes of Silence" Case in this circuit (*Barry v. Harpoon Castor Mfg. Co.*, 209 Fed. 207, 126 C. C. A. 301), and those referred to by Judge Coxe, it might be proper to sustain these filter layer claims, if the product had been made in the Kiefer press and gone into extensive use. But in the absence of this condition of things, and in view of the supposed immunity of the defendants' press, these claims should be held invalid.

[4] *Validity of Patent No. 1,023,254.* Application was filed April 22, 1907, renewed February 23, 1911, issued April 16, 1912. This covers a battery form of filter where no drum is used but the filter frames with the layers between them are pressed together against gaskets, the frames fitting into each other with telescoping ledges, and having exterior extensions with registering openings, as indicated in the explanation as to wire screens in connection with the Enzinger structure. Substantially everything found in this patent appears in 1,015,326, except the gaskets, telescoping and exterior extensions, and these variations were all made convenient by the change of type from drum to battery.

The gist of the invention is the telescoping feature. This is found in many earlier patents among them Kiefer, 779,607, Figures 7 and 9. While not absolutely essential to the battery type, it is a simple and convenient feature, which would readily occur to any one who knew anything about beer filters, whether he was skilled or otherwise. Co-action of filter layers and telescoping ledges is present, but at best the patent is merely a slight advance, requiring no inventive faculty of any description.

Repeal of Danziger Patent. This is sought on the ground that some of its claims, particularly 1, 2, 3, 5, and 6 interfere with 1,023,254. That patent being considered invalid as to all its claims, it is not necessary to consider the matter. Mr. Kiefer is thought to have no interest in it.

Decrees should be entered adjudging as follows:

Claims 9 and 10 of the reissue patent, valid, but not infringed.

Claim 1 of 993,780, valid, but not infringed.

Claims 14 to 17, inclusive, and 19 to 22, inclusive, of 1,015,326, invalid for insufficient description and want of statutory affidavit.

Claims 23 to 25 inclusive, of 1,015,326, invalid for want of novelty.

No. 1,023,254, invalid for want of novelty.

Complainants not entitled to any relief in respect to the Danziger patent to Heyman.

And that the bills should be dismissed, with costs.

In re KRUG et al.

(District Court, E. D. Pennsylvania. December 1, 1914.)

No. 5005.

BANKRUPTCY (§ 225*)—PROCEEDINGS BEFORE REFEREE—RECEPTION OF EVIDENCE.

Subject to the exercise of his discretion in controlling irrelevant inquiries, it is good practice for a referee to receive testimony to which objection is made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 384; Dec. Dig. § 225.*]

In Bankruptcy. In the matter of John F. Krug and George Klein, individually and as copartners, trading as Krug & Klein, bankrupts. On exceptions to report of referee on special reference of motion to strike out answer of attaching creditor to petition in bankruptcy. Exceptions overruled.

Henry Arronson, of Philadelphia, Pa., for petitioning creditors.

D. Hays Solis-Cohen, of Philadelphia, Pa., for attaching creditor.

DICKINSON, District Judge. The only facts with which we are now concerned are the following:

John F. Krug and George Klein formed a partnership under the firm name of Krug & Klein to engage in the milk business. The partnership was formed July 1, 1912, and acquired the ownership of certain milk routes and personal property for use in that business. In June, 1913, the firm became insolvent. An attempt was made to wind up its affairs through an agreement among its creditors by which its property should be turned over to a trustee for the creditors' benefit. This effort fell through. Following this one of the milk routes belonging to the firm was sold, the proceeds to go to the firm creditors through a trustee named to receive the money. In December, 1913, before the above moneys were paid, a petition in bankruptcy was filed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William Schmitz had secured a confessed judgment against Krug, one of the partners, and had issued an attachment in execution levying upon the money proceeds of this sale in the hands of the purchaser. The attachment issued prior to the petition in bankruptcy, and the attaching creditor filed an answer to the petition in bar of an adjudication. This answer is based upon certain averments to the effect that the partnership had been dissolved, that Krug, one of the partners, had come into possession of certain property as his share of the partnership effects, and that the moneys attached were the individual moneys of the partner, who was the defendant in the judgment upon which the attachment had issued. A motion was made to strike out the answer. A special reference was made of the answer and motion in order to have the facts found. The report of the referee, to whom the reference was made, has been filed, and the matter is now before the court on exceptions to his report. The firm is admittedly insolvent. Neither of the individual partners possess any individual assets. The real contest, therefore, is whether the proceeds of the firm property shall be applied to the payment of the firm debts or shall go to the attaching creditor. Not a little ingenuity has been displayed by counsel for the attaching creditor to make a plausible showing of his claim of right to this fund. The line of reasoning is that partners are joint owners of the partnership property; that as such joint owners they may by agreement sever the joint ownership and each become the individual owner of his part of what was before the common property. This may be accomplished by a dissolution of the firm and a division of its assets between the two partners. When any part of the property has thus become the individual property of one of the partners, it may be levied upon by any creditor of that partner who has obtained judgment and issued execution. The firm creditors have no lien upon the specific property which had formerly belonged to the firm, and their rights as creditors can be worked out only through their right to pursue each and both of the firm partners for the debts owing. These principles are given application in the present instance by the averment of the facts, already referred to, that there had been a dissolution of this firm, a division of its assets, and that the part of the assets with which we are now concerned had become the individual property of Krug, against whom the attaching creditor had obtained judgment and issued an attachment, which he was in consequence entitled to maintain against any claim of the firm creditors.

It is unnecessary to inquire into the soundness of the propositions of law upon which the claim of the right of the attaching creditor is founded, because the admitted basis of the whole claim is the averment of a series of facts beginning with the dissolution of the firm. The referee has found this and all the other facts of the case against the attaching creditor. Nothing has been suggested to call upon the court to interfere with this finding. The only inquiry remaining, therefore, is whether the referee excluded any evidence which had a bearing upon the controlling fact. The rulings referred to in exceptions 1 to 7, inclusive, clearly have no such bearing. The inquiries

involved in most of the questions to which the exceptions relate were clearly irrelevant ones, and, as to the others, answers were given which show the exceptions to be without merit. The agreement referred to in the question quoted in the eighth exception is assumed to refer to the abandoned project to adjust in some way the firm indebtedness. The question, therefore, had no relevant bearing upon the inquiry. Subject to the exercise of the discretion of the referee in controlling irrelevant inquiries, it is good practice to take the testimony to which the objection applies. As, however, the attempt to make an adjustment with the creditors was an admittedly futile one, what the agreement was leading up to it is of no evidential value to us, and we therefore cannot find that the referee was in error in refusing to permit the question to be answered.

This disposes of all the questions raised by the exceptions. The exceptions are dismissed, and the findings of the referee affirmed.

BRADY v. KERN.

(District Court, E. D. Pennsylvania. January 4, 1915.)

No. 2682.

1. EVIDENCE (§ 155*)—EVIDENCE ADMISSIBLE BY REASON OF ADMISSION OF OTHER EVIDENCE.

Where, in an action on a written contract to purchase certain corporate stock, plaintiff was permitted to testify that \$100 paid at the time was part of the purchase price, and that defendant agreed to go to the different holders of trust certificates representing the stock and secure such of it as he might be able to get, plaintiff assuring him, however, that he would be able to get it all within the price stated, defendant was entitled to testify in resistance that the contract was not absolute, but conditional on his being able to get sufficient money from his bankers to carry the deal through, and that the amount paid down was a forfeit, to be retained by plaintiff in case defendant was unable to perform.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458, 2148; Dec. Dig. § 155.*]

2. EVIDENCE (§ 420*)—CONTRACTS—CONDITION.

Where plaintiff sued on an alleged absolute contract by which defendant agreed to purchase certain corporate stock from him, defendant was entitled to prove that the contract was not absolute, but conditioned on the result of his ability to complete the purchase at the time mentioned, and was not otherwise to become operative as an agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944; Dec. Dig. § 420.*]

At Law. Assumpsit by Arthur C. Brady against Martin E. Kern. On motion for a new trial. Verdict for defendant. Plaintiff's motion for new trial denied, and leave granted defendant to move for judgment on the verdict.

E. Spencer Miller, of Philadelphia, Pa., and Montgomery Hare, of New York City, for plaintiff.

Lawrence H. Rupp, of Allentown, Pa., and Owen J. Roberts and Preston K. Erdman, both of Philadelphia, Pa., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DICKINSON, District Judge. The verdict was for the defendant. There is only one question left in the cause. It is purely an appellate one, and is decisive of the case. What it is and how it arose may be best shown by contrasting the plaintiff's case with the defense. A general statement of the issue between the parties is this:

The plaintiff claimed \$131,188.50 loss on sale of stock which defendant had agreed to buy of plaintiff for \$131,500, less \$100 paid on account, and the sale of which netted \$211.50. The defense was that the purchase was conditional; the true version of the facts being that the defendant had deposited with the plaintiff \$100, to be forfeited upon his failure to take up the stock at the time fixed. The verdict settles the question of fact. The evidence consisted in part of writings and in part of oral testimony. The real question is whether the defense should have been determined upon the writings alone, or upon the consideration of the oral testimony as well. The question was twice raised. The testimony was objected to as inadmissible, and the court was in effect requested to direct the jury to disregard it. The testimony was admitted, and the jury were instructed that they should find the facts from the evidence.

The plaintiff declared first upon a purchase of stock, without indicating whether the agreement was in writing or oral. The purchase is declared to have been a purchase of shares of stock, which are averred to have been "represented" by trust certificates. A memorandum of the agreement of purchase is further alleged to have been put in writing and signed by defendant, who thereupon paid \$100 on account of the purchase price, and agreed to consummate the sale at a designated time, which agreement of purchase the plaintiff accepted at the prices named. A copy of the memorandum of purchase is attached to the statement of claim. It is as follows:

"I agree to pay to Arthur C. Brady \$75 per share for approximately 1,500 shares of the preferred stock of the International Motor Company and \$10 per share for about 1,900 shares of the same company before 12 o'clock noon December 3, 1912.
[Signed] Martin E. Kern."

The declaration adds the averment that the number of the shares of stock to be bought was not definitely set forth in the writing, because the exact holdings of the plaintiff were not known to the parties, but that the "intent" was the defendant should buy all of plaintiff's holdings, and that by the words "shares" and "stock" and "preferred stock," appearing in the writing, neither stock nor certificates of stock were meant to be bought, but voting trust certificates. This feature of the declaration is concluded with the averment that the defendant knew the plaintiff's holdings were represented by trust certificates, and that plaintiff had tendered the stock at the time named for its delivery. The defendant pleaded the general issue, with notice of special matter, and the parties went to trial on these pleadings.

At the trial the plaintiff was called as a witness, and testified to conversations and circumstances tending to prove that a sale of the stock had been made and \$100 paid on the purchase price, and that a memorandum of the terms of purchase had been reduced to writing and signed by the defendant. The writing was produced, identified, and

put in evidence. The plaintiff was then thus situated: He had averred a tender of the stock. The agreement of purchase as proven was of no definite number of shares. The fact was that he had no stock to deliver, because his holdings were not of stock, but of trust certificates. Instead of standing upon the agreement of purchase, as set forth in the memorandum, he varied its terms by testifying to an oral agreement that the writing was to be read, not as a purchase of a definite number of shares of stock, but of all his holdings, whatever they were, and not a purchase of certificates of stock, but of the voting trust certificates for which they had been exchanged. This he might not have been required to do, but he did more than this.

The further fact was that he had neither certificates of stock nor trust certificates to deliver, for the reason that all the certificates were held by different banks, trust companies, and brokers, with whom they had been hypothecated. To relieve himself of the obligation to deliver anything, he sought to again vary the agreement of purchase by testifying to an oral stipulation that he was not to deliver the stock, but that the defendant was to go to the different holders of the stock and thus secure such of it as he might be able to get; the plaintiff assuring him, however, that he would be able to get it all within the price named. The consequence, of course, was that the plaintiff testified to all the occurrences of the evening when the contract was made. Incidentally he denied, at first inferentially, and on cross-examination categorically, that the agreement of purchase was to become effective only if defendant was able to raise the money, and denied in toto anything having been said of the \$100 being in the nature of liquidated damages, and to be forfeited if defendant was unable to complete the purchase.

[1] The plaintiff having thus testified to all which had been said and done, was it error to permit the defendant and his witnesses to give the defendant's version of the facts? The question would seem to carry with it its own answer. The evidence having been admitted, what effect was it proper to permit the jury to give to it?

[2] The defendant and his witnesses all denied the stipulation as to delivery of the stock to which the plaintiff had testified. They deposed that nothing of the kind had taken place. What had been said was in effect that the purchase was a conditional one. The defendant was to see his bankers the next morning, and the agreement was to become operative at the time fixed if he could put a sale through. If he could not, he was to forfeit the \$100 paid down. Had the finding of the jury been confined to whether the defendant had waived delivery of the stock, no objection could have been urged by the plaintiff to the instruction. A failure to refer to defendant's testimony, by confining it to a mere denial of what had been said by the plaintiff, would have been manifest injustice to the defendant. In reality and in fact the rejection by the jury of the testimony on the one side was the equivalent of the acceptance of that of the other. In strict logic and in theory, however, this is not necessarily so, and it is therefore pertinent to inquire whether defendant's testimony would have been admissible, had the plaintiff not testified. The general rule which protects contracts

in writing from being emasculated through oral testimony is a wholesome one, and all qualifications asked to be made should be closely scrutinized. The qualifications of the rule are none the less somewhat numerous. It must necessarily be so, and we think the defense in this case to be within the qualifications. We see no difference in principle between it and other defenses which have been admitted.

Among the many cases illustrative of the exceptions to the general rule it is sufficient to refer to *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Tug River Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415.

We have considered with care the very able and earnest presentation of the plaintiff's side of these questions by his counsel, but it leaves us unconvinced.

The motion for a new trial is refused, and leave is granted defendant to move for judgment on the verdict in favor of the defendant and against the plaintiff for costs.

THE SIAMESE PRINCE.

(District Court, S. D. New York. January 11, 1913.)

SHIPPING (§ 132*)—LOSS OF CARGO IN LOADING—LIABILITY OF VESSEL.

While a bundle of rubber, consisting of six bales slung to the boom of respondent steamship, was being hoisted on board from a lighter in the port of Bahia, the lighter lurched from the ship, owing to the swell, and the bundle struck her rail and was lost in the sea. The ship furnished the tackle and winchman to operate it and a man who stood at the side and signaled the winchman to hoist when told by the men on the lighter, who, with the lighter, were employed by the shipper. The bill of lading exempted the ship from liability for risk of "transshipment from or to craft." *Held*, that this placed the burden of proof on the shipper, and that there was no evidence to show negligence on the part of the ship; the negligence, if any, being that of the lightermen in not steadying the sling as it rose.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

In Admiralty. Suit by Adolph Hirsch, trading as Adolph Hirsch & Co., against the steamship *Siamese Prince*. Decree for respondent.

T. Catesby Jones, of New York City, for libellant.

John M. Woolsey, of New York City, for respondent.

LEARNED HAND, District Judge. This is an action against the steamer for the loss of eight bales of rubber while being shipped from a lighter to the steamer itself at Bahia on the night of the 3d day of January, 1912. The rubber was a part of a consignment of 584 bales which had been loaded into a lighter at Bahia and brought alongside the steamer, which was two or three miles out. In Bahia all loading is done by lighters, as it has no wharves, and the steamer was riding on one anchor off shore, as stated. The harbor of Bahia for about 90 degrees is open to the sea, and there is continuous swell which varies with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—55

the tide and wind, but is in nearly all conditions sensible on all smaller vessels. On the night in question the swell was not severe, but enough to cause the lighter to range considerably at the side of the steamer. The steamer herself was apparently substantially steady. The lighter was fastened fore and aft by two lines to the bollards of the ship, but there was no attempt to keep her from ranging off and on to the ship's side. The loading was being done from the No. 2 hatch of the ship, from which a boom had been run over the ship's side, lowered enough so as to plumb directly over the open hatch of the lighter itself. This hatch was probably about 20 feet wide, and went from side to side of the lighter itself. Possibly it was a trifle shorter. The method of loading was to sling some six or eight bales of rubber onto the falls of the boom, then to hoist away until the bundle got to the height of the deck, after which it was taken on board and loaded into the ship's hold. The lighter was furnished by the shipper, and the ship had nothing to do with it. Aboard the lighter were men charged with the duty of making up the slings. This hold was apparently a shallow affair—indeed, so shallow that a man standing in it had his head above the deck. The coaming on the outboard sides of the hatch consisted of the lighter's own rail. On the ship the loading at the time in question was in charge of the mate, but the only eyewitness was an apprentice, who tallied the cargo as it came over. There was a man on the steam winch, and a man at the gangway, or the place where the rail had been, as it was taken down for this purpose. The men in the hold of the lighter would give the signal to the gangwayman when they wished the ship to heave away, and he would repeat it to the winchman. Then the bundle would be heaved up. The particular bundle in question was made up as the others had been made and the lighterman gave the signal to the gangwayman, who repeated it to the winchman. The winch was started and the bundle was raised. Whether at that time it was swinging or not cannot be ascertained, except by inference, but this much is certain: That, as it reached about the height of the lighter's deck, the lighter gave a sudden lurch away from the ship of about two or three feet, and perhaps rose at the same time; the coaming struck the bundle, detached it from the sling, and the bales fell overboard. They were not recoverable, and no effort was made to recover them.

The bill of lading under which both parties concede the shipment is to be controlled contained, among its exemptions, the following: "Risk of lighterage to or from vessel, risk of craft or hulk, or storage or transshipment, or transshipment from or to craft." I do not think that any of these has any application to this case, except the last words "transshipment from or to craft," but this covers exactly the situation of these bales in my judgment. Therefore we start with an exemption in favor of the ship. Now Mr. Jones urges on me that this exemption is void in any case, for the reason that it is not by its own terms limited to exemptions, in the absence of negligence, that a general exemption, including negligence, would be void in any event; and, as the ship has drawn its own bill of lading, I should not save it in respect of those conditions with which it would be valid, had it been expressly so limited. On that question I express no opinion, because it has been de-

sided by Judge Noyes on exceptions to an answer in another case setting up the same defense. I shall therefore overrule that.

The sole question in the case is whether the libellant has shown enough negligence to take the case out of the exemption. Now Mr. Jones insists that it is enough in this case to call for an explanation that the accident was one which happened apparently while everything was going in the usual way, and particularly that the person who has all the facts ought to show them and show why there was no negligence. In other words, he invokes in this case the doctrine of *res ipsa loquitur*. Perhaps if I agreed with him on the facts I might agree with him on the law. I do not think it is necessary to pass on that question, because it does not seem to me that the ship was in entire control of the situation. The testimony of the apprentice, Jameson, who was the only witness who saw what happened, is quite clear to the effect that the lightermen gave the word to the gangwayman to hoist. Mr. Jones thinks, and I am inclined to agree with him, that probably this bundle must have been swaying a bit for the lighter to strike it. Certainly, if we are to take the dimensions which the witnesses gave, there must have been considerable swaying back and forth of the bundle at the time—a swaying of four or five feet on each side. He says that, when the gangwayman saw that the bundle was swaying in this way, he ought to have stopped the winch and let the bundle steady itself, before it could be hauled up. Where I differ with him is that I think the duty of steadying the bundle he was quite right in leaving to the lightermen themselves. It is conceded in the case that the ship is not responsible for what went on in the lighter, and that the libellant or his agents chose it. It is also, as I have said, the fact that the lighter had assumed the direction of the hoisting. I think they were in quite as good a position, if not better, to determine what was the proper time to hoist away and how far to hoist as the gangwayman; in any event, it was within the duties which were intrusted to them by the libellant. If the gangwayman had interfered, I think he would have gone out of the proper limitation of his own duties. Probably what happened was that the bundle had been taken from one side of the lighter, and, as it was hoisted, the lighterman did not steady it sufficiently. They, at the time of giving the order to the gangwayman, could have said to hoist a few feet so as to clear the bottom of the hold, and then they could have steadied it. I do not think that the gangwayman should be charged with that duty. If he should not, there is nothing in the ship which was negligent, and it was entitled to its exemption.

The testimony makes it quite clear that there was nothing unusual in the range of the lighter at the time when this bundle was struck. I think it also quite clear that it is utterly impossible, under the circumstances, to foretell in the least degree just when a lurch of this sort would come. Under most circumstances, the range of the lighter was too short to do any damage, but whether in a given case or not the likelihood of damage was proximate was, as I have already stated, a question which rested primarily, and indeed altogether, in the judgment of the lightermen themselves.

The result of this is therefore that the libel should be dismissed.

UNITED STATES v. OREGON SHORT LINE R. CO.

(District Court, D. Idaho, S. D. October 31, 1914.)

Nos. 131-135, 137, 142, 147, 148, 151.

1. CARRIERS (§ 37*)—FEEDING AND WATERING LIVE STOCK—PENALTIES.

Under Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651-8654), prohibiting carriers from confining live stock in cars, boats, etc., for longer than 28 consecutive hours, without unloading them into properly equipped pens for rest, water, and feeding, and prescribing a penalty for violations thereof, where stock, after being confined in a car for more than 28 hours, are unloaded into pens of inadequate size and insufficiently equipped for feeding and watering, this merely continues and aggravates the offense, and does not constitute a new and separate offense, since the offense consists in confining the stock more than 28 hours without feeding, etc., which confinement may be in the cars alone, or in the cars and pens, and confinement in improper pens is material only in so far as it contributes to the offense of depriving the stock of the requisite food, water, and rest for more than 28 hours.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

2. CARRIERS (§ 37*)—FEEDING AND WATERING LIVE STOCK—PENALTIES.

Under Act June 29, 1906, where, though consignments of live stock which were confined in cars for more than 28 hours, without food, water, and rest, were unloaded simultaneously, they were received by the carrier at different hours, the unlawful confinement of each consignment constituted a separate offense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

3. CARRIERS (§ 37*)—FEEDING AND WATERING LIVE STOCK—ACTIONS FOR PENALTIES—PLEADING.

In an action for a penalty under Act June 29, 1906, where there was no allegation as to the length of time that live stock was confined without food, water, and rest in the cars, or in the pens, or both together, no offense was stated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Ten actions for statutory penalties by the United States against the Oregon Short Line Railroad Company. Judgment for plaintiff in all of the actions except one.

James L. McClear, U. S. Atty., of Coeur d'Alene, Idaho, and John R. Smead, Asst. U. S. Atty., of Boise, Idaho.

P. L. Williams, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, Idaho, for defendant.

DIETRICH, District Judge. [1] By stipulation, ten separate actions, brought by the government against the Oregon Short Line Railroad Company, for violations of the 28-hour law (Act June 29, 1906, 34 Stat. 607), have been submitted for decision upon the complaints, together with certain admissions of fact, without formal answers. Exclusive of such features as are directly ruled by *Baltimore & Ohio R. R. Co. v. United States*, 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384, it may be said that each of the cases turns upon one of the two following questions, namely: (1) If a carrier confines stock in a car

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for more than 28 or 36 hours, as the case may be, and thereupon unloads them into pens of inadequate size and insufficiently equipped for feeding and watering, is it guilty of two offenses? and (2), if the carrier consolidates into the same train consignments loaded at different times, and thereafter, before the expiration of the period of 28 hours, unloads the entire train into pens of insufficient capacity and without proper facilities for feeding and watering, does it commit more than one offense? It is thought that both questions may be referred to one controlling consideration, and that is whether the mere unloading of stock into inadequate pens, of itself, constitutes an offense.

The act does not purport to prescribe at what points stock pens shall be maintained, or how they shall be equipped. Indeed, the carrier may fully comply with its terms without any pens at all. The purpose of the legislation is clear. It imposes upon the carrier the obligation of seeing to it that stock in transit are fed, watered, and rested at least once during every period of 28 hours, or, in certain contingencies, 36 hours. No other duty is prescribed. It is immaterial whether the stock are thus cared for upon the train or are unloaded into pens. The law is satisfied if, within the designated period, they are properly fed, watered, and rested. Without any wrongdoing, the carrier may operate cars having no facilities for feeding or watering, and so, likewise, it may maintain pens without equipment for such purposes. It is no more unlawful to unload stock into such pens than it is to load them into such cars. The offense consists in confining the stock beyond the period of 28 hours without feeding, etc. The confinement may be in the cars alone, or in the cars and pens, but in no case, whether it be in the cars or in pens, does it constitute an offense until it passes the prescribed limit. Confinement in improper pens is therefor material only in so far as it contributes to the offense of depriving stock of the requisite food, water, and rest for a period of more than 28 hours. In contemplation of law, the holding of stock in unfit pens is equivalent to holding them in cars which are deficient in similar particulars. Surely the mere unloading of stock into pens where they cannot be fed and watered does not in itself amount to a violation of the law. If, for illustration, after stock have been in transit for 10 hours, the carrier for some good reason holds them in pens for 5 hours without food or water, or an opportunity to rest, and then carries them on, and unloads them into properly equipped pens within 28 hours from the time they were originally loaded, no wrong has been done.

From these considerations it follows that, in unloading stock into improperly equipped pens after they have been confined in transit without food and water for more than 28 hours, the carrier only continues and aggravates the offense; it does not commit a new one. In effect the confinement in the cars is deemed to continue until the stock are unloaded into suitable pens and there fed, watered, and rested.

[2] In this view it is manifest that in each of the cases numbered 131, 134, 135, 137, 142, 147, and 148, where the first count charges confinement of sheep in cars beyond the lawful limit, and the second count charges that, after such confinement, they were discharged into

improperly equipped pens, only one offense or cause of action is stated. Although the six cars referred to in No. 134 were apparently consolidated in the same train with the eight cars involved in No. 135, and the two consignments unloaded simultaneously, they were received at different hours, and, within the rule of *Baltimore & Ohio R. R. Co. v. United States*, supra, the cases state two distinct offenses.

[3] In No. 151 there is no averment of the length of time the sheep were confined without food, water, and rest, either in the cars or in the pens, or both together, and for that reason no offense is stated.

As to numbers 132 and 133, there appears to be some confusion of view touching the facts. In his brief counsel for the defendant refers to these cases as involving the question whether, when stock loaded at different times are brought together in the same train and unloaded at the same time, within the 28-hour period, into unfit pens, more than one offense is committed. But the record shows that in 132 the sheep were confined in the cars 33 hours and 45 minutes, and in 133 for 29 hours and 45 minutes. If, therefore, we put aside the consideration that the pens were unfit, it still appears that the law was violated by the confinement in the cars, and in this view, the consignments having been loaded at different hours, each complaint states a distinct offense.

Before entering judgments, I would like to be advised of the circumstances of each case, with a view to fixing suitable penalty. Such explanation as the defendant desires to make should be furnished within 10 days. The district attorney is given 10 days thereafter in which to reply, or to furnish additional information.

UNITED STATES v. SKINNER et al.

(District Court, S. D. New York. December 31, 1914.)

1. COMMERCE (§ 85*) — INTERSTATE COMMERCE COMMISSION — AUTHORITY AND POWERS—COMPELLING PRODUCTION OF EVIDENCE.

The Interstate Commerce Commission has power to compel the attendance and testimony of witnesses and the production of documents only in cases of complaint for violation of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. 1913, § 8563]) and in investigations upon matters that might have been made the subject of a complaint.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

2. COMMERCE (§ 85*) — INTERSTATE COMMERCE COMMISSION — AUTHORITY AND POWERS—COMPELLING PRODUCTION OF EVIDENCE.

In an investigation by the Interstate Commerce Commission, pursuant to a Senate resolution reciting that the purposes of the investigation were to ascertain the beneficiaries of certain investments by a railroad company, whether such beneficiaries could be required to make restitution to the stockholders of the company, whether the company's officers or such beneficiaries were amenable to punishment, and what legislation might be recommended to prevent a recurrence of the evil, the Commission had no power to compel the attendance and testimony of witnesses and the production of papers, if the investigation made was limited to the purposes recited in the resolution, as in such case it did not relate to any specific

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

violation of the Interstate Commerce Act, or to matters that might have been the subject of a complaint before the Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

3. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—AUTHORITY AND POWERS—COMPELLING PRODUCTION OF EVIDENCE.

Where the Interstate Commerce Commission, on complaints made to it, instituted an investigation of the rates, resolutions, and practices of carriers, with a view to ascertaining whether specific violations of the Interstate Commerce Act had occurred, and thereafter an investigation was requested by a Senate resolution reciting purposes which would not have authorized the Commission to compel the testimony of witnesses, whether it had power to compel the testimony of witnesses, so that one testifying before it could claim immunity from prosecution for matters concerning which he testified, was to be determined by the subject-matter and scope of the investigation, and the resulting order of the Commission awarding relief, and not by the recitals of the resolution, or from the fact that the investigation was conducted under the title of the earlier investigation, commenced on complaint.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

4. CRIMINAL LAW (§ 42*)—IMMUNITY STATUTES—NECESSITY OF CLAIMING PRIVILEGE.

Under Act Feb. 11, 1893, c. 83, 27 Stat. 443 (Comp. St. 1913, § 8577), providing that no person shall be excused from testifying before the interstate Commerce Commission on the ground that his testimony may tend to incriminate him, or subject him to a penalty or forfeiture, but that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any matter concerning which he may testify before the Commission, a person, to be entitled to immunity from prosecution, must claim his constitutional privilege against self-incrimination while testifying before the Commission, since it was always competent for a person to voluntarily incriminate himself, and the statute was necessary only to enable the government to obtain testimony which otherwise would not be given, and the statute should not be construed as going further than the necessity of the case demanded, thereby conferring a gratuitous amnesty for crime, unnecessary for the purposes of law enforcement, especially as the government is entitled to know whether the testimony is given voluntarily, for the purpose of exoneration, or with the intention of claiming immunity, in order that it may exercise its option to admit the testimony and thereby grant the immunity, or reject the testimony and deny the immunity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45-48; Dec. Dig. § 42.*]

5. CRIMINAL LAW (§ 42*)—IMMUNITY STATUTES—CLAIMING PRIVILEGE.

To place on a witness before the Interstate Commerce Commission the duty of claiming his constitutional privilege against self-incrimination as a basis for immunity against prosecution under Act Feb. 11, 1893, it is not necessary that the government should inquire of him whether or not he claims such privilege.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45-48; Dec. Dig. § 42.*]

6. CRIMINAL LAW (§ 42*)—IMMUNITY STATUTES—CLAIMING PRIVILEGE.

A witness before the Interstate Commerce Commission need not, to entitle him to immunity from prosecution under Act Feb. 11, 1893, formally assert his constitutional privilege against self-incrimination, it being sufficient if he asserts it in such manner as to apprise the examining tribunal and the law officer of the government conducting the investigation that he is unwilling to answer, because the answer may incriminate him, and to enable them to determine intelligently whether there is a likelihood of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such incrimination; and such claim may even be assumed in some cases from the nature of the questions asked and the manner in which they are answered, but the circumstances must show that the tribunal was clearly informed of the witness' claim and its basis.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48; Dec. Dig. § 42.*]

William Skinner and others were indicted for offenses. On demurrers to defendants' special pleas in bar. Demurrers sustained.

H. Snowden Marshall, U. S. Atty., of New York City (R. L. Batts, Sp. Asst. Atty. Gen., of Austin, Tex., Frank M. Swacker, Sp. Asst. Atty. Gen., of Washington, D. C., and Robert Stephenson, of New York City, of counsel), for the United States.

Sullivan & Cromwell, of New York City (Royall Victor and Clarke M. Rosecrantz, both of New York City, of counsel), for defendants Skinner and Elton.

Murray, Ingersoll, Hoge & Humphrey, of New York City, and Cummings & Lockwood, of Stamford, Conn., for defendant Billiard.

GRUBB, District Judge. This matter is submitted on the plaintiff's demurrers to the separate special pleas of each of the defendants, setting up, in bar of the prosecution, the immunity they claim to have received, because of evidence given by them before the Interstate Commerce Commission, with regard to the transactions which form the basis of the indictment.

The plaintiff's demurrers question the sufficiency of all the pleas upon two grounds. They are: (1) That the pleas fail to show that the testimony was given pursuant to the requirement by the Commission in a proceeding in which the Commission had the power to compel the attendance and testimony of witnesses and the production of documents, and for that reason was not given under legal compulsion, within the meaning of the immunity statute; and (2) that the witnesses did not assert their constitutional privilege of declining to answer, when sworn before the Interstate Commerce Commission, upon the ground that their answers would tend to incriminate them, and that their answers were not compulsory, in the absence of such an assertion of their privilege, and did not earn them the immunity conferred by the statute.

[1] First. The power of the Interstate Commerce Commission to compel the attendance and testimony of witnesses and the production of documents embraces "only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint." *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253.

[2] On the one hand, the government's contention is that the purpose of the investigation, at which the defendants gave their testimony, is shown by the recitals of the Senate resolution, requesting the Interstate Commerce Commission to make the same, to have related to no violation of the Interstate Commerce Act or its amendments or supplements, and to have been instituted at the instance of the Senate, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not upon complaint. The purposes of the investigation, so far as shown by the recitals of the Senate resolution, were to ascertain who were the beneficiaries of certain investments of the New York, New Haven & Hartford Railroad Company (the company under investigation) in the securities of other companies, as to whether such beneficiaries could be required to make restitution to the stockholders of the New Haven Company, as to whether the officers of the New Haven Company, responsible for the investments, and those receiving the benefits thereof, were amenable to punishment under existing laws, and what legislation the Commission might recommend, if any, to prevent the recurrence of the evil. It is quite clear that, if these recitals correctly state the only purposes of the investigation, the power of the Commission to compel the attendance and testimony of witnesses and the production of papers did not exist. It would not then relate to any specific violation of the act to regulate commerce or to matters that might have been the object of complaint before the Commission. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253.

[3] Upon the other hand, the defendants contend: That the investigation, at which they gave their evidence before the Commission, was the continuance of an investigation entered upon before the Senate resolution was enacted. That the original investigation was entitled: "The New England Investigation. In the Matter of Rates, Classifications, Regulations and Practices of Carriers." That it was instituted upon complaints made to the Commission of such rates, regulations, and practices, and that its purpose was to investigate such rates, classifications, regulations, and practices, with a view to ascertaining whether specific violations of the act to regulate interstate commerce had occurred. The defendants contend that the reopened investigation, consequent upon the Senate resolution, was merely the continuance of the original investigation with the same purposes and character, and consequently within the class of investigations to effectuate which the Commission had the authority to compel testimony.

The character of the investigation is rather to be determined by its subject-matter, its scope, and the resulting order of the Commission awarding the relief, than by the title of the cause, on the one hand, or by the recitals of the Senate resolution requesting it, on the other. If the investigation was no broader than the recitals of the Senate resolution would indicate, no authority in the Commission to compel testimony existed. If the scope of the reopened investigation was broader than is indicated by the Senate resolution, and if the reopened investigation partook of the nature and character of the original investigation, then a different question would be presented—one which would have to be solved by reference to the subject-matter of the reopened investigation, as determined by the evidence taken by the Commission, the order made upon it, and the entire proceedings. The pleas contain no such exhaustive statement of the proceedings before the Commission as would enable the court to intelligently pass upon the question. It may be that the court takes judicial notice of them, in such sense as to have the benefit of them in determining the question upon demur-

rer. The conclusion I have reached upon the other ground of demurrer does not make a decision of this ground imperative to a ruling on the demurrer to the pleas; and for that reason, and because of the unsatisfactory condition of the pleas in this respect, so far as they relate to the first point, no conclusion on that ground is expressed.

[4] Second. The second ground of demurrer to the pleas is that they fail to aver that the defendants asserted their constitutional privilege of silence upon the hearing before the Interstate Commerce Commission. The sufficiency of this ground is to be tested by the construction of the act of Congress which, it is claimed, confers immunity upon the defendants. This is the act of February 11, 1893. The plaintiff and the defendants differently construe the language of the act. The plaintiff contends that the words, "No person shall be excused from attending and testifying, or from producing books, etc., before the Interstate Commerce Commission, etc., on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture," designate as a class those who present their excuse upon this ground before the tribunal, which exacts of them their testimony, and are nevertheless required to give it. To this class, and it only, according to the plaintiff's contention, does the subsequent clause, which confers the immunity, apply, viz.:

"But no person shall be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

On the other hand, the defendants' contention is that the function of these same words is to make inapplicable to proceedings before the Commission, or causes in the courts, involving violations of the act to regulate interstate commerce and its amendments or supplements, the fifth amendment to the Constitution, and the privilege of silence conferred by it, and so to provide that all persons, who testify before the Commission or in proceedings in the courts based on violations of the act, are immune from prosecution by reason of the subsequent clause in the act, regardless of whether they asserted their constitutional privilege of silence on the hearing. The solution of the question depends upon which of these two constructions is the correct one.

The language of the act is perhaps ambiguous. Certain it is that the authorities have differed as to the proper construction of this and similar acts. The authorities construing section 860 of the Revised Statutes are easily to be distinguished. That section is so framed as to make an assertion of the constitutional privilege impracticable with reference to at least some of its provisions. As an illustration, the provision protecting disclosures in pleadings. Again, statutes, the only effect of which is to deprive the government of the use of testimony elicited, and not to confer immunity on the witness testifying against prosecution for any crime concerning which the testimony related, are not so drastic as those conferring such immunity. The government, under the former, at most only loses the benefit of evidence

which it could not have otherwise obtained, while, under the latter, it loses the right to prosecute, although it might be able to prosecute with success without the use of the privileged testimony.

In the statute construed in the case of *People of New York v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851, there were two provisions, one analogous to section 860 of the Revised Statutes and one conferring immunity from prosecution. The feature of the statute involved in that case, however, was that which prohibited the use of the evidence given before the legislative committee, and not that which conferred immunity on the witness by reason of it. This should be taken into consideration in giving weight to the case as an authority. However, the New York cases seem to be unfavorable to the government's contention. The case of *State v. Murphy*, 128 Wis. 201, 107 N. W. 470, was decided by a divided court, so far as this point was concerned, and carries weight only as the reasoning in the individual opinions of the judges is persuasive. The question seems not to have been considered in any other state jurisdiction.

The question has not been decided by any federal appellate court. The decisions of the District Courts of the United States are not in harmony. On the side of the defendants' contention is the case of *United States v. Armour & Co.* (D. C.) 142 Fed. 808. We may lay to one side the federal cases construing section 860 of the Revised Statutes as inapplicable, and also the cases holding that the constitutional privilege of silence must be asserted to justify a declination to answer, where no immunity statute protects, since the question in those cases is not the same as that which this case presents. The case of *United States v. Heike* (C. C.) 175 Fed. 852 (Southern District of New York), is an authority for the government's contention. Its effect is that there must be a claim, either express or implied from the circumstances and character of the questions, of the right to decline to answer for fear of incrimination, in order to justify a subsequent claim of immunity. The question was not obiter. The District Judge directed a verdict for the government on defendant's plea of immunity, upon this and other grounds. The Supreme Court affirmed the lower court's ruling on a ground other than the effect of the failure to assert the privilege of silence, with the statement that other questions would have to be dealt with before a contrary decision could be reached.

In view of the ambiguity in the language of the act itself, and of the conflict in the authorities, importance should be given to the intention of Congress, as derived from the purpose to be subserved, and from the legislative history which preceded the enactment of the act of February 11, 1893. The purpose of Congress in enacting legislation of this character is expressed in the case of *Heike v. United States*, 227 U. S. 142, 33 Sup. Ct. 227, 57 L. Ed. 450, Ann. Cas. 1914C, 128, as follows:

"Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment 5. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its word fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that

of the earlier act of February 11, 1893 (27 Stat. 443, c. 83), which reads: 'No person shall be excused from attending and testifying,' etc. 'But no one shall be prosecuted,' etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, 'was not coextensive with the constitutional privilege.' *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611 [31 Sup. Ct. 676, 55 L. Ed. 873]."

It was to make available testimony that was unavailable because of the privilege of silence conferred by the terms of the fifth amendment to the Constitution. The testimony that was unavailable, because of that amendment, was that which the witness showed, to the tribunal demanding it, might reasonably tend to incriminate him. It was because such testimony could not be compelled, because of the constitutional amendment, that Congress acted. It was always competent for a person to voluntarily incriminate himself, and Congress was consequently not called upon to legislate with reference to incriminating testimony voluntarily given, but only with reference to incriminating testimony which the witness declined to disclose for that reason. The act of Congress of February 11, 1893, consequently, could only have been intended to cover testimony which the government was unable to obtain because of the declination of the witness to answer, based upon its incriminating tendency, and under the protection of the fifth amendment. It is conceded that, to claim the protection of the amendment, the witness was required to assert under oath his privilege upon that specific ground and to make it reasonably certain to the tribunal before which he gave the testimony that its tendency would be incriminating. If he testified without doing so, or refused to testify without doing so, in either case, the protection of the amendment was not available to him. The only contingency in which the statute protected him in declining to answer was in the event that, after being summoned and sworn, he placed his declination on the ground of the incriminating character of the answer which was demanded. It was to remove this constitutional bar to the securing of testimony that Congress legislated; and with no purpose to bestow immunity in cases where doing so was not necessary to obtain testimony, which could otherwise be refused. It was not the purpose of Congress to excuse wrongdoing for any other reason than that it was otherwise impossible to secure evidence to punish greater wrongdoing or more wrongdoers. The enforcement of the law and the punishment of those who break it is so essential to the existence of government that it will not be presumed that Congress went further in the direction of exemption than the necessity of the case demanded.

Its failure to go far enough to accomplish its design when section 12 of the original act to regulate commerce was enacted is persuasive of this restricted intention. It was not necessary to protect those who voluntarily gave incriminating testimony, because they were not within the protection of the Constitution. It was necessary for it to furnish to those who were compelled to testify—i. e., those who testified after asserting their right under the Constitution not to do so—protection equal to that afforded by the constitutional privilege of silence. Under the constitutional provision, compulsion did not arise because

of the summoning or swearing of the witness, but first arose when, after being sworn, the witness asserted his right to decline to answer by reason of the incriminating nature of the answer, and it was disallowed him. So that the only class of persons whose testimony Congress had occasion to make available by legislation was that class, whose evidence, when given, was compulsorily given, and, if declined, could not have been coerced. It seems reasonable to hold that this was the only class of persons which Congress has, in fact, legislated to protect. The other class of witnesses—those who assert no constitutional privilege, but testify without having done so—cannot be considered as having been compelled to testify in the constitutional sense, and so cannot have been in the mind of Congress, as entitled to any immunity as a substitute for the constitutional privilege. The evidence of this class of witnesses was available to the government, in the absence of immunity legislation, and if Congress has extended immunity to this class of witnesses it would be the conferring of a gratuitous amnesty for crime, unnecessary for the purposes of justice and law enforcement, and against the policy that requires all men to be punished alike for their wrongdoing. There being no occasion for extending such immunity, and the policy of the law forbidding it, it should not be held that Congress intended to grant it, unless the language of the act clearly demands that construction.

The defendants contend that the effect of the language of the act is to withdraw from the operation of the constitutional amendment the cases of all persons who testify before the Commission or on the other occasions or places mentioned in the act, and to confer on them all absolute immunity in its stead, and that, consequently, as the amendment is inapplicable to such cases, the witnesses are under no necessity for asserting their privilege of silence under it. The effect of this argument, if carried to its conclusion, would be to render immune all persons who testify before the Commission, including volunteers. It is because of the applicability of the amendment and the construction that has been given it that the testimony of volunteers stands on a different basis from that of those who assert their privilege of silence and are compelled to testify. Yet it was conceded by counsel for the defendants upon the hearing that the immunity statute does not cover the testimony of volunteers. The statute has not the effect of destroying the applicability of the amendment to the persons mentioned in it. It is beyond the power of Congress to place by statute a limitation upon a constitutional provision. The amendment still applies in the cases covered by the statute, as much so as it does in cases where the statute of limitations has become a bar to a prosecution; but the effect of the immunity statute, as of the limitation statute, is to do away with the possibility of injury to the witness from any crime disclosed by his testimony, and to furnish him with an even more secure protection than would be the silence guaranteed to him by the Constitution. It is only because of the impossibility of injury to the witness from the disclosure that the law compels it. The same reason has led the courts to compel the disclosure, when it was established that the statute of limitations had barred any prosecution for the crime. The courts sustain

immunity acts, not because Congress has any power by them to affect the operation of the constitutional amendment, but because they furnish a protection to one compelled to answer equal to or greater than the constitutional guaranty of silence.

In view of the purpose of Congress in enacting the Immunity Act, viz., to make available compulsory incriminating testimony, and to remove the obstacle to the use of such testimony, and in view of the fact that the only obstacle to the disclosure of such testimony that needed removal was that presented by the fifth amendment, and that it applied only in favor of witnesses who assert their constitutional privilege, and so are in the attitude of being compelled to testify, and does not apply to those who testify without asserting their privilege, and who are in the attitude of voluntary witnesses, I think the immunity should be limited to the class of witnesses in whose favor alone the obstacle existed; i. e., those who assert their privilege to decline to answer upon the constitutional ground of a tendency to incriminate.

It is contended by the defendants that the Immunity Act renders futile any assertion of the constitutional privilege, since, by the act, the witness is required to answer in any event. It may be true that the attitude of the witness, under the Immunity Act, renders the assertion of the constitutional privilege of no benefit to him. The defendants' contention, however, ignores the right of the government, the other party concerned, to have the witness assert his privilege before examination. It is still a valuable right from the government's point of view. The witness is clothed with an option to testify without asserting his privilege, in which event his testimony is voluntary, and entitles him to no immunity, or to testify only after the assertion of his privilege, and after its denial to him, in which event the evidence given by him is compulsory and entitles him to immunity. The government is entitled to know which option the witness selects. The government is also entitled to be informed, before the examination of the witness, that the witness claims the answer he is asked to give will tend to incriminate him, and in what way. The government is itself clothed with an option which cannot be intelligently exercised until there has been an assertion of privilege by the witness. It is entitled to know whether immunity will follow from the examination of the witness. It has the option to receive the testimony and thereby grant the immunity, or to reject the testimony and deny the immunity. The question of privilege cannot be determined until the witness has been summoned and sworn before the examining tribunal. Then for the first time the government must make its election. In order to intelligently make the election, it must be apprised first as to whether the witness gives his testimony voluntarily for the purpose of exoneration, or involuntarily, because he would be compelled to testify if he refused. Only in the latter case would immunity flow from his evidence. If the witness fails to assert his privilege, the government would have the right to assume that immunity was not desired by him, and that permitting him to testify would not be attended with that result. If the witness claimed his privilege upon the ground of probable incrimination, then the government would be called upon to elect whether it

would proceed with the examination, and so confer the immunity or whether it would abandon the questions and leave the witness unimmune. It could not make this election until it knew (1) that the witness was unwilling to testify, and (2) that and how it was claimed the desired evidence would tend to incriminate. This it could only learn from the witness' assertion of privilege. The assertion of the constitutional privilege by the witness desiring immunity is not, therefore, a futile thing, so far as the interest of the government is concerned.

[5] It is also contended by the defendants that the witness should not be required to assert his privilege, but it should be left to the government to inquire of him whether it was claimed, and, failing to do so, it should be assumed that it was claimed. The practice under the fifth amendment has been concededly the other way. The witness, in many cases, is alone informed as to whether his evidence will tend to incriminate him. The supposed incrimination may relate to offenses not under investigation by the examining tribunal, and of the existence of which or of the relation of the desired evidence to which the examining tribunal or the government law officer may have no knowledge. The Heike Case is an apt illustration of this possibility. The witness is likely to have exclusive knowledge as to what facts and what answers may tend to his incrimination, and with reference to what offenses. Again, the witness alone knows whether he willingly gives his evidence for the purpose of exonerating himself, or only with the expectation of receiving immunity therefor. He is therefore in a better position to be called upon to assert his constitutional privilege than is the examining tribunal or the law officer of the government to call upon him to elect to do so. If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege, prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held by the Supreme Court to be coterminous with it. There would seem, therefore, to be no reason for a different practice as to the assertion of the privilege where immunity is desired and where the constitutional privilege is insisted upon.

[6] The defendants also present the argument that the necessity for the assertion of the privilege of the witness would embarrass the examining tribunal in the conduct of the examination by the frequent appeals of the witness to the court, and that it was the purpose of Congress by this legislation to avoid such embarrassments. In view of the fact that the assertion of privilege is no reason, where there is an immunity statute, for the witness to decline to answer, such apprehended embarrassments would appear illusory. The witness would have no reason for persisting in a refusal which he knew would not be sustained by the court. The purpose of the assertion is only to apprise the examining tribunal that the answer, if given, will be compulsory, and immunity will flow to the witness therefrom. It need not be a formal assertion. It is enough if it apprise the examining tribunal, and the law officer of the government conducting the investigation, that the witness is unwilling to answer because the answer may

incriminate him, and enough of the manner in which this may be done to enable them to determine intelligently whether there is a likelihood of such incrimination. It may even be assumed, in the absence of express assertion, in some cases from the nature of the questions asked and the manner in which they are answered. The circumstances, however, must be such as to show that the tribunal was clearly informed of the claim of the witness and its basis. This was what was intended by the court in the opinion in the case of *United States v. Heike* (C. C.) 175 Fed. 852.

My conclusion is that the Immunity Act was intended only to make available testimony compulsorily given, and only to reward the unwilling giver of such evidence; that testimony given without the assertion of the constitutional privilege, or declined to be given upon any other ground than that of its incriminating tendency, is not compulsory testimony under the fifth amendment, and has always been available without new remedial legislation; and so, there being no necessity for conferring immunity on the giver of it, Congress will not be construed to have done so, where its language may be reasonably otherwise construed, as is the case with the statute under construction in this case.

No one of the pleas contain any averment of either an express or an implied assertion of the defendants' privilege on the hearing before the Commission, and for that reason the demurrers to each of the defendants' separate pleas are sustained.

GIMBEL BROS., Inc., v. BARRETT.

(District Court, E. D. Pennsylvania. December 29, 1914.)

No. 3140.

1. CARRIERS (§ 189*)—CARRIAGE OF GOODS—RATE—AGGREGATION.

Under an express company's rule that two or more packages forwarded at the same time from the same place to the same consignee must be charged for on the aggregate weight, if a lower charge is made thereby, not all of such shipments shall be taken in making up the aggregate on which the weight is based, but only such as will result in a reduced charge because of the aggregation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.*]

2. CARRIERS (§ 189*)—CARRIAGE OF GOODS—RATE—CLASSIFICATION.

Where an express company had established a general tariff of charges for merchandise, tariff of rates for other classes of goods, and a commodities tariff, a provision of the commodities' tariff that all classes of business not rated higher than merchandise between certain localities are put on a commodities rate applies only to those articles having a special classification, and not to articles under the general classification of merchandise, especially where such interpretation had been adopted by the carrier in making some of its charges.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.*]

3. INTEREST (§ 39*)—CARRIAGE OF GOODS—OVERCHARGES—TIME FROM WHICH INTEREST RUNS.

Where a shipper has been charged an unlawful rate on his shipments, he is entitled to recover the overcharge as of the date it was collected, not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the date of the demand for refund, and should therefore be allowed interest from the former date, not as interest strictly, but to give him, on the date of his recovery, an amount equivalent to the amount of his damages at the time they were suffered.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83-89; Dec. Dig. § 39.*]

4. CARRIERS (§ 189*)—CARRIAGE OF GOODS—RATES—TARIFF.

A provision in the commodities tariff of an express company fixing a minimum rate on all classes of business between certain localities, the charges to be graduated according to the scale on shipments under one hundred pounds, applies only to shipments of the commodities class, and not to shipments classified generally as merchandise.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.*]

At Law. Action by Gimbel Bros., Incorporated, against William M. Barrett, as President of the Adams Express Company. On trial by the court without a jury. Judgment entered for plaintiff.

See, also, 215 Fed. 1004.

Morton Z. Paul and Wm. A. Glasgow, Jr., both of Philadelphia, Pa., for plaintiff.

John L. Evans, Wm. B. Linn, and Thomas De Witt Cuyler, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case was tried by the court without the intervention of a jury under the provisions of Revised Statutes, §§ 647, 649. The case can be disposed of on special findings of fact and the conclusions of law to be drawn therefrom. The facts have been found and conclusions drawn, and are specifically stated. A few general findings are, however, necessary or at least helpful to an understanding of the special findings.

Discussion.

The plaintiff conducts a large department store business in the city of Philadelphia. The defendant does an express business. So far as affects this case, the dealings of the parties concern only shipments from New York City to the plaintiff in Philadelphia. We are also further concerned only with packages forwarded at the same time by different shippers to the plaintiff as consignee. The case still further narrowed concerns only the proper charges for the shipments thus made. It is, of course, obvious to any one that it would be impracticable for an express company to formulate a tariff of charges which would show a specific charge on every one of the different articles or kinds of traffic which are sent by express. The tariff as filed may be roughly characterized as showing a general merchandise rate, together with classifications of different kinds of merchandise. These are supplemented by rules in the nature of exceptions, provisions for special conditions and for special services or elements of risk. The general method or system of rate charges can be best expressed by an illustration of their practical application. In determining the charge to be made, the agent, having learned the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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character or kind of shipment, would refer to the classification schedules. If the articles to be shipped were there found, this would determine the charge to be made. If the subject of the shipment was not there found, the charge to be made would be determined by the general merchandise rate. The merchandise rate, so far as affects this case, was 75 cents per 100 pounds. This was not, however, absolutely a proportionate rate, because it was modified by a graduated scale of charges according to weight, where the weight of the package was under 100 pounds. The apportionment of charges to packages of different weights was arbitrary, in the sense of packages of different weights not being charged proportionately to the respective weights. In consequence, a package of light weight might pay a rate per pound five or six times the proportionate rate paid by a package nine or ten pounds heavier. It was only when the package reached 100 pounds in weight that the 75-cent rate became applicable as an actual proportionate rate. Above 100 pounds the graduated scale did not apply, and packages really paid proportionately to their weight. Out of these conditions it is evident would arise this very practical situation. If goods were shipped to a consignee in ten 10-pound packages, he would pay the graduated charge on each package, which might amount to as much as \$4. If they were shipped in one package, the express company would collect only 75 cents. If the packages were of a less weight, the disproportion might be even greater. It is further evident that such a condition afforded room and presented the promise of gain from a manipulation of the manner of shipments. Possibly because of this the express company incorporated in its system of charges the feature of what is called "aggregating" weights. Expressed in a general way, the thought is that the express company will charge for a number of packages as if they had been bulked in one package. Thus was brought into being the rule with which we are concerned, which contains the added thought that it is to be applicable only when it results in a decreased charge.

Out of this rule has sprung one of the questions to be determined in this case. In addition to the merchandise tariff referred to, the company has also what is termed a commodities tariff. The general purpose of having a commodities tariff, in addition to or distinct from the merchandise tariff, is this: The business of express companies includes the shipment of some things which are cheaper in price and bulkier than other shipments. These cheaper and bulkier things would not stand a rate of charge which would not be undue for the more valuable and less bulky kind of merchandise. Out of this difference came the necessity for a commodities tariff. Usually the rate on commodities would be a lower rate than on merchandise, although this would not necessarily or in every instance be the result.

Rule No. 7 of the regulations of the Interstate Commerce Commission provides that where there is a commodity rate which is applicable to an article which is the subject of the shipment the commodity rate is to govern, and that the naming of a commodity rate on any article or "character of traffic" takes such article or such traffic entirely out of the merchandise class, so that nothing in the tariff relat-

ing to merchandise is thereafter applicable to it. The commodities tariff contains a provision that the minimum charge on all classes of business between (among other localities) New York and Philadelphia is to be 75 cents per 100 pounds, the charges to be graduated according to the scale on shipments under 100 pounds. There is a further schedule of the commodities tariff which includes in the classifications "all classes of business not rated higher than merchandise" between New York and Philadelphia, and these are put on a commodity rate of 75 cents per 100 pounds, subject to the graduated scale of charges on less than 100-pound weights.

This rough outline of the facts is sufficient to present the questions which are raised by the plaintiff's case and by the defense. The case for the plaintiff is in brief that the defendant by failing to apply, or at least to fully apply, the "aggregating" rule, has overcharged the plaintiff. To make an inquiry into all the shipments and the charges made therefor, in order to determine in what instances an overcharge had been made, and, if any, the amount, would be a task of some magnitude. To save us the labor involved in this, counsel (and for this they are to be commended) agreed to take the transactions of certain dates to illustrate the whole course of the dealings between the parties, and further agreed upon the amount of the overcharges on the shipments of the typical day and on the total shipments based upon the proposition that the plaintiff's construction of the aggregating rule was the correct one. It was further agreed that all the shipments made by the plaintiff were shipments of merchandise, and were all merchandise to which a rate of 75 cents per 100 pounds, subject to the graduated scale of charges on all shipments under 100 pounds applied. It was further agreed that an aggregating rule, such as rule 9 hereinafter quoted, was in force as to all shipments of merchandise during the time of the shipments involved in this case. The real issues between the parties were and are that the plaintiff claims that the proper charges should have been determined in accordance with the merchandise rate, including the aggregating rule feature as herein later discussed.

There are three defensive positions taken. One is a denial that the plaintiff's construction of the aggregating rule is the correct one. Another is that these shipments, although primarily merchandise, and, if there had been no commodities tariff, would have moved under the merchandise rate, had been withdrawn from the merchandise class to the commodities class, and in consequence the proper charge was to be determined, not by the merchandise rate, but by the commodities rates and the tariff provisions relating thereto. The third is that the questions raised here are properly to be determined, not by a resort to the courts, but by an application to the Interstate Commerce Commission.

An examination of the shipments made on April 25, 1908, which was agreed to be a typical day, disclosed that the express company collected a certain sum. This amount was arrived at by charging on the packages less than 100 pounds in weight the graduate scale charge and for those of 100 pounds or more at the rate of 75 cents per 100

pounds. The plaintiff was not given the benefit of the reduced charge which would have resulted from bulking a number of packages and charging as for one package, except in those instances in which the packages came from the same shipper. The plaintiff contends that the "aggregating" should not have been limited to packages all of which came from the same shipper, but should have been extended to packages from different shippers. Furthermore, all the packages should not be aggregated, unless the consequence was to lower the charge. If the result of aggregating all was not to reduce the charge, then such and so many must be selected and aggregated as would produce this lessened charge result.

The claim of the plaintiff rests for its foundation upon this "aggregation" of shipments. This is provided for in clauses "a" and "b" of rule 9. These are as set forth in the special findings. Clause "a" requires the actual weight of each package to be entered on the waybill, and further requires that packages forwarded by one shipper must be charged for on the aggregate weight. This is not the actual or absolute total weight, because packages under 20 pounds in weight are to be entered in the footing of the total weight as if they actually weighed 20 pounds. This clause of the rule was observed by the defendant in its charges, and therefore does not figure in the present controversy. Clause "b" may be stated to be a modification or extension of clause "a," in that it is not confined to shipments by the same consignor to the one consignee, but is extended to shipments from more than one consignor to the same consignee. It further provides that where the rate (as is the case here) is less than \$1.50 per 100 pounds then the "aggregation" charge shall not be more than where the rate is \$1.50. We are therefore relegated to the part of the rule which relates to shipments to which the \$1.50 rate applies. This part of the rule provides that two or more shipments to the same consignee, whether made by one or more than one shipper, must be charged for on the aggregate weight, if a lower rate is made thereby.

In this general statement we have ignored all the features of the rule, except only that one which bears upon the controversy, and in presenting the controversy we will also ignore or pass over all the other defenses in order to present this one point. We do this for the reason that, if the decision upon this point is adverse to the plaintiff, the other defenses need not be considered. The point now under consideration is presented with all the practical effects of a case stated. We are not called upon, or indeed at liberty, to inquire what the proper charge for shipments on the typical day was, because it has been stipulated that if the plaintiff's construction of rule 9 is the correct construction then the parties agreed that there was an overcharge of \$1.12 for that day, and a total overcharge of \$1,108.42 in all.

[1] This brings us directly to the question of the correctness of plaintiff's construction of rule 9, it having been further agreed that this rule, as found by the special findings, was in force and applicable to all the shipments. To pass intelligently upon plaintiff's construction of the rule we must know what that construction is. Narrowed to its controversial features, it is this:

1. Under clause "b" shipments are to be aggregated, without regard to whether they come from one consignor or more than one.

2. In determining the aggregate weight, all the shipments need not be taken, but only such may be selected and aggregated in whose aggregation, or as a result of whose aggregation, the charge which would be otherwise made is reduced. This thought may most clearly be presented by an example. Take 20 packages, the charge for which unaggregated would be \$5. If the whole 20 were aggregated, the charge would be \$6. If 19 or a less number were aggregated, and the others not, the charge would be \$4.50. Plaintiff contends for the construction that the 19 or less packages should be aggregated, and a charge of \$4.50 made. The first impression received before the rule is closely considered is against this construction. It seems at first sight to be a forced construction, and to involve a complexity which could never have been intended to be incorporated in a working rule of charges. A little reflection, however, brings to light the thought that the express companies may have had a very good reason for incorporating this feature in their system of charges, and a consideration of the language they have employed makes clear that they have incorporated it, whether they had a motive for so doing or not.

This construction is based upon the propositions (which in turn are based upon the phraseology of the rule): First, that the aggregating must be done only, in the language of the rule, "if a lower charge is made thereby"; and, second, in the like language of the rule that "two or more packages" must be aggregated. From these phrases spring the argument that it was the intention of the rule to diminish and not to augment charges, and the rule in its application is made imperative only in the event of such lessened charge result. When, therefore, the rule further incorporates the phrase that "two or more packages" must be so aggregated, the implication is irresistible that it was intended to require a selection, in order to bring about the intended result. If this were not so, these words would not have been used, and would have been omitted. It is reasonable to assume that the quoted phrase has a function, and the evident one is to incorporate the idea of a selection from among the whole number of packages, in order to accomplish the result intended. No more apt words could have been chosen to express this idea, except, perhaps, to have used the phrase "any two or more." We feel constrained to give this meaning to the rule.

[2] This brings us to the consideration of the other defenses urged. The second defense rests upon the two provisions of the commodities tariff already referred to. There are several of these provisions, but they are substantially identical. To give effect to them, it must be held that all traffic not rated higher than merchandise between Philadelphia and New York has been taken out of the merchandise tariff and transferred to the commodities tariff, or it must be held that the minimum charge provision in the commodities tariff applies also to the merchandise tariff. We do not understand the defendant to take the latter position, and will therefore confine ourselves to the former. It is clear, after any article has been transferred to the commodities tar-

iff, or when any character of traffic to which the article belongs has been so transferred, the effect is to bring it about that the charges upon that article are to be determined by the commodities tariff, and the commodities tariff alone, as fully as if the merchandise tariff was not in existence and the rules relating thereto had never been promulgated. The question involved here is therefore brought down to the single question of whether shipments of every kind between Philadelphia and New York have been so transferred to the commodities list.

We are unable to follow the argument for the defendant to the conclusion reached that, because merchandise under the merchandise tariff is not rated higher than "mdse.," therefore all shipments between New York and Philadelphia are included in the phrase "all classes of business not rated higher than mdse. in official express classification I. C. C.," etc. There are two classifications. There are classes of business and "character of traffic" classified under the commodities tariff. There is a like similar classification under the merchandise tariff. The language quoted from the commodities tariff, upon which counsel for defendant relies, must be confined to either the classification referred to in the commodities tariff, or at most the classification referred to in either the commodities tariff or the merchandise tariff. It is not to be taken as referring to unclassified merchandise. If such had been its meaning, the thought could have been expressed in a much simpler way and in plainer terms. The effect of the construction which we are asked by the defendant to give to the quoted clauses in the commodities tariff would be to repeal all the provisions of the merchandise tariff so far as affects traffic between New York and Philadelphia.

With respect to the minimum charge feature in the commodities tariff, we are constrained to hold that this relates to commodities and not to merchandise. We feel confirmed in these views by the further fact that rule 9 as an aggregating rule was as to clause "a" applied by the defendant of its own motion, thus evidencing its own interpretation of the clauses referred to so far as the application of rule 9 is involved, as rule 9 would have no application if defendant's present interpretation of the clauses quoted from the commodities tariff were the true one. There is further confirmation afforded by the fact that the defendant's tariffs specifically apply the aggregating rule to certain localities, and that they from time to time enlarged and confined these localities, by including and withdrawing certain places from the localities to which the rule did apply.

The third defense, that the court is without power to consider the subject-matter of this controversy, for the reason that it is one within the scope of the exercise of the administrative functions of the Interstate Commerce Commission, we have already considered and passed upon in the motion made at the inception of this case to dismiss for want of jurisdiction. We adhere to the view then expressed.

[3] This leaves as the only undisposed-of question in the case that of interest. The question arising here was argued as one of whether interest should be calculated from the time of payment or from the date

of the demand for recoupment. The question is really one of the assessment of damages, and becomes a question of a charge of interest only by way of analogy, because of the fact that whenever the damage results from the withholding of money it cannot exceed the value of the use of that money, and by reason of this the limit of the measure may be said to be interest. In all damage cases the damages are to be assessed with reference to the time when the damage was suffered, and when the adjustment takes place at a later date the assessment is to be made as of the earlier date, with the lapse of time between that and the later date in mind. Strictly and technically, interest is not allowed from the date of damage suffered to damage assessed, but a sum is allowed for damage on the day the damage is assessed, which is the equivalent of a less sum allowed on the day the damage was suffered. Practically, however, it is the equivalent of interest.

We think the present case to be within that general rule, and that the damages should be assessed as of the date when the money was unlawfully (as is found) collected from the plaintiff, with the lapse of time as an element of damage. This date by stipulation is November 10, 1908.

The earnestness and zeal with which the very able counsel for defendant have pressed their views call for a more extended reference to certain phases of their argument, at the cost of giving perhaps undue length to this opinion.

The analysis made by them of rule 9 we believe to be correct, but we do not follow them to the conclusion that the aggregation is to be of *all* and not of "two or more" of the shipments. Had "all" been intended, the words "two or more" would not have been used. Moreover, we are not in accord with the construction which counsel for defendant have placed upon the stipulation entered into. We do not have at hand the means of verifying the calculations made, nor would we feel at liberty to correct them, even if thought to be erroneous. We certainly cannot extract from the stipulation the meaning which is ascribed to it, to wit, that judgment is to be entered for defendant, unless the court finds an overcharge of \$1.12 on the shipments of April 25, 1908. As we read the stipulation, it is, as has already been said, in the nature of a case stated. If the court is of opinion that plaintiff is right in construing rule 9 to mean that any "two or more" shipments resulting in a lessened charge may be aggregated, and that all the shipments need not be aggregated, then \$1.12 may be assumed by the court as the correct amount of the overcharge for April 25, 1908, and \$1,108.-42 the correct amount of the total overcharge. We assume this branch of the argument to be based upon the proposition that the plaintiff has given the wrong construction to the rule, and therefore judgment should go for defendant. We so understand defendant's position, because to ask us, while agreeing to plaintiff's construction of the rule, to find that the \$1.12 overcharge should be reduced by the court to 75 cents, and then to enter judgment under the stipulation for the defendant, because the calculation of \$1.12 agreed upon is wrong, would be to do violence to the agreement.

The vice in the "commodities" argument of the defendant is to be discovered in the first of their three unanswerable propositions as laid down on page 9 of their original printed brief. The second of these propositions, to the effect that any article or character of traffic upon which a commodity rate is placed is ipso facto taken out of any classification in which it may have been included, and that thereafter only the commodity rate is applicable to such article or character of traffic, has already been found. It is, however, a far cry from this to their third proposition, that they had "collected the appropriate graduate charges" on the plaintiff's shipments. In the first place (although this is of no importance), this "appropriate graduate charge" must be construed to exclude the aggregating of charges under rule 9, clause "a." The defendant in fact, in making up this "appropriate graduate charge," aggregated all shipments from the same consignor made to the one consignee at the same time. If the "commodities" argument they are now making be sound, this they were wrong in doing. The present argument compels this admission, and, as we understand the position of counsel, the acknowledgment of error is unreservedly made. In the second place (and this is of importance), before the plaintiff's shipments are subject to the 75 cents per 100 pounds commodity rate, those shipments must be brought within the commodity ratings, not merely be assumed to be there. It is, of course, true that as the subject of these shipments was merchandise, and when it moved as merchandise it moved under the merchandise rate, it was "not rated higher than merchandise."

The real question is: Does the expression "all classes of business * * * in the official express classifications" referred to include unclassified merchandise? As we understand the general scheme, both of the merchandise tariff and of the commodities tariff, a general merchandise rate is adopted. Classifications are then made, and specific articles of shipment set forth, so that the proper charge may be made upon any article. The basis of charge is always the merchandise rate. The rate upon any class may be determined because in that classification is shown how this may be found from a given merchandise rate per a given quantity. The rate on specific articles may in their turn be figured, as well as the class rate ascertained. It may, of course, be said that in a sense all merchandise is classified, because, if unclassified, it goes under the flat merchandise rate, and may therefore be said to be classified as merchandise. Even then, if analogous to a class which pays higher than the merchandise rate, it is rated as in that class. Everything, therefore, directly or indirectly, has applied to it the merchandise rate. The commodities rate is necessarily grafted upon it, and as soon as the commodity rate attaches to an article or character of traffic the merchandise tariff as to that article or character of traffic is annulled. If, therefore, all merchandise which pays the merchandise flat rate is transferred to the commodities tariff, the so-called merchandise class is wiped out.

The correct view would seem to be this: A general merchandise rate is established for everything. Shipments are then classified, and a charge (usually a higher one) fixed for the different classes and specif-

ic articles enumerated. All articles not so classified or named, and not analogous to any so classified, remain unclassified and pay the flat merchandise rate. Certain articles or a certain character of traffic may then be transferred to the commodities class, and a charge (usually a lower one) is fixed for it as a commodity. The provisions of the merchandise tariff then no longer apply to it. It is clear, therefore, that there may be "classes of business in the official express classifications" which pay more than the "mdse." rate, some possibly which pay the same, and again possibly some which pay less, as well as unclassified business, which moves as merchandise and pays the merchandise rate. It further follows that, when "all classes of business not rated higher than 'mdse.' in the official express classification" are bodily transferred to the commodities class, the transfer must be taken to include all the classified, but does not include the unclassified, merchandise. To view the unclassified merchandise as classified, because it is in the unclassified class is polemical jugglery. We may admire the skill displayed, but we cannot accept the apparent results as real.

[5] The conclusions reached may be restated as follows:

1. The shipments with which we are concerned were admittedly merchandise to which the 75-cent rate and the aggregating rate applied, and they moved as merchandise unless they had been transferred to the commodities tariff, and they were not so transferred unless they were transferred by the provision which brings "all classes of business" not rated higher than the 75-cent rate into the commodities class.

2. These shipments, not being of any of the classes of business enumerated in any of the express classifications, but being merely unclassified merchandise, were not brought under the commodities rating.

3. The minimum charge provision of the commodities tariff can clearly only have reference to shipments of the commodities class. It is in consequence disposed of by the finding that these shipments were not commodities.

We see nothing in the presentation of plaintiff's case which should induce us to change the views expressed when the case was presented through the pleadings upon the question of the authority of the court to hear and decide this cause. If anything, the soundness of the opinion then given is vindicated by the course of the trial. This case is now in effect, as has already been twice observed, nothing more than a case stated, and the question to be decided is one of pure law. To say that the jurisdiction of the court is ousted because the meaning of a ruling by the Commission is involved is to take away in such cases all original jurisdiction over overcharges by common carriers from the courts and leave to them only their appellate jurisdiction. The argument that whether these shipments were merchandise or whether they were commodities is an administrative question, for the determination of the Commission, has no basis for its support. The question is a very different question from that of whether railroad ties are "lumber." The Commission has nothing to do with the question of whether a certain article goes under the commodities rating as an administrative question. The question is determined by the meaning of the tariff provisions and the interpretation of the meaning of the tariff in this respect is a

judicial question, whether it be passed upon by the Commission or by the courts.

Judgment is entered in favor of the plaintiff and against the defendant for the sum of \$1,516.32, besides costs of suit.

The request for findings of fact and conclusions of law, not incorporated in the findings as found and conclusions as stated, are denied. With respect to the second finding of fact, the finding that the shipments in this case moved as merchandise is to be understood as an inference of fact following and supported by the conclusion reached that these shipments were not put into the commodities class by the transference of "all classes of merchandise," etc.

Findings of Fact.

1. During the period to which the claim of the plaintiff relates the merchandise rate on all shipments of merchandise between New York and Philadelphia was 75 cents per 100 pounds, the charges on packages weighing less than 100 pounds being apportioned, however, not according to weight, but following a graduated scale of charges apportioned from 1 pound to 100 as marked on the scale.

2. The shipments to which plaintiff's claim relates moved as merchandise under the merchandise rate between New York and Philadelphia.

3. The Adams Express Company Official Gazette and the same company's exceptions to official express classification and local and joint commodity tariff and supplements applying between New York and Philadelphia, as set forth in defendant's request for findings of fact from 3 to 12, both inclusive, were duly filed with and accepted by the Interstate Commerce Commission as the schedules showing rates and charges for transportation of commodities required by the acts of Congress.

4. The defendant in like manner filed "Official Express Classification No. 21," as shown in Plaintiff's Exhibit No. 5, containing, among other things, as follows:

"Rule 9. Aggregating Weights. (a) Two or more packages forwarded by one shipper at the same time to one consignee at one local address must be charged for on the aggregate weight; provided that any of the packages weighing less than 20 pounds each shall be estimated and charged for as weighing 20 pounds each; and provided, further, that a lower charge is made by such aggregation. Actual weight of each package must be entered on the waybill."

See Exception "b."

"(b) Exception. Where the merchandise rate per 100 pounds is \$1.50 or more, two or more packages forwarded, with charges to collect, by the same company from the same city or town on the same date to one consignee at one local address, whether from one or more than one shipper, or two or more packages forwarded with charges prepaid by the same express company on the same date by the same shipper to one consignee at one local address, must be charged for on the aggregate weight; provided, that any of the packages weighing less than 20 pounds each shall be estimated and charged for as weighing 20 pounds each, if a lower charge is made thereby. Where the rate is less than \$1.50 per 100 pounds, the aggregate charge on shipments from more than one shipper to one consignee, forwarded from the same point on the same date, must not be more than where the rate is \$1.50 per 100 pounds."

5. Defendant applied to the shipments covered by the claim in this case the aggregating provisions of the above rule 9, clause "a," relating to packages shipped by one and the same consignor, but did not apply the provision in clause "b" of the same rule providing for aggregating shipments by two or more different consignors.

6. Rule 9, including clauses "a" and "b," was in effect and applicable to all the tariffs in force during the time within which the shipments referred to in plaintiff's claim were made.

7. The defendant filed tariffs on October 26, 1911, and January 1, 1912, providing that shipments originating with the company in certain designated localities (in all cases including the borough of Manhattan), excepting designated municipal districts, would be aggregated in accordance with rule 9, clause "b," of the Official Express Classification, and made changes therein respecting the excepted municipal districts, but retaining the aggregating feature.

8. So far as it is a question of fact, the defendant is a common carrier, subject to the provisions of the acts of Congress relating to interstate commerce.

9. The total overcharge collected by defendant of the plaintiff was the sum of \$1,108.42 on November 10, 1908, and the damages are assessed at \$1,516.32.

Conclusions of Law.

1. The court has authority to try this case and enter judgment against the defendant for the damages sustained by the plaintiff.

2. Under the facts in this case, the defendant is a common carrier, subject to the provisions of the acts of Congress to regulate interstate commerce.

3. Clause "b" of rule 9 of the Official Express Classification is applicable to the shipments involved in this case.

4. Under rule 9, any two or more shipments made at the same time, although by different shippers, may be selected from the total number of shipments, and must be aggregated under the provisions of rule 9, if a less charge is made thereby.

5. Under the facts of this case, selected shipments should have been aggregated, resulting in a less charge than that made by the defendant to the amount of \$1,108.42.

6. Under the facts of this case, the Official Gazette schedules and provisions relating to commodities are not applicable to the shipments involved in this case.

7. Under the facts of this case, the damages are to be assessed as of the date of November 10, 1908.

8. The plaintiff is entitled to judgment for the sum of \$1,516.32, with costs of suit.

In re DE SOTO COAL MINING & DEVELOPMENT CO.

(District Court, N. D. Alabama, S. D. January 9, 1914.)

No. 12970.

CORPORATIONS (§ 471*)—BONDS—VALIDITY—CONSIDERATION.

Two stockholders of a corporation mutually agreed that the amount of the indebtedness of the corporation to them should be canceled, except as to the excess owed one over that owed the other, which was represented by a note of the corporation. The expressed object of the cancellation was to increase the value of the stock, which was all owned by the two creditors. Some time thereafter the corporation reinstated the indebtedness, which had been canceled in consideration of the payment of its outstanding debts by the two creditor stockholders, and bonds were issued to secure those debts, and the amount advanced to pay the other debts. After the corporation became bankrupt, the trustee under the mortgage securing the bonds petitioned for permission to foreclose. The trustee in bankruptcy objected, on the ground that the bonds had not been issued for money paid or property transferred to the corporation, as required by the Alabama Constitution. *Held*, that the bonds were valid under that provision, since the original cancellation of the indebtedness must be presumed to have created a surplus, which the corporation might have distributed to its stockholders, and the transaction can therefore be treated as one in which the surplus was distributed to the stockholders, who later advanced to the corporation an amount equal thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1833-1836, 1838, 1840; Dec. Dig. § 471.*]

In Bankruptcy. Proceedings against the De Soto Coal Mining & Development Company. On petition of the trustee in bankruptcy to review an order of the referee declaring valid certain bonds of the bankrupt corporation. Petition for review denied.

Henry Fitts, Phares Coleman, and N. L. Steele, all of Birmingham, Ala., for petitioner.

John P. Tillman and Sterling A. Wood, both of Birmingham, Ala., opposed.

GRUBB, District Judge. This was a petition to review an order of the referee upon a petition, filed by the trustee under a mortgage securing an issue of bonds of the bankrupt corporation, to be allowed to foreclose the mortgage. The referee granted the petition. The trustee in bankruptcy objected to the allowance of the petition, upon the ground that the bonds secured by it are invalid, because issued in contravention of the Alabama Constitution and statute, prohibiting and making void all stock or bonds of a corporation not issued for money paid to, property transferred to, or labor done for, the corporation.

The bond issue was in the amount of \$75,000. It is clear that of this issue all but \$54,621.48 paid debts of the corporation, or reimbursed its officers for debts of the corporation paid with moneys advanced by them for that purpose. The question as to the validity of the bonds depends upon whether the \$54,621.48, which were issued to E. L. Dosenbach and B. C. Stevens, were supported by money, property, or labor, the benefit of which the corporation secured.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The contention of the trustee in bankruptcy is that they were issued, without consideration moving to the corporation, to its stockholders, and traded by some of its stockholders (Stevens and D. A. Dosenbach) to others of its stockholders (E. L. Dosenbach and those he represented) in consideration of the transfer by the latter to the former of the capital stock that the latter owned in the corporation. If this was the transaction, it would be one obnoxious to the Constitution and statute of Alabama, as claimed by the trustee in bankruptcy.

The contention of the trustee under the mortgage is that at the time of the bond issue the corporation was indebted to Stevens and E. L. Dosenbach, two of its stockholders and directors, in the sum each of in excess of \$27,000, and that that much of the bonds were issued to Stevens and Dosenbach to pay the indebtedness of the corporation to them, and that Stevens transferred his portion of the bonds to E. L. Dosenbach for the stock of the corporation owned by E. L. Dosenbach, or by those represented by him. If this contention is supported by the record, the validity of the bonds is to be sustained.

It is admitted that prior to October 31, 1906, the corporation owed Stevens \$30,384.32 and E. L. Dosenbach \$27,310.74 for moneys theretofore advanced by each to the corporation. Whether this indebtedness was outstanding in August, 1907, when the bonds were issued, depends upon the construction to be put upon certain acts of the corporation and its stockholders on that day and thereafter.

On October 31, 1906, a directors' meeting of the bankrupt corporation was held in St. Louis. The minutes of the meeting of that date show merely an authorization to its officers to execute a note of the corporation, payable to Stevens, in the sum of \$3,073.58, representing the excess of moneys advanced to the corporation by Stevens over the amounts advanced to it by E. L. Dosenbach. The contention of the trustee in bankruptcy is that, prior to the directors' meeting, Stevens and Dosenbach agreed between themselves in favor of the corporation to mutually cancel an amount of the indebtedness of the corporation to them equal to the amount due by it to Dosenbach, and thus increase the value of their respective stockholdings by decreasing the corporation's indebtedness, to which it was subject in that amount; that the mutually agreed upon cancellation was later (January 10, 1907) effected by charging off on the books of the company the amounts due Stevens and E. L. Dosenbach in that amount, executing a note to Stevens for the excess, and reducing the account entitled "Lands, Leases, etc.," by the like amounts, so charged off, as debits.

The contention of the trustee under the mortgage is that there was no agreement by Stevens and by Dosenbach of mutual cancellation of any part of the amounts respectively due them, and that the note given Stevens by the corporation for the excess in the amount due him over that due Dosenbach was given him only to enable him to draw interest on the excess of his advances, and thus put him on an equality with Dosenbach, which would otherwise have been denied him in that respect.

The referee found this question of fact in favor of the trustee under the mortgage, and decided that it was entitled to the relief prayed for

on this ground. I do not find it necessary to the decision of the case to pass on this finding of fact.

It is conceded that before the bonds were issued there was an attempted reinstatement of the indebtedness on the corporation's books that had been theretofore canceled, as is claimed by the trustee in bankruptcy, probably done for the purpose of putting the corporation in a position where it could issue its bonds in payment of an existing indebtedness, and thus make them valid obligations of the corporation. This reinstatement was the unanimous act of the stockholders, and it was provided that all existing debts were to be paid by Stevens and D. A. Dosenbach, and they were, in fact, so paid, with the exception of the note given Stevens for the excess of moneys advanced by him, as before stated; and Stevens, of course, is estopped, as a creditor, to question the validity of the bonds, which were issued partly because of his act as a stockholder, director, and officer.

The trustee in bankruptcy contends that this attempted reinstatement of the alleged canceled indebtedness was a fraud on the law and a futile attempt to evade the prohibitions of the Alabama Constitution and statute against the creation of fictitious bonded indebtedness by corporations, and that the bonds were subject to this infirmity as to subsequent creditors, and so the unanimous consent of stockholders could not avail to validate the bonds supported by the reinstated indebtedness. It is true that if the effect of the reinstatement was to create a fictitious indebtedness, which alone supported the bond issue, then the bonds based upon it would be void, even as to subsequent creditors, who might have been misled in extending credit by the apparent, but unreal, capitalization of the corporation brought about by the fictitious bonds.

The question is whether the cancellation and subsequent restoration of the indebtedness from the corporation to Stevens and Dosenbach can be said, under the facts, to have created a fictitious indebtedness in the amount restored. It is not disputed that the original indebtedness was a bona fide one, and that the moneys represented by it were actually advanced the corporation, and went into its treasury in the full amount. Nor is it claimed at the time the indebtedness was written off in October, 1906, or in January, 1907, that the company's capital had been impaired to that extent by losses. The expressed purpose of the writing off of the indebtedness was that it would, in an equal amount, increase the value of the stock, which was all owned by Stevens and Dosenbach, and not that it was done to replace any previous impairment of capitalization. It will therefore be presumed that at the time the indebtedness was written off there was an excess of assets over capitalization equal to the amount of the indebtedness then written off. In other words, that the writing off of this indebtedness without consideration moving from the corporation for its cancellation left it assets in amount at least equal to the amount of the canceled indebtedness, in excess of its obligations and capital stock liability. The record does not show that there was any impairment of capital between the canceling of this indebtedness and the issuance of the bonds. At the time of the issuance of the bonds, therefore, the company's assets exceeded its liabilities, including

its capital stock, in a sum at least equal to the alleged canceled indebtedness.

No question is made in the record as to full and proper payment of the original capital stock subscription. The question then is whether the reinstatement of the canceled indebtedness, under these circumstances, can, as to future creditors, be held to be the creation of a fictitious indebtedness. The full amount of money, which the indebtedness represented, had been concededly contributed to the treasury of the company, still remained there, and was not represented by the original capitalization of the corporation or by any of its then outstanding obligations. It was, therefore, in the nature of a surplus over and above the liability of the corporation to its creditors or on capital stock account. Being a surplus, it would have been competent for the corporation to have distributed it among the shareholders. It would then have been competent for the shareholders to have loaned it back to the company and taken the company's obligations of indebtedness for it. Under the reservation of the Supreme Court of Alabama, in the case of *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604-607, 2 South. 727-729, that "we have not decided, nor need we declare, what would be our ruling, if it were shown that the Dispatch Publishing Company had an accumulated money surplus, or visible, tangible property in excess of its authorized stock, and proposed to make that the basis of additional stock to be issued," it is probable the surplus could have been distributed among the shareholders in the way of a stock dividend. The conceded fact that the amount of the canceled indebtedness went into the treasury of the corporation, remained there until the original indebtedness was reinstated, and was not until then represented either by evidences of debt or capital obligations of the corporation, shows that an increase of corporate obligation in the same amount, whether of capital or indebtedness, based upon it would be in no sense fictitious.

The fictitious indebtedness of capitalization prohibited by the Constitution and statute is one which has no representation in the assets of the corporation, such as subsequent creditors dealing with the corporation would have the right to rely upon. If it was competent for the corporation to distribute the surplus created by the cancellation of the indebtedness in cash or stock dividends, without incurring liability under the Constitution and statute, it was equally competent for it, with the consent of all its stockholders, it having no existing creditors unprovided for in full, to permit the fund to remain in its treasury and issue evidences of its indebtedness to whom it saw fit in an equal amount. This is what it did at the time of the bond issue, by reinstating the indebtedness in favor of Stevens and E. L. Dosenbach on its books. No fictitious increase of capital or indebtedness was thereby created, for this amount was free assets in the sense that it was unrepresented theretofore either by the corporation's capitalization or by its obligations of indebtedness. After reinstatement of the indebtedness, the outstanding obligations of the corporation, both on account of debt and of capital stock, would only equal its actual assets.

If the indebtedness was legally reinstated, it follows, so far as the rights of future creditors are concerned, and there were no existing

creditors, that the corporation with the unanimous consent of its stockholders could issue its bonds secured by mortgage, and deliver them to Stevens and E. L. Dosenbach, in liquidation of the then existing indebtedness of the corporation to them. The case of *First National Bank v. Winchester*, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904, is authority for this conclusion.

The petition for review is denied, and the trustee in bankruptcy taxed with the costs of the petition.

WILLIAMS v. HOCHSTEIN.

(District Court, D. New Jersey. December 1, 1914.)

1. **BILLS AND NOTES (§ 371*)—ACCOMMODATION MAKER—LIABILITY.**

An accommodation maker is liable to the holder of a negotiable note in due course, and cannot plead want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371.*]

2. **BILLS AND NOTES (§ 371*)—ACCOMMODATION MAKER—DEFENSES.**

In an action on a note by a holder in due course, it was no defense that defendant signed for the accommodation of R., to the knowledge of the payee, and that on several occasions R. had requested plaintiff, the payee's receiver, to charge the note to R.'s account, but that the receiver had refused to do so, and that defendant was only liable in the event R. should fail to pay.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371.*]

At Law. Action by Christopher Williams, as receiver of the First National Bank of Bayonne, against Joseph Hochstein. Judgment for plaintiff.

The First National Bank of Bayonne became insolvent upon December 8, 1913, and in due course plaintiff became receiver. The complaint alleges that about October 10, 1913, the defendant made and delivered his promissory note, dated at Bayonne, N. J., October 10, 1913, and promising to pay to the order of the First National Bank of Bayonne, N. J., \$380.79 at the First National Bank of Bayonne; that no part of the note has been paid, although payment thereof has been duly demanded.

The second count alleges that on or about December 1, 1913, the defendant made and delivered his promissory note, dated at Bayonne, N. J., December 1, 1913, and promising to pay to the order of E. L. Watters \$60 at the First National Bank of Bayonne. Before maturity and for a valuable consideration E. L. Watters duly indorsed and delivered the said note to the First National Bank of Bayonne. Thereafter the note was duly presented at maturity for payment, payment was not made, protest followed, and no part of the note has been paid.

The third count alleges that on or about December 3, 1913, the defendant made and delivered his promissory note, dated at Bayonne, N. J., December 3, 1913, and promising to pay to the order of Prospect Planing Mill Company \$125 at the First National Bank of Bayonne. Before maturity and for a valuable consideration the Prospect Milling Company duly indorsed and delivered the said note to the First National Bank of Bayonne. The note was duly presented at maturity, payment was not made, protest followed, and no part of the note has been paid.

The fourth count alleges that on or about October 20, 1913, defendant made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and delivered his promissory note, dated at Bayonne, N. J., October 20, 1913, and promising to pay to the order of himself \$1,225 at the First National Bank of Bayonne. The note was due December 20, 1913. The indorsement was made by Joseph Hochstein, Julius A. Rose, and two others. The note was duly presented at maturity, payment was not made, protest followed, and no part of the note has been paid.

Judgment is demanded for \$1,795.25, with interest on \$380.79 from December 10, 1913, on \$60 from February 1, 1914, on \$125 from February 3, 1914, and on \$1,225 from December 20, 1913, together with costs and disbursements of this action.

The answer of the defendant Hochstein sets up that he made and executed a note mentioned in the fourth count, but alleges that he was merely an accommodation maker for Julius A. Rose, and that he (the defendant) is and was only secondarily liable, by reason of the said First National Bank having knowledge of the fact that he (the defendant) was merely the accommodation maker for the benefit of Rose, and that Rose is primarily liable. He sets up that Rose on several occasions has requested the receiver of the First National Bank to charge the note to the account of Rose, as he has a just and legal right to demand of the receiver to do, but the receiver refused to do this. He alleges that he (the defendant) is only liable on the note in the event that Rose shall fail to pay the same, and asks judgment for costs.

Motion is made by the receiver to strike out the answer of the defendant, on the ground that answer was not filed within 20 days after service of summons, and for judgment for the plaintiff.

George M. Burditt, of New York City, for complainant.

H. B. Dembe, of Bayonne, N. J., for defendant.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] Examination of authorities demonstrates that defendant cannot avoid himself of his attempted defenses, for it is well settled that an accommodation maker, even if he is known to be such by the holder of a negotiable note in due course, is yet liable. It has been said by the Supreme Court of the United States in *Israel v. Gale*, 174 U. S. 391, 19 Sup. Ct. 768, 43 L. Ed. 1019, that it is elementary that mere knowledge that paper has been drawn for an accommodation does not prevent one who has taken it for value from recovering thereon. The decision of the Supreme Court in *Israel v. Gale* was in affirmance of the decision of the Circuit Court of Appeals of the Second Circuit in *Israel v. Gale*, 77 Fed. 532, 23 C. C. A. 274. There the case was by a receiver of a national bank upon a promissory note and upon a defense that the note was made and delivered without consideration and merely for accommodation. *Israel v. Gale* was also followed by Judge McPherson, sitting in the Circuit Court of the Eastern District of Pennsylvania, in *Earle v. Enos*, 130 Fed. 467, and again the rule was sustained that the fact that a bank which has discounted an accommodation note has done so knowing of its character does not give to the maker the defense of want of consideration. *Randolph on Commercial Paper*, § 1020.

These cases are enough, and of course the recognition of the rule as stated by the Supreme Court will be accepted as conclusive.

The motion of the receiver to strike out the answer is therefore well taken upon the legal ground stated. Let the motion be granted, and judgment entered as prayed for.

WILLIAMS v. ROSE.

(District Court, D. New Jersey. October 21, 1914.)

1. BANKS AND BANKING (§ 135*)—NATIONAL BANKS—INSOLVENCY—SET-OFF—INDEBTEDNESS.

Where a depositor in an insolvent national bank had indorsed a note, on which he was in fact primarily liable, and procured the bank to discount it for his benefit, he was entitled, in a suit by the bank's receiver to recover the amount of the note, to set off his deposit in the bank against his liability on the note.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 375-379; Dec. Dig. § 135.*]

2. BANKS AND BANKING (§ 49*)—NATIONAL BANKS—STOCKHOLDER'S LIABILITY—SET-OFF.

A stockholder of a national bank was not entitled to set off against his double stock liability the amount of his unpaid deposit account in the bank at the time of its failure; such stock liability, imposed by Rev. St. §§ 5226, 5227 (Comp. St. 1913; §§ 9813, 9814), being for the express purpose of making good the contracts, debts, and engagements of the bank, and being a trust fund in which all creditors were entitled to share pro rata.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.*]

At Law. Action by Christopher L. Williams, as receiver of the First National Bank of Bayonne, N. J., against Julius A. Rose. On motion to strike out defendant's answer. Denied without prejudice.

The First National Bank of Bayonne became insolvent upon December 8, 1913, and in due course plaintiff became receiver. The complaint alleges that about October 20, 1913, Joseph Hochstein made and delivered his promissory note, dated at Bayonne, N. J., October 20, 1913, and promising to pay to the order of himself \$1,225 at the First National Bank of Bayonne. The note was due December 20, 1913. The indorsement was made by Joseph Hochstein, Julius A. Rose, and two others. Before maturity the defendant Rose duly indorsed and delivered the note to the First National Bank of Bayonne for value. The note was duly presented at maturity, payment was refused, protest followed, and no part of the note has been paid.

The second count alleges that on November 9, 1913, George W. Evans made his note, due one month after date, to the order of Minnie Rose, promising to pay \$650 at the First National Bank of Bayonne. This note was indorsed by Minnie Rose and Julius A. Rose, and before maturity it was indorsed and delivered to the First National Bank of Bayonne for value. Thereafter payment was demanded, but not made.

The third count alleges that the First National Bank of Bayonne was organized as a national bank on December 5, 1906, with a capital stock of \$100,000, consisting of 1,000 shares of stock, of the par value of \$100 each. The bank did business until December 6, 1913, when it became insolvent, and plaintiff was appointed, in due course, receiver. It is alleged that prior to December 6, 1913, the defendant Rose purchased 2 shares of the capital stock of the bank and the certificates for the said 2 shares were duly issued and delivered to the defendant prior to December 6th; that they were registered in the name of the defendant on the books of the bank prior to said date; and that he was the owner and holder of the said 2 shares at the time of filing the suit, to wit, September 2, 1914. It is alleged that on May 13, 1914, the Comptroller of the Currency, having concluded that it was necessary, in order to pay the debts of the bank, to enforce the individual liability of the stockholders to the extent of 100 per cent., as prescribed by sections 5151 and 5234 (Comp. St. 1913, § 9821) of the Revised Statutes of the United States, made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an assessment upon the shareholders for \$100,000, to be paid by each ratably on or before June 13, 1914, and demanded \$100 upon each and every share of the capital stock held or owned by the shareholders, respectively, at the time of the failure of the bank, to wit, December 6, 1913. Demand was thereafter made of the defendant to pay \$100 per share on each of the 2 shares standing in his name on the books of the bank, but he failed to make the payments.

Judgment is demanded for \$2,078.14, with interest on the \$1,225 note from December 20, 1913, and with interest on the \$650 note from December 9, 1913, and with interest on \$200 for the shares of stock.

The answer of the defendant Rose sets up that he applied to the bank for a \$1,500 loan, and was told that if he would present a note for that amount the bank would discount the same and apply the proceeds to the credit of the account of the defendant; that thereupon defendant induced Joseph Hochstein to make a note for \$1,500 as an accommodation to the defendant, which note defendant also induced two others to indorse as accommodation indorsers, and presented the same to the bank for discount; that the bank discounted the note, well knowing that Hochstein and others had merely signed for the accommodation of the defendant, and that defendant was primarily liable, and the note and the proceeds were to be used by him for his own benefit; that no consideration was received by Hochstein and others for becoming parties to the note, and that they were merely accommodating the defendant and aiding him in procuring the loan; that renewals were had until the note was reduced to \$1,225, when defendant delivered to the bank the note mentioned in the first count of the complaint; that on December 8, 1913, when a receiver for the bank was appointed, the defendant Rose had on deposit with the bank \$1,964, and that upon the maturity on the \$1,225 note he requested that the note be charged against the credit of \$1,964 by reason of his account, but the receiver refused to do this; and that the defendant, being primarily liable on the note, was entitled to have the note set off and paid out of the money on deposit to his credit in the bank.

For answer to the second count, the defendant sets up that, being in need of money, he induced one George W. Evans to make a note for \$1,500 as an accommodation for the defendant, which said note was made payable to the order of Minnie Rose, the wife of the defendant, and that thereafter the bank discounted the note, knowing that the defendant was primarily liable, and that the proceeds arising from the note were to be used by the defendant for his own proper use and benefit; that Evans received no consideration for becoming a party to the note, and that the note was reduced from time to time; and that when the bank failed on December 8, 1913, it owed the defendant \$1,964, but that the bank refused, upon the maturity of the note of \$650, to charge the note against the credit of \$1,964.

For answer to the third count, defendant sets up that when the bank failed he had an account of \$1,964 on deposit in said bank; that he demanded of the plaintiff that it apply against the credit of \$1,964 in favor of the defendant the \$200 due from him, mentioned in the third count of the complaint, and offered to pay the defendant the difference between the amount on deposit with the bank to the credit of the defendant and the amounts due from him (the defendant) to the bank on the demands referred to in the first, second, and third counts, but that the bank refused to accept. He asks judgment in his favor on the third count for costs, and that the money on deposit in the bank to the credit of the defendant be set off against the amount claimed by the plaintiff in the first, second, and third counts.

Motion is made by the receiver to strike out the answer of the defendant, on the ground that answer was not filed within 20 days after service of summons, inclusive, and for judgment for the plaintiff.

George M. Burditt, of New York City, for plaintiff.

H. B. Dembe, of Bayonne, N. J., for defendant.

HUNT, Circuit Judge (after stating the facts as above). The first question presented by the motion is whether the defendant, who al-

leges that he is primarily liable upon the notes, although an indorser, may offset the notes against his deposit account with the bank, which has failed; and the second is whether a stockholder, who has not paid the assessment upon his national bank stock, may offset his deposit in the bank, which has failed, against the assessment demanded under the provisions of the National Banking Act.

[1] 1. The first question seems to have been considered very often, and a number of well-reasoned decisions have been made, wherein it has been held that an indorser cannot offset his deposit balance against his notes. This view is often based upon the ground that if he could, where the maker is a solvent person, to allow him to do so would extend to the indorsers of the paper an unwarranted preference. The Comptroller of the Currency has ruled to this effect, saying that, if the maker of a note is solvent and can be compelled to pay it, the indorser should not be permitted to take up the note by canceling the indebtedness of the bank to himself, for he might thereby be enabled indirectly to obtain a preference over other creditors. The current of the decisions of later date seems to be that no preference shall be given to one over another depositor, and therefore that, where the maker is solvent, it is unjust to allow the indorser the set-off of a deposit.

In *Davis v. Industrial Manufacturing Co.*, 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322, this general rule was recognized, and in *Knaflle v. Knoxville Banking & Trust Co.*, 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167, the Supreme Court of Tennessee said that, if the relief there prayed for by the petitioning surety were granted, an inequitable result would be worked against the rule which ordinarily denied set-off where a depositor was in fact a mere surety on the note and it appeared that the principal obligor was solvent. *Edmondson v. Thomasson*, 112 Va. 326, 71 S. E. 536, Ann. Cas. 1913A, 1301, was decided in accordance with a like rule. So, also, were the cases of *New Farmers' Bank's Trustee v. Young*, 100 Ky. 683, 39 S. W. 46, and *Stephens v. Schuchmann*, 32 Mo. App. 333. The Missouri case just referred to was an action by a receiver of an insolvent national bank against an indorser on promissory notes, wherein the indorser sought to set off his deposit in the bank. Section 5242 of the Revised Statutes of the United States (Comp. St. 1913, § 9834) received careful examination by the court, which in interpreting the intent of the statute held that it did not give the indorser of the note credit for the entire amount of his deposit while other creditors had to be satisfied with just what the assets of the bank might be.

In *Re Middle District Bank*, 1 Paige (N. Y.) 585, Chancellor Walworth said:

"If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to offset bills which he had at the time the bank stopped payment. But no such offset should be allowed to an indorser where he is indemnified by the real debtor, or where the latter can be compelled to pay."

A recent decision in New York, cited by the plaintiff, *Borough Bank of Brooklyn v. Mulqueen et al.*, 70 Misc. Rep. 137, 125 N. Y. Supp. 1034, is to a like effect.

But, however sound these decisions may seem to me, I find it impossible to distinguish the present case from the rule of *Yardley v. Clothier*, 51 Fed. 506, 2 C. C. A. 349, 17 L. R. A. 462, where Judge Wales, speaking for the Circuit Court of Appeals for this circuit, affirms the conclusions reached by Judges Acheson and Butler in *Yardley v. Clothier* (C. C.) 49 Fed. 337. The Court of Appeals quotes the provisions of section 5242 of the Revised Statutes of the United States, and refers to the frequent objection interposed in the distribution of insolvents' assets upon the ground that the allowance of set-off creates preferences among creditors, yet reaches the conclusion that the controlling weight of authority has established the doctrine that, in the absence of express statutory prohibition, set-off of a debt owing to the defendant will be allowed if it was due when the creditors' rights attached, whether the debt sued on was due at the same time or matured subsequently. Many cases are examined by the court, including *Re Middle District Bank*, 1 Paige (N. Y.) 584, *Armstrong v. Scott* (C. C.) 36 Fed. 63, and others.

Counsel for the plaintiff refers to the decision of *Yardley v. Clothier*, admitting that it is in point, in that the indorser of a note was there allowed the offset of his deposit, but would have the court distinguish it from the present case, for the reason that the point that, if the maker is solvent, the indorser cannot set off his deposit was not presented. Possibly the Court of Appeals would recognize the distinction urged, but I gather that the court considered the point that the defendant's obligation in the case before it was that of an indorser simply, for such a position had been referred to by the Circuit Court and, moreover, the action was one by a receiver against a defendant as an indorser. The Court of Appeals applied the rule that mutual accounts are to be adjusted in such manner that the balance constitutes the debt to be recovered. Furthermore, it is significant that the rule of set-off as declared in *Yardley v. Clothier* by the Circuit Court was expressly approved by the Supreme Court of the United States in *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

[2] 2. Upon the second question, in the absence of a controlling decision by a higher court, my view is that a stockholder is not entitled to set off against an assessment made against him pursuant to the Revised Statutes of the United States, where a bank has become insolvent, the amount of his individual claim against the bank. The reasoning of the Circuit Court of Appeals of the Ninth Circuit in *Wingate v. Orchard*, 75 Fed. 241, 21 C. C. A. 315, covers this branch of the present case. The court there put its decision upon the ground that the fund provided for under the Revised Statutes was not intended for any particular creditor, but to make good all debts equally and without any preference, and that in the event of the winding up of the affairs of a national bank the fund provided by sections 5226 and 5227 was for the express purpose of making good the contracts, debts, and engagements, and is manifestly a trust fund, to a pro rata share of which all creditors are equally and equitably entitled. The court distinguished the case of *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, and cited in support of the conclusion reached De-

lano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. In the latter case the Supreme Court of the United States treated an assessment under section 5151 as made by authority of the Comptroller of the Currency, not as a voluntary one, and as only to be applied to the satisfaction of the creditors, equally and ratably. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968.

The present motion to strike out the whole answer is denied, without prejudice, however, to the interposition of another motion by the plaintiff, based upon the view expressed upon the second point discussed in this memorandum opinion.

STATE OF MAINE LUMBER CO. et al. v. KINGFIELD CO. et al.

(District Court, D. Connecticut. December 8, 1914.)

No. 1408.

1. COURTS (§ 312*)—UNITED STATES COURTS—JURISDICTION—DIVERSE CITIZENSHIP—ACTION BY ASSIGNEE.

Under Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), giving District Courts jurisdiction of suits between citizens of different states, but providing that no District Court shall have cognizance of any suit on any promissory note or other chose in action in favor of any assignee, unless such suit might have been prosecuted therein if no assignment had been made, where V. and B., citizens of Massachusetts, and R., a citizen of Connecticut, contracted to buy certain timber land from a Connecticut corporation, and assigned their contract to a Massachusetts corporation, a suit by the Massachusetts corporation against the Connecticut corporation, in which it was claimed that the Connecticut corporation deceived plaintiffs' assignors, could not be maintained in the United States District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.*]

2. COURTS (§ 308*)—UNITED STATES COURTS—DIVERSE CITIZENSHIP.

Where jurisdiction of a United States District Court is claimed solely on the ground of diverse citizenship, all parties on one side of the controversy must be citizens of different states from those on the other.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.*]

3. EQUITY (§ 132*)—BILL—ALLEGATIONS AS TO PARTIES.

A bill setting forth that plaintiffs were acting in behalf of themselves and of such other creditors of and claimants against defendants, or any of them, as might desire relief similar to that prayed for therein, and might intervene and become parties, without setting forth the names, citizenship, and residence of such parties, violated equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), providing that it shall be sufficient that a bill in equity shall contain the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 312; Dec. Dig. § 132.*]

In Equity. Suit by the State of Maine Lumber Company and others against the Kingfield Company and others. On motion to dismiss. Bill dismissed without prejudice.

See, also, 214 Fed. 878.

Arthur Perkins, of Hartford, Conn., and William G. McKechnie, of Springfield, Mass., for plaintiffs.

Francis H. Parker, Hugh M. Alcorn, and R. W. Thompson, all of Hartford, Conn., for defendants.

THOMAS, District Judge. The State of Maine Lumber Company, a Massachusetts corporation, located at Springfield, in that state, with Samuel D. Viets and Burdette M. Bancroft, both citizens of Springfield, have jointly brought their bill in equity against two Connecticut corporations, seven citizens of Connecticut, and one citizen of the state of Maine, prefacing their complaint proper as follows:

"Your orators, acting in behalf of themselves, and also in behalf of such other creditors of and claimants against the respondents, or any of them, as may desire relief similar to that prayed for herein by the complainants and may intervene herein and become parties thereto, complain and say."

The bill itself contains 34 paragraphs, setting out very particularly the claims of the plaintiffs, and indicating that in a certain transaction some of the defendants had deceived the plaintiffs and one De Forest E. Rogers, who was not named as a party to the suit.

It is not necessary, however, to go into the complaint at length. To properly discuss this motion it is sufficient to say: That it appears from the bill of complaint that on May 5, 1913, said Samuel D. Viets and Burdette M. Bancroft, both of them, then and now, are citizens of Springfield, Mass., and said De Forest E. Rogers then and now is a citizen of Middletown, Conn. That by a written proposal made to and accepted by the Maine Land & Lumber Company, a Connecticut corporation, and one of the defendants, said Viets, Bancroft, and Rogers jointly agreed to purchase of that corporation certain timber land located in the state of Maine, which was incumbered by a first mortgage of \$40,000, and on which, before that date, a judgment of foreclosure had been granted in favor of the owner of the mortgage and against the said Maine Land & Lumber Company, the mortgagor and owner of the equity in the land. That these three men subsequently "offered to cause to be assigned and conveyed to the said State of Maine Lumber Company, the said timber land," and that "at a legal meeting of the directors of the said State of Maine Lumber Company" the directors thereof "agreed to accept said assignment and conveyance, so that said State of Maine Lumber Company acquired the right to purchase such timber land on certain terms and conditions set out in said assignment or conveyance" (but the terms and conditions set out in said assignment or conveyance were not set forth in the bill of complaint). That since the 5th day of May, 1913, and up to the time of bringing this suit, "said Viets, Bancroft, and Rogers, and the State of Maine Lumber Company, have been and are prepared, ready, and willing to carry out their part of said agreement" (referring to the agreement of purchase made jointly by said Viets, Bancroft, and Rogers), and make the payments required of them in said agreement, within a reasonable time after the Maine Land & Lumber Company should tender to them a deed of said property free from incumbrance, except a mortgage of \$50,000.

The defendants have filed a motion to dismiss the suit on the ground of nonjoinder of parties, because the bill shows that Rogers was jointly interested with Viets and Bancroft in the agreement of May 5, 1913, for the purchase and sale of the timber land. Viets, Bancroft, and Rogers are named as the parties of the one part to said agreement, while the Maine Land & Lumber Company, one of the defendants, is named as the other party to said agreement. Defendants also moved to dismiss the complaint because Rogers still has a united interest with the other two in the subject-matter of this suit, and that therefore it was necessary and indispensable that Rogers be made a party plaintiff to this cause, and as he is now, and was at the time this suit was brought a citizen of Connecticut, the necessary diversity of citizenship required to give this court jurisdiction does not exist.

In addition to this reason for dismissal, the defendants, in their motion, have set up other claims which need not be noticed here, as the motion to dismiss must be granted for nonjoinder of parties.

In case the plaintiffs bring a suit in the state court, based upon a bill of complaint like that set out in this action, the defendants may then raise, by demurrer or otherwise, the other questions which they have herein presented in their motion to dismiss, at which time such questions may be heard and determined.

[1] By section 24 of the Judicial Code of the United States, in force January 1, 1912 (Act March 3, 1911, 36 Stat. 1091), it is provided that the District Courts shall have original jurisdiction—

“of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * is between citizens of different states, or is between citizens of a state and foreign states, citizens, or subjects. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

It will therefore be seen that Rogers, being a citizen of Connecticut, could not have maintained his suit here against either of the defendant corporations, or the other seven defendants who are citizens of this state, as the court would have no jurisdiction to hear and determine the controversy, so that even were he, as plaintiffs claim, only a nominal party in the matter here, as the assignor of his interest in the agreement of May 5, 1913, and the State of Maine Lumber Company, his assignee, the real party in interest, this court would still be without jurisdiction. It is well settled that, in a suit brought to a federal court by an assignee, he must show that it could have been prosecuted in the federal court by his assignor, and unless he is able to do so the suit must be dismissed. *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

[2] Where, as in this case, the jurisdiction is claimed solely on the ground that the matter in controversy is between citizens of different states, all parties on the one side of the controversy must be of different states from those on the other. *The Sewing Machine Co.*, 18 Wall.

553, 21 L. Ed. 914; American Bible Society v. Price, 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70; Ayres v. Wiswall, 112 U. S. 187, 193, 5 Sup. Ct. 90, 28 L. Ed. 693.

It was held in *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435 and in *Bissell v. Horton*, 3 Day (Conn.) 281, Fed. Cas. No. 1,448, that, if there be several plaintiffs and defendants, each plaintiff must be capable of suing each defendant in the federal courts. See, also, *Vose v. Roebuck Weather-Strip & Wire Screen Co.* (D.C.) 216 Fed. 523.

[3] Rule 25 of "Rules of Practice for the Courts of Equity of the United States" (198 Fed. xxv, 115 C. C. A. xxv), promulgated by the Supreme Court on November 4, 1912, provides in brief that:

"Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption, * * * the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under a disability, that fact shall be stated. * * *"

It will be recalled that the plaintiffs set forth that they are acting, not only in behalf of themselves, but also "in behalf of such other creditors of and claimants against the defendants, or any of them, as may desire relief similar to that prayed for herein and may intervene and become parties thereto." Without more information, without setting forth the names, citizenship, and residences of such parties, the bill has been made to offend against this rule, and for this reason might well be dismissed by the court on its own motion. *Florida Central & Peninsular R. R. Co. v. Bell*, 176 U. S. 321, at page 325, 20 Sup. St. 399, 44 L. Ed. 486.

These defendants, therefore, may have a decree dismissing the bill on the ground that this court has no jurisdiction of the suit, without prejudice to the bringing of any other action in another court with respect to the controversy herein.

INSURANCE CO. OF NORTH AMERICA v. McCOACH, Internal Revenue Collector.

(District Court, E. D. Pennsylvania. December 7, 1914.)

No. 2402, Dec. Sess. 1912.

1. INTERNAL REVENUE (§ 9*)—CORPORATION EXCISE TAX—COMPUTATION.

In computing the excise tax due from an insurance corporation, it was improper to include, in the gross income accrued, but unpaid, interest on investments represented by unmatured interest coupons payable in the future.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

2. INTERNAL REVENUE (§ 9*)—CORPORATION EXCISE TAX—"INSURANCE RESERVE"—"RESERVE FUND"—"RESERVE."

Where the insurance laws of the state and the forms of return prepared by the State Insurance Department required an insurance company to return as liabilities the net amount of its unpaid losses or claims and the unearned premiums on unmatured policies, the aggregate of these sums, technically known as an "insurance reserve," and the moneys thus

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

carried, known as "reserve funds," constituted the "reserve" required by law to be maintained, within Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300-6307), imposing an excise tax on corporations, and authorizing a deduction from the gross income of the net addition required by law to be made to the reserve funds of insurance companies.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, First and Second Series, Reserve, Reserve Fund.]

3. INTERNAL REVENUE (§ 9*)—CORPORATION EXCISE TAX—COMPUTATION.

Where an insurance company, in addition to the reserve required by law to be maintained to meet its unpaid losses and claims and its liabilities on unmatured policies, measured by the unearned premiums thereon, had a surplus of several million dollars, it was not entitled, in the computation of its excise tax, to a deduction from its gross income of the excess of its losses over those for the preceding year, though a greater reserve was thereby made necessary, as, in view of its surplus, it was not required to add that amount to its reserve, but could have paid it out in dividends had it so decided.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

At Law. Action by the Insurance Company of North America against William McCoach, collector of internal revenue. Judgment for plaintiff for a part of the amount sued for.

B. Franklin Pepper and George Wharton Pepper, both of Philadelphia, Pa., for plaintiff.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., and Edward S. Kremp, Asst. U. S. Atty., of Reading, Pa., for defendant.

DICKINSON, District Judge. This case was tried before the court without the intervention of a jury, under the provisions of sections 649 and 700, Revised Statutes (Comp. St. 1913, §§ 1587, 1668). The evidential facts are not in controversy, and the case partakes almost of the nature of a case stated. An excise tax, under the provisions of the act of Congress of August 5, 1909, was assessed against and paid by the plaintiff. The payment, so far as affects the questions involved, was accompanied by the usual formalities which give the plaintiff the right to recover in this form of action the amount claimed, if the tax was illegally exacted. All this is conceded by the defendant, and the necessary facts and conclusions of law are found to this end, and there is no need to incorporate them in formal special findings. The question, therefore, resolves itself into one of the liability of the plaintiff to the payment of the tax. The only disputable question is further really narrowed to one of the proper application of the latter part of the second of the five classes of deductions allowed by the act of Congress to be made from the "gross income" of the plaintiff in order to determine the taxable "net income." The real question is embraced in the phrase "the net addition, if any, required by law to be made to reserve funds" of insurance companies.

[1] There is, however, another question which may be disposed of before discussing that which we have thus characterized as the real

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

question. This first question is this: The collector included in the "gross income" of the company, and thereby taxed as income, certain sums of accrued, but as yet unpaid, interest on investments held by the plaintiff. This accrued interest was represented by unmatured interest coupons payable in the future. The income to which this dispute applies was not strictly of this character, but this is fairly representative of all of it, and admittedly presents the point to be ruled. No discussion of it is called for, because since the tax was imposed the very question raised has been decided in favor of the plaintiff for us. *Mutual Benefit Life Ins. Co. v. Herold* (D. C.) 198 Fed. 199; *Herold v. Mutual Ben. Life Ins. Co.*, 201 Fed. 918, 120 C. C. A. 256; *Id.*, 231 U. S. 755, 34 Sup. Ct. 323, 58 L. Ed. 468. The plaintiff is therefore entitled to judgment for the tax thus improperly imposed.

[2, 3] The remaining question is a difficult one to compress into a simple statement. It can most clearly be presented thus: The plaintiff was incorporated by a special act of assembly of the commonwealth of Pennsylvania, approved April 14, 1794 (3 Smith's Laws, p. 129). It is subject to the general insurance laws of the state. These provide for the establishment of an insurance department, which is under the charge of an insurance commissioner, upon whom has been conferred drastic powers of control over all companies doing an insurance business in the state. Every such company is "required by law" to submit itself to the regulations of this department under penalty of having all its business transactions in the state suspended. The main and real purpose is to make clear the solvency of the companies by making such returns of their financial condition as will show their capital to be unimpaired further than is tolerated by law. To this end they are required to return as liabilities all the obligations called for by such forms of returns as are prepared for the purpose by the insurance department. Among the obligations so required to be returned as liabilities is the net amount of the company's unpaid losses or claims against it and the amount of the premiums called for by its policies so far as they are then unearned. These sums are reserves. Every calling comes to have its own terminology. As part of this, the same word may come to have a special meaning in particular callings. This is true of the word "reserve," which, it will be remembered, is the word used in the act of Congress. The policy obligations of an insurance company are unique in that they are contingent, being contracts of indemnity only. In a statement of the financial condition of a company, to treat these contingent obligations as an absolute liability would be to doom every insurance company, no matter how strong financially, to technical insolvency. They are none the less obligations, and in a very practical sense liabilities. The real question is, to what extent? If no losses have been incurred, the company may re-insure or cancel its policies, and the amount of the unearned premiums therefore measures very fairly the money liability. Losses, however, may have been incurred on some policies. They may therefore be classified, and we have among these latter policies those under which no proofs of loss have been submitted, those under which proofs have been submitted, and those upon which losses have been adjusted, as

well as admitted and disputed claims. What may be termed the "actual liability" may thus be measured with substantial accuracy. The aggregate of these sums must be carried as a liability, and thus becomes technically known as an "insurance reserve," and the moneys thus carried as "reserve funds." If the company carries any insurance against such policies, this is allowed to be deducted, and we have the "net amount of losses and claims" which, together with the "reinsurance reserve" or unearned premiums, constitutes the "insurance reserve" "required by law" to be maintained by the company. In the forms of returns as required to be made by this plaintiff for the years 1909, 1910, and 1911 all these items are called for and set forth in detail, and they constituted, or rather were included, as part of "the reserve required by law" to be maintained. For the several years they and the surplus of the plaintiff company were as follows:

1909	Reserve	\$7,796,094 92
	Surplus	2,577,235 60
	Net	\$5,218,859 32
1910	Reserve	\$8,327,931 49
	Surplus	3,712,333 93
	Net	\$4,615,597 56
1911	Reserve	\$8,908,377 36
	Surplus	4,202,404 41
	Net	\$4,705,972 95

The real surplus of a corporation is, of course, the difference between the aggregate value of all its assets and the sum of all its liabilities, including capital stock. This difference may be called surplus, undivided profits, contingent fund, or by any other name. In a real and substantial sense, it is a reserve. Broadly speaking, it is not required to be maintained, but may be paid out in dividends, or otherwise distributed among the stockholders. Ordinarily no part of it is embraced in the sum total of liabilities. When, however, something is added to the sum of liabilities which is not owing by the company, this addition then becomes a reserve. It is in this sense that moneys set aside to meet possible liabilities are "reserves," and if required by law to be thus carried, they are "additions required by law to be made to reserve funds."

Let us pause here to bring into the discussion the act of Congress. It was clearly the purpose of Congress to impose this excise tax, based upon the net income of corporations received during the year. To ascertain this, the gross income is taken, reduced only by certain specified deductions. The general purpose of the act is to make the statement of income a statement of cash receipts and disbursements. Actual payment is made the test of deductions. It was recognized, however, that in certain instances the money might be as effectually withdrawn from available income as if actually paid away. The allowance of the deduction embraced in the phrase already quoted is one. This company did add to its reserve by including in its liabilities unpaid losses and claims and unearned premiums. The sums thus added have been stipulated, and are found as stipulated. The losses for 1911 in fact ex-

ceeded those of 1910 by \$88,600, and the latter exceeded 1909 by \$222,250. The question, therefore, is, Were these sums net additions required by law to be made to the reserve fund? If the company had been without surplus, then the amount of losses must have been reserved for 1909 and for 1910, and as the latter exceeded the former by \$222,250, that much additional would have been so required. As, however, the company in 1909 had a large surplus, and therefore a much larger reserve than was required by law, there was no requirement to make any "additions" to it in 1910. In other words, the company was not required to add this \$222,250 to its reserve. It could have paid it out in dividends had it so decided, and its entire capital have been left unimpaired with millions to spare. The same is true of 1911, when the company had a surplus of \$4,000,000 and a contingent fund of \$202,404.41. It is evident, therefore, there was no requirement of law to add \$88,600 to the reserve the company already had. Moreover, under the law of Pennsylvania, the capital is not required to show clear and unimpaired above the sum of liabilities, including the items under discussion. There is a leeway of 20 per cent. allowed. What Congress had in mind was something more than a mere book-keeping fact. What the act of Congress says is that when a company is financially so situated that a part of its yearly income is not available for corporate use, but is required to be set aside and placed beyond the reach of the company as absolutely as if it had actually been paid away, then it may be deducted just as if it had been so paid, but not otherwise. The stipulated sums of \$151,750 for the year 1910 and \$113,000 for the year 1911 are taxable, and were properly not deducted from the gross incomes for those years, respectively.

There is no need for special findings of fact. These general findings are sufficient.

The conclusions of law reached are as follows:

Conclusions of Law.

1. The income sum of \$8,303.41 on which an excise tax was assessed and collected for the year 1910 was not taxable as income.
2. The income sum of \$8,638.83 on which the tax was assessed and paid for the year 1911 was not taxable as income.
3. The sum of \$151,750 was properly not deducted from the taxable income for the year 1910.
4. The sum of \$113,000 was properly not deducted from taxable income for the year 1911.
5. The plaintiff is entitled to judgment for the sum of \$192.73, made up as follows:

1910 tax payment.....	\$ 83 03
Interest from August 22, 1912.....	11 43
1911 tax payment.....	86 38
Interest from August 22, 1912.....	11 89
Amount of judgment.....	<u>\$192 73</u>

—together with costs of suit.

This judgment is accordingly entered in favor of the plaintiff and against defendant for \$192.73, with costs of suit.

LEE LASH CO. v. NORTHWESTERN CONSOL. MILLING CO.

(District Court, E. D. Pennsylvania. December 15, 1914.)

No. 3044.

1. CONTRACTS (§ 338*)—ACTIONS—PLEADING—AFFIDAVIT OF DEFENSE.

A contract for the display of advertisements by means of lantern slides provided that in case of shortage in the performance of the contract, due either to unsatisfactory service or to nonservice, other services were to be substituted for the shortage, but that, if plaintiff, at defendant's request, furnished new slides, the cost of such slides should be accepted in lieu of such extra substituted service. Plaintiff sued defendant, alleging, in its statement of claim, that at defendant's request a new series of slides was substituted; that it supplied 2,681 of the substituted slides at a cost of \$1 each; that it had fully performed its contract and fully discharged its obligation to render extra service because of a failure or defect in service; that accounts had been rendered, as required by the contract, showing a balance of \$5,055; that the total value of the services rendered was \$87,946, and the total credits amounted to \$82,891. The affidavit of defense denied that any slides were furnished at defendant's request, alleged that the substituted slides were voluntarily supplied by plaintiff pursuant to an oral agreement preceding the written contract, denied that the value of the services was as alleged, alleged that their value did not exceed \$85,100, and alleged a payment since suit brought of \$2,374. *Held*, that while, if plaintiff, as ordinarily required, had alleged the dates and items of the services rendered or set forth copies of the account stated, defendant would have been required to specify which of the alleged services were not performed, plaintiff having contented himself with a summary of the services, credits and balance due, and defendant having accepted such summary, defendant was confined to a denial in a like summary form, and hence the affidavit of defense was sufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1691, 1692, 1695, 1698-1705; Dec. Dig. § 338.*]

2. CONTRACTS (§ 338*)—ACTIONS—PLEADING—AFFIDAVIT OF DEFENSE.

While treating the allegation that slides to the value of \$2,681 were supplied as merely anticipating a possible defense, and therefore as surplusage, the allegation that slides were not furnished at defendant's request might also be treated as surplusage, the statement of claim might be found to be ambiguous and to base plaintiff's claim on the performance of a part of the original service under the contract, plus some extra service, and with the further addition of the cost of the slides, and, in this view of the statement of claim, such allegation was of value.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1691, 1692, 1695, 1698-1705; Dec. Dig. § 338.*]

At Law. Action by the Lee Lash Company against the Northwestern Consolidated Milling Company. On rule to open judgment. Rule made absolute, and leave to file affidavit of defense granted.

See, also, 217 Fed. 315.

Henry Budd, of Philadelphia, Pa., for plaintiff.

Roberts, Montgomery & McKeehan, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case has been argued as if heard on a rule for judgment for want of a sufficient affidavit of defense. It is not a little difficult to discover just where the parties cross

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

swords in their conflict. The facts over which there is no controversy appear to be these:

[1, 2] The plaintiff is in the business of displaying advertisements, shown on lantern slides, in moving picture houses. To this end it contracts with different theaters for the privilege of showing the slides. The defendant is in the milling business, and advertises its products very widely. On April 1, 1912, the parties made a contract. It is in writing, and takes the form of a written proposal by the defendant, accepted by the plaintiff. The essential features of the agreement are that the plaintiff was to display the advertisements of the defendant in the theaters with which the former held contracts. For this service the defendant was to pay a fixed price per day for displaying the advertisements in each of the houses. The defendant had the right to select the houses, and the service rendered was to be subject to its approval. This meant that no charge was to be made to the defendant for the houses or for the times in and at which no service was performed, nor was the defendant to be charged for services condemned by it as unsatisfactory. The shortage in the performance of the contract, due either to this nonservice or unsatisfactory service, was to be made up, however, by other services which were to be substituted for the shortage. The plaintiff was to be at the entire cost of the slides. The defendant had the right to require of the plaintiff that the slides be changed at defendant's request. If new slides were furnished at defendant's request, and if there was a shortage of service or there was unsatisfactory service in the performance of the contract, then the cost of the changed slides, furnished at the request of the defendant, was to be accepted pro tanto in lieu of the extra substituted service above referred to. The defendant was to be given prompt information of what was done by the plaintiff under the contract, and accounts were to be rendered periodically. The plaintiff entered upon performance of the contract, and the services terminated May 31, 1913. Accounts were rendered from time to time, and a final statement of the account was made on June 16, 1913. A summary of these accounts showed total services to the value of \$87,946, against which total credits were allowed of \$82,891, leaving a balance of claim of \$5,055. The plaintiff performed some service of the character above designated as extra service. A record was kept of unperformed and unsatisfactory services under the contract in the form of what the parties termed "credit notes." The amount of these notes does not appear in the pleadings. There does not seem to be any controversy over any of the facts included in the above statement.

Having what the plaintiff claimed to be a just cause of action for the above balance of \$5,055, it brought this action. Its statement of claim sets forth the contract in full, sets forth that, at the commencement of the service, the plaintiff was exhibiting a certain slide, and subsequently, at the request of the defendant, substituted for the slide at first in use a series of four other slides, and, in order to comply with the request of the defendant for changed slides, supplied in all 2,681 slides at a cost of \$1 each, and declares that the plaintiff has fully performed the contract on its part. The statement of claim further avers, however, that

the plaintiff had "fully discharged its obligation to render extra service when, for any cause, there had been a failure or defect in service in houses selected or approved by the defendant." There is a further averment to the effect that statements had been rendered from time to time, showing the state of the account at such times, and that a final statement was rendered on June 16th, showing a balance of \$5,055 to be due by defendant to plaintiff. The statement of claim gives the dates on which these different accounts were rendered, but no copies of the account are incorporated in the statement. The services are alleged to have been terminated on May 31, 1913, and the total value of services rendered is given as \$87,946, against which credits are admitted to the amount of \$82,891, and a claim is made for the difference.

The defendant took a rule for a more specific statement. There was no criticism of the statement of claim on the score that it did not set out either the service rendered or copies of the accounts as furnished, and a further and more specific statement of the plaintiff's claim in this respect was understood by the court to have been waived. The rule for a more specific statement was based upon and was understood by the court to be confined to the following feature of the statement of claim: It was asserted by the defendant that the statement of claim included a claim for the 2,681 slides, and the court was asked to require the plaintiff to set forth a detailed statement of the dates when the slides were furnished and the quantity of slides furnished on the respective dates. This rule was discharged by the court because the basic statement on which the rule was founded was itself without foundation. Plaintiff, by its statement of claim, was not seeking to recover payment for the changed slides. It was claiming \$5,055 for services contracted for, and which it alleged it had performed. So far as affected the statement of claim, the averment of the supply of changed slides played no function. It was mere surplusage.

The real defense meant to be set up would seem to be that the plaintiff was not entitled to the sum of \$5,055, but to only \$2,374, which sum has been paid by defendant. This defense on the face of the statement of claim might have been simply and directly presented by a denial of service to the amount of value as claimed by the plaintiff and a statement of the correct amount, together with the fact of payment. Instead of this, for some reason, the affidavit of defense sets forth a somewhat lengthy averment of an oral agreement anterior to the written contract to the effect that the plaintiff was to display a slide which had been in previous use until a series of four new slides could be procured, which were then to be substituted for the old slide, and that the agreement with respect to a change of slides referred to such changes as might thereafter be requested by the defendant to be made. It is further set forth that the 2,681 slides referred to in the statement of claim consisted of this series of four slides. It is denied that these were furnished at the request of defendant, but is averred that they were voluntarily supplied by the plaintiff because of its moral obligation to comply with its oral promise, in reliance on which the defendant had made the written contract. This is followed by the statement of fact that no slides had been furnished at defendant's request. There is

no sufficient denial of the fact that slides were supplied to the number claimed by plaintiff. There is in like manner no sufficient denial of performance by the plaintiff of its contract. The rendering of the accounts is admitted, but a denial is made of the acceptance of the accounts as correct. This is coupled with the positive averment that they were objected to as incorrect. A positive denial, however, is made that the value of the services rendered by the plaintiff amounted to \$87,946 and as positive an averment that the value did not exceed \$85,100. They admit the correctness of a credit allowance of \$82,891, and set up a payment since suit brought of \$2,374. There is some discrepancy in the figures given, but the defense set up is in substance that the plaintiff has been paid in full; defendant admitting an indebtedness to the amount, without interest, of the \$2,374, which it has paid. The assertion before made is reiterated that the plaintiff was including \$2,681, the cost of the slides, in its claim. These slides the defendant denies it was to pay for or to pay for any slides in money.

As the plaintiff was claiming the agreed compensation for the service of displaying advertising slides at certain times and at certain houses, it would ordinarily have been incumbent upon the plaintiff to have set forth the dates when the service was rendered and what service was rendered. So far as the claim of the plaintiff was based upon what would have, under the old form of common counts, been expressed as an indebtedness on an account stated between the parties, the basis of which would have been the bills rendered, it would have been necessary for the plaintiff to have set forth copies of these bills as they were in writing. If the statement of claim had taken this form, the requirement would have been upon the defendant to have met this in the affidavit of defense by a denial, not only that services had been rendered to the amount of value as claimed by the plaintiff, but it would have been further required that the affidavit should specify what of the services alleged by the plaintiff to have been performed were not performed. To have set forth all these particulars in the statement of claim would have expanded the statement into a very voluminous document. The defendant, therefore, did not insist that the plaintiff fulfill this requirement of pleadings, but was willing to accept in lieu thereof a simple summary of the mathematical results of such a statement, to wit, that the total services amounted to \$87,946, the credits to \$82,891, and the balance of the claim \$5,055. The waiver of the requirement which rested upon the plaintiff necessarily involves a waiver of the requirement which would otherwise have rested upon the defendant; and, as the plaintiff contented itself with a statement of the summarized figures, the defendant is confined to a denial in a like summary form.

An affidavit of defense to a claim of the first kind, which would be insufficient because too general, could not be thus criticized if it were introduced in answer to a statement of claim of the second kind. The affidavit in this case would ordinarily be held to be insufficient. The argument addressed to us by learned counsel for the plaintiff is as convincing as a demonstration. Inasmuch, however, as the statement of claim rests the plaintiff's case upon the general averment that the

value of the services rendered by the plaintiff was \$87,946, we are constrained to accept as a good affidavit of defense a denial of the averment that the value of the services was this sum, coupled with the counter averment that the amount of the value of the services did not exceed \$85,100. As in the statement of claim the averment that slides to the value of \$2,681 was held to have no function in the statement of claim otherwise than to forestall an anticipated possible defense, and could therefore be treated as surplusage, so in like manner the averment in the affidavit of defense that the plaintiff was seeking to secure a money recovery for the value of the changed slides has no function in the affidavit of defense, and may be treated also as surplusage. As, however, the statement of claim, when carefully read, may be found to be ambiguous in that, while it avers a performance of the service called for by the contract, there is also a reference to extra service. This reference to the extra service, which before escaped the notice of the court, gives a significance to the otherwise uncalled for averment of the cost of the changed slides, because the claim of the plaintiff may, in view of this, turn out to be based upon the fact that it did not perform what may be termed original service to the amount claimed, but that the service which was thus performed, plus some extra service, and with the further addition of the cost of the slides (which extra service and cost are by the contract made the equivalent of the service called for by the contract to be performed), together make up the sum total of the value of the services claimed by the plaintiff to have been performed. In this view of the facts, the claim of the plaintiff would in effect include a claim for the money cost of the slides. The averment in the affidavit of defense that the slides referred to in the plaintiff's statement were not slides furnished at the request of the defendant, within the terms of the contract, but were slides which the plaintiff voluntarily furnished in pursuance of the expectation of the parties that they would be furnished outside of and independently of the obligations of the contract, in consequence becomes of value.

To sum up the whole matter, there is in the affidavit of defense the specific and positive denial of the averment in the statement of claim that services to the value of \$87,946 were furnished, a denial that any slides were furnished by the plaintiff at the request of the defendant under the terms of the contract, and a specific averment that \$2,374 had been paid by the defendant to the plaintiff, which payment the defendant further avers paid all just demands of the plaintiff in full, without interest.

The rule to open the judgment to let the defendant into a defense is made absolute, and leave is granted to the defendant to file the affidavit of defense submitted with the brief of counsel.

UNITED STATES, to Use of PITTSBURG PLANING MILL CO. et al. v. SCHEURMAN et al.

(District Court, D. Idaho, Central Division. November 9, 1914.)

1. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—ACTIONS—STATUTORY PROVISIONS.

Under Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), providing that, if no suit be brought by the United States on the bond of a contractor for the construction of public works within six months from the completion and final settlement of the contract, laborers and materialmen may bring suit thereon in the name of the United States, provided that such suit shall be commenced within one year after the performance and final settlement of the contract, that only one action shall be brought, and any creditor may file his claim therein and be made a party thereto within one year from the completion of the contract, and that personal notice of the pendency thereof shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation for at least three successive weeks, the last publication to be at least three months before the time limited therefor, the limitation of time prescribed for bringing the suit conditions the right to sue and does not merely bar the remedy.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—ACTIONS—STATUTORY PROVISIONS.

That an action on a contractor's bond under Act Feb. 24, 1905, was not commenced a sufficient length of time before the expiration of one year from the completion of the contract to permit of the prescribed publication of notice to other creditors did not defeat the action, as the provision for such publication is for the benefit of other creditors, and in no way for the benefit of the surety, the contractor, or the United States.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

3. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—ACTIONS—STATUTORY PROVISIONS—"COMMENCED."

Where, in an action on a contractor's bond against the contractor and its surety, an amended complaint was filed substituting for the surety a defendant alleged to have succeeded to the surety's business and assumed its liabilities, the action was not "commenced" against such defendant, within Act Feb. 24, 1905, requiring such actions to be commenced within one year after the completion of the contract, until the filing of the amended complaint.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

4. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—ACTIONS—STATUTORY PROVISIONS—"COMMENCED."

In an action on the bond of a contractor with the United States who completed his contract on July 3, 1912, a complaint was filed against the contractor and its surety on June 21, 1913. Process was not issued until September 23, 1913, at which time a subpoena was placed in the hands of an officer and returned unserved because none of the defendants could be found in the district. On July 31, 1914, summons was issued and served upon a defendant which had been substituted for the original surety. *Held* that, if the suit was in equity, it was not "commenced" within one year after the completion of the contract, as required by Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Feb. 24, 1905, since a suit in equity is not commenced until the issuance of a subpoena followed by a bona fide effort to serve it.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

5. PROCESS (§ 21*)—TIME FOR SERVICE—STATUTORY PROVISIONS—"COMMENCED."

If such action were at law, and hence "commenced" when the complaint was filed, it could not be maintained because the summons was not issued within one year after the filing of the complaint, as required by Rev. Codes Idaho, § 4139.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 16; Dec. Dig. § 21.*]

Action in the name of the United States, to the use of the Pittsburg Planing Mill Company and other creditors of the Interstate Construction Company, Limited, against Ernest W. Scheurman and others, co-partners doing business as the Interstate Construction Company, Limited, and another. On demurrer to the complaint. Overruled as to the construction company, and sustained as to the defendant Maryland Casualty Company.

F. B. Wheeler, of Pittsburg, Kan., and Geo. G. Pickett, of Moscow, Idaho, for plaintiffs.

Forney & Moore, of Moscow, Idaho, for defendants.

DIETRICH, District Judge. [1] The plaintiff brings this suit under the provisions of an act of February 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), conferring upon persons who have furnished labor or material for the construction of public works the right, under certain conditions, to claim the protection of the bond given to the government by the contractor for the faithful performance of his contract.

The contract presently involved, which was for the construction of the post office building at Moscow, Idaho, was completed, and final settlement thereof made, on July 3, 1912. The complaint herein was filed June 21, 1913. Originally the Interstate Construction Company, which was the contractor, and the Bankers' Security Company, its surety, were named as defendants; but in an amended complaint filed June 10, 1914, the Maryland Casualty Company was joined as defendant, with the explanation that after the execution of the bond in question the casualty company had, by a written agreement, and for a valuable consideration, succeeded to the business of the security company, and had assumed all the liabilities of the latter, including the obligations of this bond.

Among other provisions, the act of 1905, *supra*, contains the following:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall * * * be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

elsewhere, for his or their use and benefit, against said contractor, and his sureties, and to prosecute the same to final judgment and execution: Provided, that where such suit is instituted by any of such creditors on the bond of the contractor it shall * * * be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

[2] The limitation of time thus prescribed for bringing suit conditions the right to sue, and does not merely bar the remedy. *Baker Contract Co. v. United States*, 204 Fed. 390, 122 C. C. A. 560. Invoking this principle, the casualty company, by general demurrer, raises the objection that the complaint fails to exhibit an existing cause of action. In the first place, conceding that the suit was originally instituted within a year from the time the final settlement was made, it urges that it was too late, for the reason that the statute provides that, after action is commenced, notice by publication for at least three weeks must be given of the pendency thereof, the publication to be complete at least three months prior to the expiration of the year, and that compliance with this provision was no longer possible when the suit was commenced. Reliance is placed upon *United States v. Stannard* (D. C.) 206 Fed. 326, which it is to be admitted apparently supports the proposition. Under this view, while the act in express terms provides that the suit may be brought within a year, it must in reality be instituted in approximately eight months, and, inasmuch as it cannot be brought within the first six months of this period, the creditor has in fact only a little more than two months in which to commence it. While doubtless such a construction is possible, it not only harshly restricts the remedy which it was the purpose of the statute to afford, but it is in the face of language the meaning of which, if standing alone, could not be mistaken, and therefore it should not be adopted except for reasons of the most cogent character.

For the necessities of this case it will suffice to inquire for whose benefit and for what object this proviso was inserted. Clearly it was not for the protection of the government, for suits of this character cannot be instituted until it has been fully indemnified or has waived its right by failure to sue. It was not for the benefit of the contractor, for he is, of course, liable, regardless of the statute. Nor was it for the protection of the surety, for in no contingency can it be benefited by the giving of the notice, or prejudiced by withholding it. If the failure to publish the notice could under any circumstances operate to extend the time for the assertion of claims, or serve as the basis or the occasion for additional suits, or in any other way increase the burdens or perils of the surety, it would doubtless have the right to insist upon full compliance with the provision. But such is not the

case. Whether the notice is or is not given, only one suit is authorized, and no claims can be put in suit by intervention or otherwise after the expiration of one year from the date the contract was completed. In this respect, therefore, it must be noted that there is a clear distinction between this proviso and the clauses limiting to one year the time in which suit may be commenced or interventions had. Whatever may be its scope or its precise meaning, the former, as it clearly purports to be, is solely for the benefit of other claimants; while the latter, as they purport to be, are for the protection of the surety. The latter present conditions precedent to the right to put claims in suit, while clearly such is not the effect of the former, for its requirements cannot be complied with until after suit is commenced. We need not now determine upon whom falls the burden of giving the notice; certain it is that the statute does not in terms impose the duty upon the plaintiff. Nor need we decide under what conditions it should be given, or what it should contain. It is difficult to see of what utility it could be in a case like this. If the plaintiff were pressing its suit to judgment and execution before the expiration of the year, then the purpose of such a notice would be clear enough. By being advised of the pendency of the action, other claimants could intervene before the plaintiff secured any advantage, and thus share pro rata in any judgment that may be obtained. But if the plaintiff waits until the expiration of a year, other claimants can suffer no prejudice. They are in no need of the notice to advise them of their rights or of the conditions upon which they can enforce them. This information they already have from the statute, which definitely advises them in what tribunal and within what time and in what manner they must assert their claims. The notice can add nothing to the knowledge they already have, except the unimportant fact that a suit has been commenced, which they can learn upon the simplest inquiry at the place pointed out by the statute. It would therefore seem to be useless to give the notice, except in cases where the plaintiff desires to proceed to judgment before the expiration of the year. But if the other view be taken, and if it be conceded that notice must be given in all cases in so far as possible, and that the burden rests upon the plaintiff, the surety, being without interest, cannot profit by any default in that respect. As intimated in the Baker Contract Co. Case, that is a matter entirely between the plaintiff and other claimants who may suffer loss by reason of the neglect. The surety has, by its bond, undertaken that its principal will pay all claims for labor and material not to exceed the penalty of the bond, after the government's demands are satisfied. About this obligation the statute has thrown two safeguards, and only two: All claims must be presented within a year, and all must be waged in a single suit in a designated tribunal. By the failure to give the notice in this case the surety has been in no wise prejudiced in the full enjoyment of these guaranties. The plaintiff has put its claim in suit in the proper tribunal and within the prescribed time. The only possible effect of notice would be to augment, and not to diminish, the surety's burdens, and to yield to its contention would be to hold that a party may assign as error an omission or mistake of which it is the beneficiary.

[3] In the next place, it is urged that the suit was not "commenced" within a year from the time the contract was completed and settlement made. It is not denied that the original complaint was seasonably filed, but attention is drawn to the fact that the casualty company was not a party thereto, and was first brought into the suit by the filing of the amended complaint, more than eleven months after the expiration of the year. It is a familiar principle that a suit is not deemed to be commenced against a party brought in by amendment until such amendment is made; the amendment does not relate back to the filing of the original pleading. True, the cause of action stated against the casualty company arises, not directly out of the original undertaking, but out of the contract between it and the security company, and that contract is in itself not subject to the limitations of the act under consideration. But nevertheless liability must first be established upon the undertaking before responsibility attaches under the subsequent contract. What aspect this question might have had if the casualty company had been brought in as an additional party defendant, we need not discuss, for here it was not added but substituted, and therefore in effect by the filing of the amended complaint the suit was dismissed as to the security company.

[4, 5] But if we were to adopt the theory that the substitution was not in effect the commencement of a new action upon the bond, but only a continuation of the existing one, what is the situation? While, as already observed, the original complaint was filed on June 21, 1913, twelve days before the expiration of the year, no process was issued until September 23, 1913, more than two months and a half after the expiration of the year, at which time a subpoena ad respondendum was placed in the hands of the marshal, and by him indorsed with a return, of that date, to the effect that none of the defendants could be found in the district. No other process was issued until after the filing of the amended complaint, whereupon, of date July 31, 1914, a summons was issued and immediately served upon the casualty company, but returned without service upon the defendant contractor. Apparently plaintiff was in doubt touching the nature of the action, and hence the subpoena at one time and the summons at another. While the question is not free from uncertainty, I am inclined to the view that the action is upon the equity side of the court. In some contingencies at least there are adjustments to be made which are difficult to accomplish by the verdict of a jury. It was doubtless the purpose of Congress to substitute the undertaking for the right of lien which in most jurisdictions is conferred upon laborers and materialmen, in the case of private structures, and the enforcement of claimants' rights in the undertaking in a case like this is not without analogy to the enforcement and marshaling of mechanics' liens, and the distribution of the proceeds in case a sale of the property to which the liens attach is necessary. Under the statute the surety may pay into court the full amount of the penalty of the bond, and thereupon be relieved from further liability, and in such a case the proceeding very clearly takes on an equitable aspect; its only function being to equitably distribute

a given fund to numerous claimants in proportion to their several rights.

If then we adopt the view that the suit is in equity, clearly it was not commenced in time against even the security company, under the well-settled principle that such a suit is "commenced" only upon the issuance of subpoena, followed by a bona fide effort to serve the same. *United States v. American Lumber Co.*, 85 Fed. 827, 29 C. C. A. 431; *United States v. Miller* (C. C.) 164 Fed. 444.

Were it deemed to be an action at law, and hence subject to the rules of practice established by the Idaho Codes, then to be sure it must be held to have been "commenced" as to the security company when the complaint was filed, on June 21, 1913; but even upon that theory the plaintiff would appear to be without footing, for if we reject the view, which I think should prevail, that as to the casualty company the action was not commenced until the amended complaint was filed, still no summons was issued until more than 13 months after the original complaint was filed, whereas the statutes of the state (section 4139, Idaho Revised Codes) authorize the issuance thereof only during the 12 months ensuing after the filing of the complaint.

It follows that the demurrer of the casualty company must be sustained, and as to it the action is dismissed. The demurrer of the contractor will be overruled, and it will be given 60 days in which to answer.

Ex parte TILDEN.

(District Court, D. Idaho, C. D. September 19, 1914.)

1. INDIANS (§ 38*)—CRIMES—JURISDICTION.

An Indian may not be taken from the jurisdiction of the state courts to answer for an offense not committed on an Indian reservation, unless it appears, as a matter of law, that he is being held for an act done or omitted in pursuance of a law of the United States, as provided by Rev. St. § 753 (Comp. St. 1913, § 1281).

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 22, 64, 66; Dec. Dig. § 38.*]

2. INDIANS (§ 38*)—CRIMES COMMITTED BY INDIAN—TRIAL.

That petitioner for a writ of habeas corpus, held for alleged violation of a state law, was an Indian policeman, and engaged in the discharge of his duties at the time he committed the alleged crime, did not render him immune from prosecution in the state courts.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 22, 64, 66; Dec. Dig. § 38.*]

3. INDIANS (§ 38*)—OFFENSES—TRIAL—"INDIAN COUNTRY"—"INDIAN RESERVATION."

Pen. Code 1910 (Act March 4, 1909, c. 321, 35 Stat. 1151 [Comp. St. 1913, § 10502]) § 323, provides that all Indians committing against the person or property of another Indian or other person certain specified crimes within any state and within any Indian reservation shall be subject to the same laws and be tried in the same courts and in the same manner and be subject to the same penalties as are all other persons committing any of such crimes within the exclusive jurisdiction of the United States. *Held*, that a right of way granted to a railroad company over the Nez

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Perce Indian reservation by Act Cong. May 8, 1890, c. 199, 26 Stat. 104, was neither "Indian reservation" or "Indian country," the two words being synonymous; and hence a homicide committed by an Indian policeman on such right of way was not within the exclusive jurisdiction of the federal courts.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, First and Second Series, Indian Country; Indian Reservation.]

Application for a writ of habeas corpus for Samuel Tilden. Writ denied.

James L. McClear, U. S. Atty., of Cœur d'Alene, Idaho, for applicant.

Miles S. Johnson, Pros. Atty., of Lewiston, Idaho, for respondent.

DIETRICH, District Judge. Samuel Tilden, who is held in custody by Harry Lydon, as sheriff of Nez Perce county, Idaho, applies for a writ of habeas corpus. The matter has been somewhat informally submitted upon the testimony taken upon a charge of murder against the applicant at a preliminary examination before a committing magistrate of Nez Perce county. Upon such hearing the magistrate committed the applicant without bail.

Briefly stated, the facts are that on the 6th day of May, 1914, the applicant, a Nez Perce Indian policeman, with other Indian policemen, went to the railroad station at Joseph, Idaho, under the direction of Theodore Sharp, superintendent of the Nez Perce Indian school, for the purpose of learning whether certain Indians who had been off playing baseball, and who were returning to the "reservation," had with them any intoxicating liquor, and, if so, of preventing them from bringing it on the "reservation." While at the station he got into an altercation with one William Jackson, an Indian, who was a member of the baseball team, and, while the two were struggling together, he inflicted a gunshot wound upon Jackson, from which the latter died on May 8th. The applicant was arrested by state officers, and has been in their custody ever since.

The status of what is referred to as the Nez Perce Indian reservation is pretty fully set forth in the opinion in the case of *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520. Villages and towns inhabited almost exclusively by white people have grown up upon the territory formerly embraced within its limits. Title to much of the land has passed by patent to white people, and in some cases absolute title has passed to Indian allottees, although it is to be inferred that much of the land allotted is still held by the government as trustee for the allottees under what is sometimes referred to as trust patents. At the time of the shooting, Theodore Sharp was superintendent of the Indian school, which is maintained on the reservation, and also seems to have had general charge of the Indians, but it is not clear to just what extent he exercised authority over them or their property. The Indian police force appointed by him with the approval of the Commissioner of Indian Affairs appears to have been main-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained chiefly for the purpose of preventing the introduction of liquor into the reservation, to which, under a treaty stipulation, as appears in the Dick Case, the general laws of the United States, relating to the introduction of liquor in the Indian country, continue to be applicable, notwithstanding the allotment of a part of the lands and the sale of the other part to white people. The shooting took place upon a railroad right of way granted to the Palouse & Spokane Railway by act of Congress approved May 8, 1890 (26 Stat. 104). The right of way at this point is embraced within the general boundaries of what in the treaty with the Indians of May 1, 1893 (28 Stat. 328, 329), are referred to as the "Langford tracts," the present status of which is not made entirely clear; apparently they are held under a patent from the United States by a town-site company as a town site.

By section 753 of the Revised Statutes of the United States it is provided that:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

As a basis for the issuance of the writ, the applicant makes two contentions: First, that he "is in custody for an act done * * * in pursuance of a law of the United States"; and, second, that he is "in custody in violation of * * * a law * * * of the United States."

[1] The first proposition rests upon the assumption that, as an Indian policeman, he was clothed with the authority, when directed by Superintendent Sharp, to search Jackson, and, when the latter offered resistance, to kill him. It is unnecessary to decide with just what authority the applicant was vested or to what extent he had the right of search. If, for the purpose of disposing of this point, we assume that, as is contended on behalf of the respondent, the place where the killing was done was not on an Indian reservation, and was therefore not within the exclusive jurisdiction of this court, the offense with which the applicant stands charged is one within the jurisdiction of the state courts, under whose process he is being held, and we cannot properly take him from their custody unless it appears, as a matter of law, that he is being held "for an act done or omitted in pursuance of a law of the United States." In *re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. But, conceding to the applicant all the authority claimed for him as a police officer, the evidence is not of such a conclusive character as to warrant us in saying, as a matter of law, that he was acting within his rights. Where the quality of the applicant's act involves not merely a question of law but an issue of fact as well, the issue of

fact is to be tried by a jury. Assuming that the killing took place off the reservation, then admittedly the federal court has no jurisdiction to try the applicant for murder; and if, while acting as Indian policeman, for the ostensible purpose of arresting or searching Jackson, the applicant wantonly killed him, or killed him under circumstances which were not justifiable, the only tribunal in which he can be tried and by which he can be punished is the state court; and, if we were to grant the writ, he would escape prosecution entirely. If, upon the trial in the state court, the applicant should be denied any right under, or any protection afforded by, the Constitution or laws of the United States, he will not be without remedy.

[2] But clearly he is not exempt from trial in the state court merely because he is an Indian policeman and, generally speaking, was engaged in the discharge of his duties. The question still remains whether the circumstances were such as to justify the homicide. He may set up his official character and authority as a defense, and, under proper instructions from the trial court as to the extent of such authority, it will be for the jury to determine whether his defense is well founded.

[3] The other proposition rests upon the assumption that the point where the killing took place is an "Indian reservation," and is based upon section 328 of the Federal Penal Code of 1910, which provides that:

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, * * * within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It is not thought necessary to discuss in detail the status of the applicant. For the purposes of the decision, it is assumed that he is an Indian, within the meaning of this section. If, therefore, the right of way at the point in question is within an Indian reservation, the crime, if any was committed, falls within the exclusive jurisdiction of the federal courts. It will also be assumed, but it is not decided, that, if such be the fact, the defendant is "in custody in violation of * * * a law * * * of the United States," and that therefore a proceeding in habeas corpus is a proper remedy.

The contention that the railroad right of way and the "Langford tracts" still constitute a part of the reservation is thought to be ruled adversely to the applicant by *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201. In that case it was expressly held that the taking of intoxicating liquor upon the right of way of the Northern Pacific Railroad Company, where the same ran through the Flathead Indian reservation, did not constitute an introduction into the Indian country. The status of the right of way there considered is not substantially different from that of the right of way here involved. On behalf of the applicant a distinction is sought to be made between the meaning of the phrase "Indian country," as used in the statute prohibiting the introduction of intoxicating liquor, and the phrase "Indian

reservation," as used in section 328 above referred to, and certain expressions of Mr. Justice Brewer in *United States v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195, are relied upon. But the language there used must be understood in the light of the facts under consideration. It is not thought that such distinction is applicable here. The phrases are used interchangeably in the *Clairmont Case*, the facts of which are more like those here involved. The last paragraph of the opinion in that case is as follows:

"Our conclusion must be that the right of way had been completely withdrawn from the *reservation* by the surrender of the Indian title, and that, in accordance with the repeated rulings of this court, it was not *Indian country*. [Italics ours]. The District Court, therefore, had no jurisdiction of the offense charged, and the judgment must be reversed."

So, in the more recent case of *Donnelly v. United States*, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, in speaking of the meaning of the phrase "Indian country," the court said:

"With reference to country that was formerly subject to the Indian occupancy, the cases cited furnish a criterion for determining what is 'Indian country,' but 'the changes which have taken place in their situation' are so numerous and so material that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed 'Indian country,' within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation."

If, as contended by the petitioner, he cannot be tried in the state court for an offense committed upon this right of way, it is apparent that if he or any other Indian should commit any one of the offenses named in section 328, anywhere within the boundaries of what was formerly the Nez Perce Indian reservation, against either an Indian or a white man, jurisdiction of such offense would be exclusively in this court. So that if an Indian should go upon patented farm land or into one of the towns or villages and commit murder, manslaughter, rape, assault, arson, burglary, or larceny against the person or property of either an Indian or a white person, the local state courts would be without jurisdiction, for no distinction can be drawn between the status of this right of way and that of the lands upon which these towns and villages are situated and of the numerous farms owned by white people within the boundaries of the reservation. I cannot assent to a view having such extraordinary implications. The treaty stipulation, considered in the *Dick Case*, *supra*, operates to retain jurisdiction for the enforcement only of the anti-liquor statutes, not of those relating to other crimes.

An order will be entered denying the writ.

UNITED STATES v. OREGON-WASHINGTON R. & NAV. CO.

(District Court, D. Oregon. December 14, 1914.)

No. 6461.

MASTER AND SERVANT (§ 13*)—STATUTORY REGULATION—HOURS OF SERVICE—“PERMIT”—“AGENT”—“EMPLOYÉ.”

Act March 4, 1907, c. 2939, 34 Stat. 1416 (Comp. St. 1913, § 8678) § 2, providing that no telegraph operator shall be required or permitted by interstate carriers to remain on duty for longer than 9 hours in any 24-hour period at places and stations continuously operated night and day, and section 3 (section 8679) providing that the carrier shall be deemed to have had full knowledge of all acts of all its officers and agents, imposes an absolute duty upon the carrier, and reasonable care or want of knowledge of the violation on the part of the officers and agents of the carrier, other than the operator himself, constitutes no defense, since, while the primary significance of the word “permit” implies knowledge of the thing suffered or allowed to be done, the statute specifically declares that the carrier shall be deemed to have had knowledge, and, in so declaring, it does not, as claimed, distinguish between officers and agents on the one hand and employes on the other, but uses the term “agents,” in its broadest sense, as including every relation in which one person acts for or represents another by his authority, especially in view of the provision that “employés” shall be held to mean persons actually engaged in or connected with the movement of any train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, First and Second Series, Agent; Employé; Permission.]

At Law. Action by the United States against the Oregon-Washington Railroad & Navigation Company. Directed verdict for the government, and defendant moves for a new trial. Motion denied.

Clarence L. Reames, U. S. Atty., of Portland, Or., Otis B. Kent, Sp. Asst. U. S. Atty., of Washington, D. C., Robert R. Rankin, Asst. U. S. Atty., of Portland, Or.

W. W. Cotton, Arthur C. Spencer, and Charles E. Cochran, all of Portland, Or., for defendant.

WOLVERTON, District Judge. This cause was presented on the theory that the court ought to instruct the jury, as a matter of law, to find either for the plaintiff or for the defendant. After argument, the court instructed the jury to find for the government, but at once directed the defendant to file a motion to set aside the verdict and for a new trial, and the cause was taken under advisement upon the presentation made.

It is stipulated by counsel for the parties herein that:

“E. H. Heintze was and remained on duty during the 24-hour period, beginning at the hour of 9 o'clock a. m., January 24, 1914, from 9 o'clock a. m., January 24, 1914, to 1 o'clock a. m. on January 25, 1914, a period of 16 hours, as a telegraph operator and employé at said station of Troutdale; that said office and station is a continuously operated day and night office or station of said defendant; and that the said E. H. Heintze during said time engaged in the handling of orders pertaining to and affecting the move-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment of trains engaged in interstate commerce by the use of the telegraph, and that prior to the said 24th day of January, 1914, and before he had performed any service in excess of 9 hours in any 24-hour period, the said Heintze was given by defendant's superintendent, through the agency of its chief dispatcher, a definite period or number of hours within which to work, and which was not in excess of 9 hours in any 24-hour period, and that the said Heintze remained on duty as such telegraph operator at said station longer than 9 hours in said 24-hour period, in violation of his said instructions, and without the actual knowledge of any person in said defendant's employ other than said Heintze."

The question presented is whether the defendant railroad company is liable as for an infraction of the act of Congress of March 4, 1907, commonly known as the Hours of Service Act. The act provides (section 2) "that it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than" certain specified hours, namely, as applied to telegraph operators, 9 consecutive hours in a period of 24 hours. Section 3 provides "that any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation" of the act, shall be liable to a penalty, prescribing the same. And it is further declared by the same section that "in all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents."

That the operator remained on duty longer than it is contemplated he should under the Hours of Service Act is specifically conceded, but the defense is that he so remained on duty of his own volition, and contrary to the instructions of his superiors, and without the actual knowledge of any person in the defendant's employ other than himself.

The position of counsel, as concretely stated by their brief, is as follows:

"The defendant is not contending that the questions are to be decided for reasons of convenience to the carrier; neither does it contend that the duty prescribed by the Hours of Service Act is not absolute; but we do contend that the absolute duty prescribed by the act does not include a liability arising out of the mere fact of over-service, either voluntarily rendered or maliciously rendered, or performed under any other circumstance and condition where actual knowledge of its rendition is not possessed by some other officer, agent, or employé."

In arriving at this conclusion, counsel insist that the act makes a distinction between officers and agents of the carrier on the one hand and employés on the other, and that the knowledge imputed to the carrier by the third section is only the knowledge of its officers and agents, and not of its employés.

It is hardly conceivable how the duty enjoined can be absolute, as conceded by counsel, and yet that the carrier will be relieved for want of actual knowledge on the part of its officers and agents. It would seem that counsel concede too much. But this aside.

It is at once apparent that the act makes all officers and agents in appointive authority, or with supervision as to the time of service, as well as the carrier itself, amenable to its provisions, as it declares that

"any officer or agent thereof, requiring or permitting any employé to * * * remain on duty," etc., shall be liable to the penalty prescribed. It may very well happen that an officer or agent may have appointive power or authority, or have delegated supervision as to the hours of service, who may himself be an employé whose time of service is regulated by the act. For instance, we may suppose that a train dispatcher is authorized to appoint and fix the time of service of telegraph operators. In such a case the train dispatcher would be amenable to the law for permitting the operator to remain on duty overtime, and yet some other superior officer would be amenable for permitting the train dispatcher himself to remain on duty overtime. While the supposed case is probably not the fact, yet it affords a demonstration that the act, by intendment, was not designed to distinguish between officers and agents on the one hand and employés on the other, for it prescribes that the term "employés" * * * shall be held to mean persons actually engaged in or connected with the movement of any train—a special, but very broad, signification.

But the imputed knowledge is "of all acts of all its officers and agents." The term "agents," it would seem, is here used in its broadest sense, because it comprises all agents.

"Agency, in its broadest sense, includes every relation in which one person acts for or represents another by his authority." 31 Cyc. 1189.

And again the learned author of the article entitled "Principal and Agent," in the same work, says:

"The relation of principal and agent and master and servant are frequently confused. In general the principles governing the rights, duties, and liabilities growing out of the two relations are the same, and to determine whether a given relation is one of agency or of service is of no consequence. This results from the fact that the law of principal and agent is an outgrowth and expansion of the law of master and servant." 31 Cyc. 1191.

It would therefore seem to follow that knowledge by the employé, in whatsoever capacity engaged, if connected with the movement of any train, under the act is tantamount to knowledge of the carrier, and this even if it be the knowledge only of the employé remaining on duty overtime.

But I am not disposed to rest the case on this reasoning alone. The act is so nearly analogous in the respect under consideration to the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, §§ 8605-8612]) as to make an authoritative construction of the latter act decisive of the former. The language of the second section of the latter act is that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact"—language of identical import with that used in the statute under consideration.

The Supreme Court of the United States had before it, in *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, the question of the liability of a railroad company not equipping its cars with drawbars of the standard height above the rails.

as required by section 5 of the act, and the court held, speaking through Mr. Justice Moody, that:

"The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

Thus it rejected the defense sought to be interposed that the company had exercised reasonable care to keep the drawbars at a standard height, as not relevant under the statute. The result was to impose upon the carrier an absolute duty to keep its cars equipped as required by the act, and especially by the particular section 5.

The appropriate construction of the act came again before the court in *C., B. & Q. Ry. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, which arose under section 2 thereof. The precise question considered is stated by the court as follows:

"Does the act of Congress in question impose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars?"

It was insisted that the question was not involved by the *Taylor Case*, and therefore not decided. But the court held that it was not only so involved, but that the question was properly decided. See, also, *Delk v. St. Louis & San Francisco R. R.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, a companion case, decided at the same time.

So that, as it pertains to section 2 of the act, as well as the entire act, it has become the settled construction of the Supreme Court that there is thereby imposed upon the railroad company an absolute duty, and the penalty prescribed cannot be escaped by the exercise of reasonable diligence. Without else, considering the similarity of the language of the two acts, and the purpose designed to be subserved by each, which is the protection of the public, as well as the protection and relief of employes, these cases would seem to be decisive of the present.

The primary significance of the word "permit" implies knowledge of the thing suffered or allowed to be done; but, as if to allay all question as to its appropriate meaning and application under the present statute, it is specifically declared that the carrier shall be deemed to have had knowledge of all the acts of all its officers and agents, thus rendering the statute in question much more explicit touching what was intended than the safety appliance statute.

I conclude, therefore, that the duty imposed by the act is absolute, and that reasonable care or want of knowledge on the part of the officers and agents of the carrier constitutes no defense to a charge of requiring or permitting an employe to be or remain on duty overtime. Judge Rudkin, of the Eastern District of Washington, has held to the same purpose. *United States v. Oregon-Washington R. & Nav. Co.* (D. C.) 213 Fed. 688.

Motion denied.

UNITED STATES v. FARMER et al.

(District Court, S. D. New York. January 31, 1914.)

1. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD.

Where an indictment charged that defendants devised a scheme to defraud divers and unknown persons by inducing them to purchase from defendants certain alleged de luxe editions of books, the exact character of which was to the grand jury unknown, and to induce such purchase falsely and fraudulently represented that the books were rare, valuable, and limited editions, whereas, in fact, the books, as defendants and each of them well knew, were not rare, nor of valuable and limited editions, but were books bound in a showy and pretentious manner, and of little intrinsic value, with a market value far below the price at which such persons should be induced to purchase them, it was not demurrable, as failing to adequately describe the books relied on as the subject-matter of the scheme to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

2. POST OFFICE (§ 35*)—MISUSE OF MAILS—SCHEME TO DEFRAUD.

The government is not limited, in enforcing the purity of the mail service by criminal prosecutions, to attempts to use the mails to further a scheme to defraud, definitely devised in the first instance with respect to the particular instruments of fraud and the particular proposed victims; but it is sufficient if, after the devising of a scheme of general features, it is alleged and shown that in the exercise thereof particular instruments and particular victims have been developed and a use attempted to be made of them.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

3. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.

An indictment for misuse of the mails, in furtherance of a scheme to defraud by selling alleged de luxe editions of books falsely represented to be valuable, in connection with offers to resell them for the victims at a higher price, was not objectionable for failure to specify the names of the persons to whom defendants were charged to have represented that the books would be resold.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 48*)—MISUSE OF MAILS—FALSE REPRESENTATIONS.

An indictment for misuse of the mails, in furtherance of a scheme to defraud by the sale of alleged de luxe editions of books, under false representations to resell them as agents of the victims for higher prices, was not demurrable on the theory that such representations concerning the resale were of a mere opinion character as to the value and future obligation.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

5. CRIMINAL LAW (§ 16*)—FRAUDULENT USE OF MAILS—STATE STATUTES.

Cr. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1092 (Comp. St. 1913, § 10385), prohibiting the use of the mails to promote frauds, etc., is violated whenever the mails are used for the furtherance, whether effective or not, of any scheme of a fraudulent character to perpetrate, if fully executed, a fraud on any person or persons, whether such device is reprehended by any state law, or whether from the limitations of the state or federal statute, or the definitions of the common law, the scheme, if carried out, would not be punishable; and hence it is no objection to an indictment that the scheme, to carry out which the assistance of the mails

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer
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is to be invoked, is obnoxious to some state statute, or is of a character responsible to the police powers of the state only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3-5; Dec. Dig. § 16.*]

James J. Farmer and others were indicted for misuse of the mails in furtherance of a scheme to defraud, and demurred to the indictments. Overruled.

Frank Morse Roosa and John Neville Boyle, Asst. U. S. Attys., both of New York City.

Max J. Kohler, of New York City, for defendants.

KILLITS, District Judge. The court has before it the demurrer of several of the defendants to each of the six counts of the indictment herein. Three of these counts, 1, 2, and 5, deal with alleged violation of sections 37 and 215 of the Criminal Code, while 3, 4, and 6 are drawn to meet the provisions of section 215 alone. In the opening paragraph of the principal brief for demurring defendants, it is alleged that these two categories of counts are, first, "for conspiracy to devise a scheme to defraud;" and, second, "for perpetrating such a scheme." In this attempt to describe the nature of the indictment is found an index to the confusion of mind which seems to have inspired the demurrer itself. Counts 1, 2, and 5 are not for conspiracy to devise a scheme to defraud, but they are for a conspiracy to commit an offense against the United States, the offense being to use the mails to further a scheme to defraud, while the third, fourth, and sixth counts, so far from being attempts to plead a perpetration of a scheme to defraud (which would not be cognizable in the federal court at all), are each an attempt to plead the use of the mails in an effort to further a scheme to defraud. The distinction we are making in each case is vital to the interpretation of the conspiracy of this indictment in each count.

[1] Going now to the points made in the principal brief against the indictment, we notice, first, that the indictment is charged as "bad and insufficient for failure adequately to describe the books relied upon as the subject-matter of the scheme to defraud." The indictment charges that the defendants devised a scheme to defraud divers and unknown persons, by inducing said persons "to purchase from the said defendants books, among others, in editions de luxe, the exact character of said books being to the grand jurors unknown; and said defendants, for the purpose of inducing said persons so intended to be defrauded to purchase said books, intended falsely and fraudulently to represent to said persons, and to each of them, that said books were of rare, valuable, and limited editions, and were of a value at and far in excess of the price at which they, the said persons so intended to be defrauded, should be induced to purchase them; whereas, in truth and in fact, the said books, as the defendants, and each of them, well knew, were not rare, nor of valuable and limited editions, but were books bound in a showy and pretentious manner, and of little intrinsic value and worth, and had a market value far below the price at which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the said persons so intended to be defrauded should be induced to purchase them."

It is the opinion of counsel for demurrants, touching this phase of the indictment, that the case will turn, upon this branch of it, wholly upon the identity of the books "whose value, rarity, and limited edition character is in question." That doubtless is true, but we conceive a case to be possible, and that this, so far as the terms of the indictment are concerned, may be such, where the conspirators have simply agreed upon a scheme to defraud of this character, without having determined, as part of the formalities of their scheme, the exact, particular books which they shall use in its execution, but agree, in formulating the scheme, tacitly or directly, to leave the identity of the publications to the exigencies of the future, as the scheme is attempted to be executed; in other words, that the government cannot be held, in the trial of this case, to prove that a book of any particular description was within the contemplation of the parties when the devising of the alleged scheme was in process, much less, therefore, should the indictment fail because no such particular allegation was made.

It follows, therefore, that the allegation of ignorance by the grand jury of the exact character of the books contemplated by the defendants was fair and proper, and that the subsequent language of this portion of the indictment, in the averment that the books were not rare, nor valuable, nor of limited editions, but were otherwise, is not inconsistent; for it is a fair construction of all the language of the indictment germane to this particular question that here the pleader was attempting to describe in a general way, in the nature of a negative, the character of books in the minds of the defendants at the time the scheme was being devised.

We are unable to find any support for this branch of the attack upon the indictment in the cases cited. In *Stewart v. United States*, 119 Fed. 89, 55 C. C. A. 641, the indictment was so manifestly different from that before us, and in the difference so defective, that the case cannot be cited as an authority in favor of the demurrer; for, in the court's judgment, the generalizing of that court, on page 94 of 119 Fed. (55 C. C. A. 641), as to what the indictment should contain, is met by the indictment before us. Without taking further time on this case, it is sufficient to call attention to the vice found in the *Stewart* indictment, discussed on page 95 of the opinion, which vice certainly does not exist in the indictment before us.

In *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, as in *United States v. Post* (D. C.) 113 Fed. 852, the indictment charged only in the language of section 5480, Rev. Stat. (now, with some modifications, section 215 of the Criminal Code). The weakness of that in the *Hess* Case, as it is set out in 124 U. S. on page 484, 8 Sup. Ct. 571, 31 L. Ed. 516, in the opinion, is not present in the pleading before us. As we read *Bartell v. United States*, 227 U. S. 427, 33 Sup. Ct. 383, 57 L. Ed. 583, so far as it is of interest at all in this matter, it is an authority supporting this phase of the indictment, which, in our judgment, needs no further authority than that of *Brown v. Elliott*, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, and *Durland v. United*

States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. Even in the Durland Case it is held that the omission to state the names of the parties intended to be defrauded is satisfied by the allegation, if true, that they were unknown to the grand jurors.

[2] Consistent with all authorities, direct and analogous, we are clear that the government ought not to be limited in enforcing the purity of the mail service by a criminal prosecution in this particular to attempts to use the mails to further a scheme to defraud definitely devised in the first instance with respect to the particular instruments of fraud and the particular proposed victims, but that it is sufficient if, after the devising of a scheme of general features, it should be alleged and shown that in the execution thereof particular instruments and particular victims were developed and a use attempted to be made of them.

[3] The second point is that:

"The indictment is also bad because of failure to specify the names of the alleged persons to whom defendants are charged to have represented that the books would be resold."

Again, in an attempt to make this point, counsel seem to have misread the indictment. It does not, as the argument says, attempt to charge a promise to "resell and cause to be resold said books at a great increase in price, such resale to be made to certain alleged persons, who the defendants should falsely represent were and would be ready and willing to repurchase," whereas, in truth and in fact, "said alleged persons did not in fact exist, but were wholly and entirely fictitious"; but it charges that, as a part of said scheme and artifice the defendants should falsely and fraudulently represent and pretend that the books would be resold for the purchaser, if he should become dissatisfied, to certain alleged persons who were wholly fictitious. With respect to these matters, the whole proposition is subjunctive and in futurity. The pleader is not attempting to plead any specific promise made to any attempted victim of the fraud, but is pleading the outlines of the fraudulent scheme itself, and the scheme would be no less obnoxious to the federal statute invoked here if the schemers at the time had not definitely had in mind any person whose name should be used as the one to rebuy the books from the dissatisfied victim, than it would be if, at the inception of the scheme, some one should have been definitely selected by the schemers to play that fraudulent role.

[4] The third point made is that:

"Mere representations of an opinion character, as to value and future obligations to resell, are averred, which are not within this criminal statute."

This point is not argued, but certain authorities are cited simply. These authorities, in our judgment, would be good if the gist of the offense here were the obtaining of property by false representations, in which case, of course, mere representations of an opinion character are not sufficient upon which to found a prosecution. As this case is presented in the indictment, we can see no validity in this objection.

[5] Point 4, that "the conspiracy counts are bad because, under the federal Constitution, no federal element is present in a charge of

conspiracy to commit the offense under section 215, but merely an offense against the states," is substantially disposed of by what has preceded in this memorandum, if we understand the point at all. As we interpret section 215, that section is violated whenever the mails are used for the furtherance, effective or not, of any scheme or device of a fraudulent character to perpetrate, if fully executed, a fraud upon any person or persons, whether such device is reprehended by any state law, or whether, from the limitations of state or federal statutes or the definitions of the common law, the scheme, if carried out, would not be punishable. So that it is no objection to an indictment that the scheme to carry out which the assistance of the mails is to be invoked is obnoxious to some state statute, or is of a character under our polity responsible to the police powers of the state only.

In considering, as we have done, the principal brief in the case, that of Mr. Kohler, for the defendants Farmer, Marr, Rosenfield, Dunn, Scott, and the Anglo-American Authors' Association, we have covered, in our judgment, practically the points made in the brief of Mr. O'Connell for the defendant Cooper.

The tendency in the federal practice is to disregard all purely technical objections to criminal pleadings. In this case we think this indictment attempts to plead offenses clearly within sections 37 and 215 of the Criminal Code as to the respective counts, and that the averments are not only as definite as the grand jury could well have made them under most circumstances, but sufficiently apprise the defendants of the nature of the charge and what they are called upon to meet, so that a conviction, if had against any one of them, would be a bar to a further prosecution.

The demurrers are therefore overruled.

WHITE v. MURRAY.

(District Court, W. D. Pennsylvania. December 29, 1914.)

No. 29.

1. COVENANTS (§ 96*)—BREACH—MISTAKE OF LAW.

Where the receiver of a national bank sold certain real property to complainant, which had previously belonged to the bank, though the title was in the name of the president, contracting to convey clear of all incumbrances, and it was afterwards determined that a judgment against the president was a lien on such property, the receiver was not relieved from liability on his covenant, on the theory that the breach resulted from a mistake in a matter of opinion or law.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 111-129; Dec. Dig. § 96.*]

2. DEEDS (§ 94*)—COVENANTS—MERGER—CONTRACT TO CONVEY—DEED.

Where the receiver of a national bank contracted to convey to complainant certain premises belonging to the bank, the contract containing a covenant against incumbrances, but the deed executed in performance of the contract was one of special warranty, without a covenant against incumbrances, the covenant in the contract did not merge in the deed, so

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that, on the purchaser losing her title by reason of a pre-existing incumbrance, she was entitled to recover the purchase money, etc., in an action on the covenant in the contract.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 266; Dec. Dig. § 94.*]

In Equity. Suit by Catherine White against Charles C. Murray, receiver of the Ft. Pitt National Bank. Decree for complainant.

John D. Brown and John E. Winner, both of Pittsburgh, Pa., for plaintiff.

W. S. Moorhead, of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. This is a bill filed to recover from the receiver of the Ft. Pitt National Bank the purchase money paid by plaintiff on a sale to her of certain real estate by the receiver, the title to which she afterwards lost by dispossession in an action of ejectment.

Findings of Fact.

First. On August 10, 1901, the Ft. Pitt National Bank of Pittsburgh purchased a certain lot of ground situate in the Twelfth ward of the city of Pittsburgh, on which was erected a brick dwelling house, known as No. 531 Turrett street. The title to the property was taken in the name of Andrew W. Herron, who was then president of the bank. Afterwards, to wit, on January 31, 1902, Mr. Herron executed a declaration of trust in favor of the bank; but this instrument was not recorded until May 5, 1908.

Second. On December 6, 1907, the said Ft. Pitt National Bank was found and declared to be insolvent by the comptroller of the Currency of the United States, and Charles C. Murray was appointed and duly qualified as receiver of said bank.

Third. On March 26, 1908, prior to the recording of the declaration of trust, the Rochester Trust Company recovered a judgment against Andrew W. Herron in the sum of \$5,103.28.

Fourth. On May 29, 1908, the said Andrew W. Herron and wife conveyed said property to the receiver of said bank, the deed being recorded on June 5, 1908.

Fifth. On October 7, 1909, Charles C. Murray, receiver entered into an article of agreement with Catherine White, the plaintiff herein, wherein the said receiver, for himself, his successors and assigns, did covenant, promise, grant, and agree to and with the said Catherine White, her heirs and assigns, that he, the said receiver, on or before December 1, 1909, at the proper costs and charges of the said receiver, his successors and assigns, would by deed of special warranty well and sufficiently grant, convey, and assure unto the said second party, her heirs and assigns, in fee simple, *clear of all incumbrances*, the land hereinbefore referred to, for the consideration of \$4,200. Two hundred dollars hand money was paid by the purchaser on the execution of the agreement; it being therein provided that the same was to be refunded if the title to the property is not clear, or cannot be made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

clear, or in the event that the sale was not ratified and approved by a court of competent jurisdiction.

Sixth. The said Charles C. Murray, receiver, on the 15th of November, 1909, presented his petition to the Circuit Court of the United States for the Western District of Pennsylvania, at No. 30 May term, 1909, in equity, setting forth the terms and conditions of the said agreement of sale, and praying that the court approve and ratify the same, and thereupon the court made an order and decree as follows:

"The prayer of said petitioner is granted, and said Charles C. Murray, receiver of the Ft. Pitt National Bank of Pittsburgh, is hereby authorized and empowered to sell and convey by proper deed of conveyance in fee simple to Catherine White, her heirs and assigns, for the price or sum of \$4,200, and upon the terms mentioned in the written agreement, a copy of which is attached to said petition and marked 'Exhibit A,' all that certain lot," etc. (describing the property in question).

Seventh. In pursuance of said decree the said receiver, on the 16th of November, 1909, executed and delivered to the said Catherine White a deed for the said land. The deed recites the agreement of sale, the presentation of his petition to the court, that the sale was by the court ratified and approved at the price and upon the terms stated in said agreement, and the receiver authorized and empowered to execute and deliver a deed for said property. The deed contains the following clause by way of special warranty:

"And the said party of the first part hereby covenants, promises, and agrees to and with the said party of the second part, her heirs and assigns, by these presents, that he, the said party of the first part, has not done, committed, or knowingly or willfully suffered to be done or committed, any act, matter, or thing whatsoever, whereby the premises hereby granted, or any part thereof, is, are, shall, or may be impeached, charged, or incumbered in title, charge, estate, or otherwise."

Eighth. After the plaintiff had received a deed for said property, and had paid the consideration in full, a writ of execution was issued upon the aforesaid judgment of the Rochester Trust Company against Andrew W. Herron, and the property of the plaintiff was levied upon and sold by the sheriff of Allegheny county to the plaintiff in the judgment.

Ninth. Subsequently the Rochester Trust Company, by virtue of the title acquired by it under said sheriff's sale, commenced an action of ejectment against the plaintiff in the court of common pleas No. 2 of Allegheny county for the recovery of said property, in which action a judgment was entered in favor of the trust company, which judgment was on appeal affirmed by the Supreme Court of Pennsylvania (Rochester Trust Co. v. White, 243 Pa. 469, 90 Atl. 127), by reason of which the plaintiff herein lost the property purchased by her as aforesaid.

Tenth. The plaintiff's father, Timothy Barrett, who is now dead, acting for the plaintiff, appears to have employed a Mr. Culbertson, an abstractor, to make some examination of the title; but it does not satisfactorily appear that any attorney was employed on behalf of the plaintiff to examine the title. John S. Wendt, Esq., an able and reputable lawyer, was attorney for the receiver in the transaction. He

signed the agreement as attorney for the receiver, presented the petition for the confirmation of the sale, and so continued as attorney until the transaction was closed. While the title was under consideration, Mr. Culbertson spoke to Mr. Wendt about the judgment against Herron, and asked the latter if he thought it was a lien against the property. The latter says that he told Culbertson that he did not think the judgment was a lien; that the property had been purchased by the money of the bank and the title taken in the name of the president for convenience; that the president had executed a declaration of trust, which was recorded, and that the judgment only bound whatever interest Mr. Herron had in the property; that he (Mr. Wendt) had not examined the title, and was merely expressing his opinion as representing Mr. Murray, the receiver; and that he (Culbertson) would have to decide the question for himself. Mr. Culbertson died before this suit was brought.

Conclusions of Law.

First. The covenant in the contract of sale, to convey "clear of all incumbrances," was neither merged in the deed nor waived by the plaintiff.

Second. This covenant was broken by a conveyance of the property subject to a lien, the enforcement of which deprived the plaintiff of her title.

Third. The plaintiff, by reason of the breach of contract on the part of the vendor, which deprived her of the total consideration of the contract, is equitably and legally entitled to a return of the purchase money paid by her.

Discussion.

We are confronted here with this question: The vendor receiver, under articles of agreement, stipulated to convey in fee simple, "clear of all incumbrances." He asked the consent of the court, and obtained a decree to convey the property in fee simple for the price and upon the terms mentioned in the written agreement. The receiver makes his deed with special warranty. The purchaser pays the purchase money, takes possession of the property, and later has her title swept away by reason of a lien on the property at the time of the conveyance to her. Must she lose the purchase money, when the entire consideration of the contract was stricken down by reason of the vendor's breach of contract to convey clear of incumbrances. If this be true, it is a most striking illustration of the proposition that law and justice are not always synonymous terms. The equities of the case are so strong with plaintiff that nothing but an absolute legal bar should prevent her recovery. An examination of the cases convinces me that no such legal bar exists. On the other hand, I find that the authorities are in complete harmony with the manifest justice of the case.

The defendant urges three propositions to sustain his case. He says, first, that this is a case of mistake in a matter of opinion, or a mistake of law, and cites authorities to show that under such circumstances the doctrine of caveat emptor applies, and that the plaintiff, having notice or presumptive notice of the existence of the lien in

question, cannot recover; second, that the article of agreement for the sale of the land, with its provisions, were merged in the deed, which was made in consummation of the sale; and, third, that the provision of the article of agreement, providing for a conveyance clear of incumbrances, was waived by the plaintiff.

[1] As I view the case, none of these principles, which may be said to be general legal propositions, are applicable to the facts of this case. It is not a question of a mistake of law, but purely a question of contract, and the performance of that contract. No misrepresentation is charged or shown, and there is no question of fraud, accident, or mistake. The parties got together and entered into an article of agreement, which is plain and unequivocal in its terms, one of the important covenants of which was that the property should be conveyed to the purchaser clear of all incumbrances. The consideration named was the whole consideration which the purchaser was to pay. It was agreed by the vendor, and it became his duty to see, that the property was free of any form of incumbrance, and, if not, to discharge such incumbrance, so that the covenant with his vendee might be kept in good faith. Relying on this covenant she had a perfect right to assume that it would be kept, and, so relying, she would lose no right which she had by the fact that notice was brought to her of the existence of some lien, or some judgment which might ultimately be held to be a lien, on the property before the deed was delivered to her.

[2] With reference to the question of the merger of the article of agreement in the deed that followed it, it may be stated as a general proposition that there is a presumption that such merger takes place, and where there is a covenant of warranty in the contract, and a similar covenant is embodied in the deed afterwards accepted, the first covenant is merged in the last; but if there is no similar covenant embodied in the deed, there is no merger.

In *Drinker v. Byers*, 2 Pen. & W. (Pa.) 528, the Supreme Court held that a warranty of title executed and delivered by a vendor to a vendee is not merged in a subsequent deed of conveyance which contains only a special warranty.

In the case of *Frederick v. Campbell*, 13 Serg. & R. (Pa.) 136, parol evidence was held admissible to show that at the time the deed was executed the vendor declared to the vendee that he had a good title to 225 acres and would warrant that quantity of land. The deed contained no such covenant of warranty.

In the case of *Richardson v. Gosser*, 26 Pa. 335, the Supreme Court held that where a vendor, who conveys to his vendee by deed of general warranty, promises to indemnify him for any improvements he may make upon the premises in the event of the title proving worthless, such promise is not nudum pactum, but will support an action of assumpsit, and that the deed did not alter the situation of the parties in this respect, being distinct from the contract sued on.

In *Cox's Administrators v. Henry*, 32 Pa. 18, there was a covenant of warranty in the agreement for the sale of the land, and a similar covenant embodied in the deed afterwards accepted, and it was held that the first covenant was merged in the last, so far as regards the

measure of damages, but that a special covenant to indemnify the vendee against all costs, charges, and damages on account of any action which might be brought against him by any claimant of the land, there being no similar covenant in the deed, was not merged in or extinguished by the deed.

In *Lehman v. Paxton*, 7 Pa. Super. Ct. 259, the rule is laid down that the acceptance of the deed in pursuance of a contract of sale is presumably in satisfaction of the previous covenants, but that this has its exceptions; that the contract remains binding as to further stipulations contained in it, conferring rights on the vendee and forming part of the consideration on which he contracted to pay the consideration money and accept the deed, and that an agreement to convey *clear of all incumbrances*, not embodied in terms in the deed, is an obligation subsisting and enforceable. This case pretty fully considers the authorities on the subject.

It was held in *Wilson v. Pearl*, 12 Pa. Super. Ct. 66, that the obligation in a contract of a purchaser of land to pay a stipulated sum survives the delivery of the deed, unless he has discharged it by a compliance with the terms of the contract, or has been released from it, and the fact that he has paid the consideration mentioned in the deed is not conclusive of that question; that it is competent to prove by parol a money consideration greater than that mentioned in a deed; and that the doctrine of merger of the preliminary contract in the deed does not apply.

It was held in *Stewart v. Trimble*, 15 Pa. Super. Ct. 513, that an oral agreement, made before or at the time of the sale of real estate, under which the vendor assumes obligations collateral to the conveyance of title, is not merged in the deed subsequently executed.

In *McGowan v. Bailey*, 146 Pa. 572, 23 Atl. 387, it was held that a stipulation contained in a contract for the sale of land, but omitted from the deed executed in pursuance of the contract, will not be extinguished by merger, when its place is not taken or supplied by the expressed or implied operation of the provisions and covenants which the deed does contain.

Stockton v. Gould, 149 Pa. 68, 24 Atl. 160. In this case there was a written contract for the exchange of real estate, by which each party expressly assumed the mortgage on the property to be conveyed to him. It was held that this covenant was not merged in deeds subsequently executed for the premises in question, containing no express assumption of the mortgages.

In the case at bar the clause of special warranty, as I regard it, does not affect the question at issue. There was no covenant whatever in the deed in relation to incumbrances. As a rule there is no such covenant in a deed. The property may be conveyed subject to liens, or free of liens, and the deed be entirely silent on the question, and, when this is so, it follows as a necessary conclusion that the agreement of sale, which embodied the actual terms under which the property was to be conveyed, must be referred to, and that a covenant in the agreement, which does provide as to how the conveyance is to be made with reference to liens, must be given effect.

I am satisfied that there was no merger of the covenant against incumbrances in the receiver's deed which followed, and that the plaintiff cannot be held to have waived the important covenant in her article against incumbrances. For these reasons, we think the plaintiff is entitled to recover the purchase money paid, together with interest and costs.

A decree may be drawn accordingly.

CITY OF DES MOINES v. DES MOINES WATER CO. et al.

(District Court, S. D. Iowa, C. D. December 30, 1914.)

1. EMINENT DOMAIN (§ 241*) — WATERWORKS — CONDEMNATION — PAYMENT OF DAMAGES—TIME.

Where the statutes of a state fixed no time within which an award in a proceeding by a city to condemn privately owned waterworks should be paid after final judgment fixing the value, the court, by agreement or otherwise, had jurisdiction to fix a reasonable time within which payment should be made, and to incorporate such provision in the judgment, which, when so incorporated, became a part of the judgment itself.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621-625; Dec. Dig. § 241.*]

2. JUDGMENT (§ 299*)—AMENDMENT—EMINENT DOMAIN—PAYMENT OF AWARD—TIME.

Where the court, as a part of a judgment fixing an award for a private waterworks system in a proceeding by a city to condemn the same, fixed the time for payment, it had no jurisdiction after the term to modify the judgment, so as to extend the time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.*]

3. JUDGMENT (§ 301*)—CONSENT DECREE—MODIFICATION.

Where a decree was rendered by consent, entitling a city to acquire a privately owned waterworks system by condemnation on payment of a specified sum within a specified time, the court could not modify the decree, so as to extend the time for payment, without the consent of both parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 587-593; Dec. Dig. § 301.*]

In Equity. Suit by the City of Des Moines against the Des Moines Water Company and others. On application by complainant for modification of a condemnation decree and for an extension of time for payment. Denied.

See, also, *Des Moines Water Co. v. City of Des Moines*, 206 Fed. 657, 124 C. C. A. 445.

H. W. Byers, E. C. Carlson, and E. M. Steer, all of Des Moines, for complainant.

Parker, Parrish & Miller, of Des Moines, Iowa, for defendants.

VAN VALKENBURGH, District Judge. The above-entitled cause is a condemnation proceeding commenced by the city of Des Moines against the Des Moines Water Company for the purpose of acquiring the water plant of said company located at the city of Des Moines.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

Under the statute in such cases made and provided a condemnation court, consisting of three judges, was named by the Supreme Court of the state. The finding of that court fixed the value of the water company's plant as of April 1, 1912, \$2,302,522. Both parties appealed from the finding and judgment of the condemnation court to the district court of Polk county, Iowa, whence the case was transferred to this court through removal proceedings. Some months thereafter negotiations for an adjustment of the controversy resulted, on July 28, 1913, in a proposition from the water company, followed by a prompt acceptance from the mayor, which was in turn ratified and approved by the city council. On the 3d day of December, 1913, both parties appeared in this court, and a consent order and judgment in condemnation was entered. The proposition and acceptance above referred to are embodied in the order of the court, which is in the words and figures following:

"In the District Court of the United States, Southern District of Iowa,
Central Division.

"City of Des Moines, Complainant, v. Des Moines Water Company et al.,
Defendants.

"Order.

"Now on this 3d day of December, 1913, this matter coming on for hearing upon the stipulation of the parties, the city of Des Moines appearing by its attorneys, H. W. Byers, Robert O. Brennan, and Eskil C. Carlson, and the Des Moines Water Company appearing by its attorneys, Parker, Parrish & Miller, and it appearing to the court that on the 28th day of July, 1913, the parties hereto entered into the following memoranda and stipulation of settlement:

" 'Chicago, Illinois, July 28, 1913.

" 'Honorable James R. Hanna, Mayor of the City of Des Moines, Des Moines, Iowa—Dear Sir: Referring to our conference to-day respecting an adjustment of the controversy existing between the Des Moines Water Company and the city of Des Moines, Iowa, over the acquirement by the city of the property of the water company, I have this tentative proposition to make to you and to the city council of Des Moines, relating to same:

" 'We will agree that the District Court of the United States for the Southern District of Iowa may enter an order in condemnation proceedings, fixing the value of the property of the Des Moines Water Company as of April 1, 1912, at two million three hundred and two thousand five hundred and twenty-two dollars (\$2,302,522), the amount fixed by the court of condemnation. The city council of the city of Des Moines is to repeal the ordinance which became effective about July 1, 1913, by which the rentals of the mains were reduced, and is to take such steps as may be necessary to fix the rentals of the mains at three hundred and fifty dollars (\$350) per mile. If the city takes over the property of the company, we will attempt to agree upon how much the city is to pay the company for the additions and improvements to the property of the company since April 1, 1912, and, in the event we are unable to agree, such amount may be ascertained by proper supplementary proceedings in the condemnation case.

" 'Yours very truly,

President Des Moines Water Company.'

" 'Chicago, Illinois, July 28, 1913.

" 'Mr. C. H. Payson, President Des Moines Water Company, Des Moines, Iowa—Dear Sir: Subject to the approval of the city council of Des Moines, Iowa, I hereby accept your proposition, dated Chicago, July 28, 1913, proposing to sell the water plant in Des Moines to the city for two million three hundred and two thousand five hundred and twenty-two dollars (\$2,302,522),

the price fixed by the court of condemnation, and to comply with the other conditions set forth in your proposition.

"Yours very truly,

Mayor."

"And it further appearing to the court that the city council of the city of Des Moines on the ——— day of ——— by resolution approved the action of the mayor in entering into said stipulation of settlement, and authorized the mayor and the city's legal department to carry out in so far as possible the said stipulation of settlement.

"It is therefore ordered that the value of the Des Moines Water Company's plant and system as fixed by the court of condemnation be and the same is hereby confirmed, and for the purposes of this case the value of said plant, as of the 1st day of April, 1912, is hereby fixed and determined to be the sum of two million three hundred and two thousand five hundred and twenty-two dollars (\$2,302,522).

"It is further ordered that upon the payment into this court of said sum of two million three hundred and two thousand five hundred and twenty-two dollars (\$2,302,522) at any time within one year from this date by the city of Des Moines the said Des Moines Water Company shall turn over and deliver to said city the said Des Moines water plant and system, with all of its property and equipment, including all additions and extensions made thereto since the 1st day of April, 1912.

"It is further ordered that the value of the additions and extensions to said plant made subsequent to the 1st day of April, 1912, and the amount to be paid to the Des Moines Water Company by the city of Des Moines therefor, be reserved for future settlement between the parties, or under the rules of practice and procedure in this court, as may later be determined, and the court reserves and retains jurisdiction of this cause for the purpose of making such further orders as may be necessary to the final settlement and determination of all matters pending herein. Smith McPherson, Judge."

Thereupon steps were taken to secure the necessary authority for the issuance of bonds as provided by statute. At two elections the city concededly failed to secure the necessary affirmative vote. At a third election, held on the third day of November, 1914, the majority in favor of the issuance of the bonds was, in the judgment of the city, sufficiently large to meet the requirements of law. However, this is a matter of such substantial doubt that it has been referred for determination to the courts of the state, and, so far as this court is advised, the question is still undecided. For this and for the further reason that no bonds could be sold, and the amount fixed by the order paid, prior to December 3, 1914, application on behalf of complainant was made to this court for a modification of that order and an extension of time for such payment. It being agreed that the matter could not be presented and a decision reached prior to the date of expiration under the order, it was stipulated by counsel that the presentation of the application should stand in the place of the ruling thereon in point of time. Complainant contends that the order of December 3, 1913, was interlocutory in character, and subject to modification and change at any time prior to the entering of a final judgment in the case. The defendants contend that the order amounted to a final judgment and is not now subject to modification or change. It is conceded that the application for modification was made long after the expiration of the term at which the order was entered. The question at issue is further simplified by the following concession of counsel for complainant in their brief:

"We would concede that if in this case the entire amount due the defendant company, and the exact quantity and character of the property to be turned over to the city, had been fully settled and determined by the court, or by agreement of the parties, and an order and judgment had been entered fixing the time in which the judgment should be performed, and nothing was left to be done except to perform or meet the judgment of the court, that would be such a final judgment as that, in the absence of fraud or some other defect in the proceedings, it could not be modified or changed by the court after the term at which the judgment had been rendered and entered."

Because of the fact that the value of the additions and improvements to the property of the company, made since April 1, 1912, remains to be determined either by agreement or by proper supplementary proceeding, complainant contends that the case has been but partially tried, and that the order in question is interlocutory and subject to modification.

[1] It is conceded that the statutes of Iowa do not fix the time within which the amount of an award in a condemnation proceeding must be paid, after final judgment fixing the value, in order that the party initiating the proceedings may avail itself of its right to take the property; nor have any Iowa decisions dealing with this question been called to the attention of the court. Resort to other jurisdictions discloses that some limit must exist, and that payment must be made within a reasonable time. In *City of Chicago v. Barbican*, 80 Ill. 486, the Supreme Court of Illinois, under a similar state of the law, said:

"In answer to the suggestion of evil that might result from having such a judgment suspended indefinitely over property, it is sufficient to say no such result need follow. Unless the condition should be complied with within a reasonable time, by the payment of the damages and the taking possession of the property condemned, the proceedings would be regarded as abandoned, and a court of equity, if need be, would stay any attempt to proceed under them."

There can be no doubt that, in the absence of statute, the court, by agreement or otherwise, may fix the time of payment at the time of the judgment; and, when it does so, the time fixed and incorporated in that judgment becomes as much a part of it as the award itself.

[2] If, then, the judgment in this respect is final, no change or modification can be made, after the term in which it has been rendered, which may substantially vary or affect it in any material thing. *Sibbald v. United States*, 12 Pet. 492, 9 L. Ed. 1167; *Phillips v. Negley*, 117 U. S. 674, 6 Sup. Ct. 901, 29 L. Ed. 1013. This is the settled law. In 1897 the Legislature of Illinois provided by statute that the court should fix a time for the payment of compensation as a part of the judgment; and in *La Salle County Electric Ry. Co. v. Hill*, 260 Ill. 621, 103 N. E. 624, the question was whether or not a court might, after the close of the term in which the judgment was entered in a condemnation case, extend the time for payment beyond the date fixed in the original decree. It was held:

"The court, after naming a certain time, cannot extend that time after the term at which the judgment was rendered, as the naming of a time for payment fixes the rights of the parties, and the court's control ceases with the term."

The order entered here is in all respects an order in condemnation, whereby the value of the property condemned, as of a certain date, was judicially determined and the time for payment fixed. It is true that some other matters remain for adjudication, but the issues remaining for consideration could in no wise affect the matters settled by this order. If this identical judgment had been rendered by the court in regular course, and not by stipulation and consent, it would have been appealable just as the original finding of the condemnation court, organized under the laws of the state and awarding identically the same amount, was appealed from by both parties thereto. While it is true that the character of conclusiveness by way of estoppel attaches only to a final judgments, not to interlocutory judgments or orders which remain under the control of the court, an exception is made of such orders as dispose finally of some distinct branch or part of the case, or are appealable as being orders affecting the substantial rights of the parties. It is doubtful whether, under the procedure existing in Iowa, any more definite form of condemnation judgment could have been rendered. A public utility of this character is constantly changing; not only must it continue to operate, but additions and improvements must necessarily be made, constantly increasing the value of the property and the amount that the city must finally pay. Some date must be fixed at which the value for purposes of award may be established; the determination of subsequent additions and improvements being left to agreement or supplementary proceedings. It is not, and cannot well be, urged that the award fixed by the order of December 3d can now be set aside as interlocutory. If it cannot be, neither can the reasonable time of payment judicially determined by the same order. If the one is interlocutory, so must the other necessarily be.

[3] But there is another equally serious objection to this application. This order, and everything in it, was entered by consent. In such cases, in the absence of fraud or mistake, it cannot be modified or varied in any essential part without the consent of the parties to the same. *Leitch v. Cumpston*, 4 Paige, 476; *Mains et al. v. Des Moines National Bank*, 113 Iowa, 395, 85 N. W. 758. While the court, upon the application of either party, may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit and intent, the variation of such an essential element as the time of payment would not fall within such a legitimate exercise of discretion, but would amount to a material alteration of the unambiguous terms of the agreement. In *Horning v. Kendrick*, 161 Mich. 413, 126 N. W. 650, the Supreme Court of Michigan said:

"A decree by consent cannot, in the absence of fraud or mistake, be set aside by rehearing, or on appeal; nor can it be modified without the consent of the parties. Where a decree by consent was entered, under which complainant was to pay a certain sum to defendant on or before a certain date, whereupon defendant was to convey certain property in dispute to the complainant, a supplemental decree entered, extending the time of payment 60 days, was an alteration of the decree: the element of time being the very essence of the agreement, which ripened into a decree. * * * If the court

below could extend the time once for a month, it could again extend it for a further period, and thus render the decree less valuable, or even useless, to the party not consenting to the change. A reduction of the sum to be paid might easily be less injurious to the rights of relator than an extension of the time for payment."

There can be no question that the courts incline to such reasonable modifications of the terms of the orders remaining under their control as may further the ends of justice. In this spirit the consideration of this application has been approached and conducted. No court, however, is justified in arbitrarily disregarding settled rules of procedure and in disturbing fixed rights acquired thereunder. In such cases the only wise and just policy is to adhere to the practice established and approved by controlling authority. Complainant regards the objections made as purely technical. Defendants insist that they are substantial, and seriously affect the considerations which induced them to enter into the stipulation made. We may well conceive that certainty as to the time of performance and of the enjoyment of the amount awarded may be of material importance to the defendant company. The reasonableness of the award itself may depend, in some substantial measure, upon the time of its payment. It is not the province of the court to weigh and determine such matters upon this application, but rather to leave the parties where the law, which must govern the case, has placed them.

It is urged on behalf of defendants that, even though the court had discretion to extend the time within which the award must be paid, the showing made by complainant is not sufficient to justify it in granting the request. In support of this contention it is urged that complainant has thus far failed to secure the requisite authority to issue bonds for this purpose, and that, therefore, no situation is presented which would invite an extension of time. The proposition urged is not without force; but since, as has been stated, the question of authority is now before the state court, the determination will be left to that tribunal without unnecessary consideration here.

This application for an extension of time is denied.

BOSTON & M. R. R. v. NILES et al.

(District Court, D. New Hampshire. November 27, 1914.)

No. 71.

1. COURTS (§ 489*)—FEDERAL AND STATE COURTS—COMITY.

The rules of comity existing between the federal and state courts mean something more than rules of convenience, and, while a federal court has undoubted jurisdiction of a suit to determine the constitutionality of a state statute, except in extreme and exceptional cases the state court, which has concurrent jurisdiction and on which the Constitution and laws of the United States are equally binding, is the appropriate court to deal with the question in the first instance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 489*)—FEDERAL AND STATE COURTS—COMITY—SUIT TO ENJOIN ENFORCEMENT OF STATE STATUTE.

A statute of New Hampshire dealing with the subject of railroad fares also created a public service commission, with judicial powers to carry out its provisions. The act provided that, in case a petition for rehearing on any matter should be denied by the commission, an appeal should lie to the Supreme Court of the state. A railroad company filed a petition for rehearing after a decision by the commission, raising the issue of the constitutionality of the statute, which petition was denied. Thereupon the company commenced a suit in the federal District Court, alleging that certain provisions of the statute were discriminatory on their face and unconstitutional. *Held* that, having first invoked the jurisdiction of the state tribunals, the federal court would not pass on the constitutionality of the statute, or grant an injunction restraining its enforcement, until the company had exhausted its remedies in the state courts, but that until such time the cause should be held in abeyance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

In Equity. Suit by the Boston & Maine Railroad against Edward C. Niles and others, constituting the Public Service Commission of New Hampshire, and James P. Tuttle, Attorney General. On motion for injunction. Cause held in abeyance.

Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., for plaintiff.

James P. Tuttle, Atty. Gen., of New Hampshire, for defendants.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge, sitting under the provisions of section 266 of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1243]).

ALDRICH, District Judge. [1] While we do not doubt the jurisdiction of United States courts, or their power to entertain questions like these here, in an original and independent proceeding instituted for the purpose of testing the constitutionality of state statutes, which it is claimed conflict with the federal Constitution, we do think that such a proceeding in certain circumstances is subject to being controlled or influenced by preliminary considerations involved in rules of comity existing under our judicial system, and these rules are now accepted as meaning something more than rules of convenience.

It was pointed out in the *Houseman Case*, 93 U. S. 130, 136, 137, 23 L. Ed. 833, that, while the jurisdiction of the federal courts was the jurisdiction of a paramount sovereignty, the laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws; that legal and equitable rights acquired under either system may be enforced in any court of either sovereignty competent to hear and determine; that in respect to matters, though federal, unless otherwise provided, a remedy may be had upon proper proceedings in the state court, because, though the state courts derive their existence and functions from the state laws, such courts are subject also to the laws of the United States

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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and just as much bound to recognize these as operative within the state as they are to recognize the state laws; that the two together form one system of jurisprudence, which constitutes the law of the land for the state; and that there is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States to which their jurisdiction is competent and not denied. It has come to be pretty generally understood, we think, that state courts, in respect to federal rights involved in a proper proceeding before them, are under the same duty to enforce the federal law as that which imposes itself upon the federal courts. This is because the federal law is a part of their own system, and the state courts have gone as far in saying this as the federal courts.

Still in respect to the question as to where remedy shall be had for supposed invaded rights, which depend upon the federal Constitution or upon a state Constitution, or partly upon both, as well as in respect to other rights about which jurisdiction is concurrent, much depends upon the question as to where the proceeding to establish the right is first instituted.

In the case of *Covell v. Heyman*, 111 U. S. at page 182, 4 Sup. Ct. 358, 28 L. Ed. 390, the Supreme Court said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

The reasoning to which we have referred is very general, and has reference to all rights in respect to which there is concurrent jurisdiction. The result of the reasoning of this case, and others, is that when rights have been put at issue in a state court, even though the right of ultimate review may reside with the court of paramount sovereignty, rules of comity require that the state court whose process has been first invoked shall have a free hand under the presumption that the right will be suitably established, and this view is understood to hold good until the reasonable remedies in the state courts have been exhausted and a decision reached which aggrieves one of the parties, and then, if the supposed grievance is based upon the idea that the decision conflicts with the paramount federal law, he may have his review upon writ of error from the Supreme Court to the state court, and perhaps, in exceptional circumstances, through independent proceedings instituted in the lower federal courts.

While this reasoning applies to litigation in a broad sense and to general rights, it has especial force in cases which involve the validity of a state statute which has not been passed upon by the state courts,

and where the federal courts are invoked to pass in the first instance upon the question whether it is in conflict with the spirit of either the federal or a state Constitution. In respect to such situations, the Supreme Court has set forth over and over again that, except in extreme and exceptional cases, the state court is the appropriate court to have the first opportunity to determine whether its statutes are good or bad in a constitutional sense. And, moreover, where state statutes relate to general rights, unless they conflict with the provisions of the federal Constitution, it has been repeatedly said that the state court's interpretation or construction will generally be accepted as final, and would only be departed from, if at all, with reluctance.

[2] This case involves the single question of the validity of a state statute, which has not yet been passed upon by the Supreme Court of the state. The question has been at issue before the local Public Service Commission of New Hampshire, a commission which is comparatively new, and one whose powers have not been defined by the state courts. Upon certain proceedings, that Commission based its action upon the statute in question, accepting it as binding, and as establishing certain rights in respect to passenger railroad tariff rates in New Hampshire. The question thus grows out of a situation which is in a large sense a domestic one, and it goes without reasoning or saying that the New Hampshire courts, whose duty is coextensive with that of the federal courts in respect to all questions of right properly before them, are the appropriate courts to deal with the question in the first instance, and the federal courts, though of paramount authority in respect to federal questions, in such a situation, are bound under rules of comity to presume that the state courts will give force and effect to the federal laws and constitutional provisions, so far as they apply and become limitations, as well as to the laws of the state in respect to which there are no federal limitations.

We do not deem it necessary to inquire here as to the extent of the powers of the New Hampshire Public Service Commission. It manifestly has certain judicial power, and doubtless certain legislative power; but no particular point as to its powers either judicial or legislative is presented by the bill. The Boston & Maine Railroad filed a schedule of rates, acting upon the idea that such rates should become operative, notwithstanding the statute in question assumed to establish a maximum. The Commission accepted the statute as controlling contrary to the contention of the railroad. Thereupon the railroad petitioned for a rehearing, expressly putting in issue the question of the constitutionality of the act. The Commission, exercising its judicial function, denied the motion for rehearing. The statute which created the Commission, and also put the limitation upon the rates, broadly provides for an appeal to the Supreme Court of the state.

We have no hesitation in saying that we think the question of the validity of the New Hampshire statute was put in issue before the state tribunals through the initiative of the Boston & Maine Railroad, and that the railroad having first sought relief, through the instrumentalities of the state tribunals, from what it asserts is an oppres-

sion resulting from a state law which it claims contravenes the federal Constitution, that, before invoking federal aid, it should exhaust its opportunities to have the supposed wrong righted there. The Boston & Maine Railroad, through paragraph 4 of its bill, alleged that the New Hampshire mileage book statute was in contravention of the commerce clause of the federal Constitution, as well as in violation of the Constitution of New Hampshire; but both of those claims are expressly waived for the purposes of this hearing, and we have, therefore, no question whether the two-cent rate is either confiscatory or unreasonable. We have only the single question whether the statute upon its face is discriminatory, and therefore in violation of the fourteenth amendment to the Federal Constitution. The contention of the railroad is that as its objection to the mileage book statute is a single one, based upon the ground that the act is discriminatory upon its face, and that as no legislative phases are involved, they are within the decision of the Supreme Court of the United States in *Railroad v. Smith*, 173 U. S. 684, 699, 19 Sup. Ct. 565, 43 L. Ed. 858, which as they say declares a statute in substantial terms like the one here to be invalid because discriminatory, and that we are bound under federal considerations to accept the decision of the Supreme Court as controlling, and to at once afford relief from the New Hampshire statute. We express no opinion as to the scope or decisiveness of the Supreme Court decision, further than to say that, if a question like the one here has been decided by the Supreme Court, we should assume that it would be accepted as imperatively binding upon the state court as upon us, and, the question here being put first at issue before the New Hampshire tribunals, that the state remedies should be pursued until the state opportunities for relief have been exhausted. If, as a result of such a course, the petitioner should be relieved from the supposed grievance, there would be no occasion for invoking relief here or elsewhere in the federal courts, and, if a contrary result should be reached, it would unquestionably be open to the petitioner to have the supposed federal grievance righted by the Supreme Court upon writ of error, or possibly through an independent proceeding instituted in the lower courts of the United States.

We make no suggestion as to the proper remedy in case of a result adverse to the railroad before the state court or upon this phase of the case, further than to say that the petitioner would be at liberty to renew his application in the federal courts without fear of being met by a plea of *res judicata*. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 230, 29 Sup. Ct. 67, 53 L. Ed. 150.

In the *Smith Case*, to which reference has been made (173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858), the defendant in error started the litigation in the state courts, and after the law had been sustained by the Supreme Court of Michigan, the railroad raised the question for the Supreme Court of the United States by writ of error, and that court passed upon the rights, not as rights involved in legislation in respect to matters about which the state Legislature had the power to act, but as rights safeguarded by the federal Constitution which were out of the sphere of legislative power and which were infringed

by the statute upon its face. Reference is made to the character of the question in that case, to distinguish it from the questions involved in the case of *Bacon v. Rutland R. R. Co.*, 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538, upon which the petitioner in this case greatly relies. In the *Bacon Case*, where the Supreme Court sustained the view of going forward in the federal courts under an independent bill, the questions involved, if we read the case correctly, were in a very substantial sense legislative questions, and the right to go forward at once in the federal courts was sustained upon the ground that the right of appeal from the Vermont Public Service Commission in respect to these questions was not adequate, because the Supreme Court of Vermont has no legislative powers.

The question before us being the concrete question whether the mileage book statute is discriminatory upon its face, it is one to be controlled through judicial function, and as the right of appeal to the state Supreme Court given by the state statute requires that a rehearing by the Commission must first be asked, and that the ground of appeal shall be stated, and the question having been limited to the single one which we have stated, we think the remedy through the statutory right of appeal is entirely adequate, and that all reasonable considerations of comity and of public policy require that the statute, against which objection was first raised before the New Hampshire tribunals, should first receive attention from the state courts. By such a course the petitioner loses no substantive right, because the law furnishes him a perfect safeguard through resort to the United States courts for review in respect to questions covered by the federal Constitution.

The question as to where a grievance of this kind should first be entertained is more a question of desirability, convenience, and comity than a question of right, and we are not disposed to follow the proposition of the right of way through priority of jurisdiction further than to cite a note, containing authorities, which appears in 22 C. C. A. at page 358. It must be said, however, that aside from the force resulting from priority of jurisdiction is the further consideration that United States courts are reluctant to deal with state statutes with a view to sustaining or overthrowing them before the state courts have first had an opportunity to do that. The Supreme Court has repeatedly said that. It is said by Mr. Justice Hughes in *Louis. & Nash. R. R. Co. v. Garrett*, 231 U. S. 298, 305, 34 Sup. Ct. 48, 58 L. Ed. 229. It is said in effect by Mr. Justice Holmes in the *Prentis Case*, 211 U. S. 230, 29 Sup. Ct. 67, 53 L. Ed. 150, in which both Chief Justice Fuller and Mr. Justice Harlan, though concurring in the result, dissent from the opinion because it does not go far enough on lines of comity. It has more recently been said in an opinion by Mr. Justice Holmes, handed down November 2, 1914, in *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. —. It is true that these cases have reference to statutes which it is claimed offend state Constitutions, but it is not perceived that the reason of its being a state Constitution instead of the federal Constitution was the controlling reason. As has already been said the federal Constitu-

tion is a part of the system under which the state courts operate, and it is because the state courts recognize the federal system as a part of their own that rules of comity require, and particularly in cases first pending before them, that they should first have an opportunity to pass upon the statutes of their own state. It is incumbent upon the federal courts, in such a situation as this, to presume that, if the Supreme Court of the United States has declared a statute like the one involved here to be in contravention of the federal Constitution, the Supreme Court of New Hampshire will give the force of such a decision its proper consideration and scope. Such a presumption results in a large measure because of the strong expressions by state courts like those of Mr. Justice Cullen in *Beardsley v. New York, L. E. & W. R. R. Co.*, 162 N. Y. 230, 56 L. Ed. 488, that "in obedience to the law, as declared by the Supreme Court of the United States, we must hold the statute of 1895 is invalid," that of the Supreme Court of Appeals of Virginia in the *Coast Line Ry. Co. Case*, 106 Va. 61, 67, 55 S. E. 572, 574 (7 L. R. A. [N. S.] 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124), that "we are bound by this decision, as it emanates from the highest tribunal in the country," and numerous like expressions which could be cited, if deemed necessary.

Holding this view as to where this statute should first receive consideration, there are two courses open—one, to deny the injunction and dismiss the bill, and leave the parties to resort, if necessary, to remedy through writ of error, or possibly through a new and independent proceeding in the District Court; and, second, to hold the proceeding here, together with the application for an injunction, in abeyance, as was done by the Supreme Court in the *Prentiss Case*. There Mr. Justice Holmes said (211 U. S. 232, 29 Sup. Ct. 72, 53 L. Ed. 150):

"As our decision does not go upon a denial of power to entertain the bills at the present stage, but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them."

We are disposed to adopt the course suggested by Mr. Justice Holmes, and hold this proceeding in abeyance pending results in the state courts; and it is so ordered.

DODGE and BINGHAM, Circuit Judges, concur.

In re CRAWFORD WOLLEN CO.

Appeal of TERHUNE, NEARING & CO.

(District Court, N. D. West Virginia. January 8, 1915.)

1. BANKRUPTCY (§ 192*)—SELLING AGENTS—LIEN—"WORKMAN, LABORER OR OTHER PERSON PERFORMING LABOR."

Petitioners, who were selling agents for the bankrupt woolen manufacturing company on commission, were not workmen, laborers, or other persons performing work or labor by contract, entitling them to a lien on the bankrupt's assets, under Code W. Va. 1913, c. 75, § 7 (sec. 3848), providing that every workman, laborer, or other person, who shall do or perform any work or labor by virtue of any contract for any incorporated company doing business in the state, shall have a lien on the real estate and personal property of the company, which shall have priority, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. § 192.*]

2. BANKRUPTCY (§ 192*)—LIENS—PRIORITY—SERVICES—EXTENT.

Where servants of the bankrupt are entitled to a lien for services rendered under a state law, the right to preference is limited by Bankr. Act July 1, 1898, c. 541, § 64b, cl. 4, 30 Stat. 563 (Comp. St. 1913, § 9648), to a maximum of \$300.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. § 192.*]

3. BANKRUPTCY (§ 311*)—CLAIMS—PREFERENCES—FILING.

Where it was doubtful whether claimants were entitled to a preference on their claim for services to the extent of \$300, given by Bankr. Act 1898, § 64b, cl. 4, the referee properly permitted the filing of the claim to that amount as a preferred claim, and filing a claim for the balance as a general claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Crawford Wollen Company. On petition of Terhune, Nearing & Co. to revise the referee's order determining that petitioners were not entitled to priority under a state statute for the amount of their claim, but permitting them to file their claim for a preference to the amount of \$300 and as an unsecured claim for the balance. Affirmed.

Charles E. Williams, of Martinsburg, W. Va., for petitioners.

S. W. Walker, A. C. McIntire, and C. E. Martin, all of Martinsburg, W. Va., for contesting creditors.

DAYTON, District Judge. The bankrupt is a corporation, and was engaged in the manufacture of woolen fabrics at Martinsburg, this district. The petitioners compose a partnership doing business in Philadelphia, Pennsylvania. The corporation has been adjudged an involuntary bankrupt, and petitioners have sought to file a claim for \$7,605.09 as a preferred one, under and by virtue of section 7, c. 75 (section 3848, Hogg's Code 1913) of the Code of West Virginia, which provides:

"Every workman, laborer, or other person who shall do or perform any work or labor, by virtue of any contract for any incorporated company doing business in this State, shall have a lien for the value of such work, or labor upon all the real estate and personal property of said company, and such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lien shall have priority over any lien created by deed or otherwise on such real estate or personal property, subsequent to the time when the said labor was performed, but there shall be no priority of lien as between the parties claiming under the provisions of this section. Provided, that no lien shall be created under this section for labor performed more than nine months before such lien was recorded."

Section 8 (3849, Hogg's Code) provides that such lien shall be discharged unless the person desiring to avail himself thereof shall file with the clerk of the county court of the county in which the corporation has its principal office, works, or estate a sworn statement of the true amount due for such labor. It is admitted that petitioners' claim is based upon a contract for commissions due them as selling agents of the bankrupt of its manufactured products.

Under section 8 petitioners have undertaken to perfect a "lien" for their claim by filing the required account with the county clerk, after petition in bankruptcy had been filed. This claim for "lien" priority was vigorously contested by numerous other creditors before the referee, who decided that petitioners were not entitled to priority under this state statute for the amount of their debt, but under section 64b, cl. 4, of the Bankruptcy Act they were entitled to priority for \$300, part thereof, and were entitled to file claim for the balance as an unsecured debt. To revise this ruling this petition has been presented.

[1] Of the objections urged by unsecured creditors against the claim for priority asserted by petitioners, I deem it necessary to consider two only that go to the very marrow of the bone of contention: First, were petitioners, as agents selling on commission the manufactured and finished product of the corporation, "workmen, laborers or other persons" performing "work or labor" by contract, within the true intent and meaning of this state statute, whereby under it they were entitled to assert such claim of "lien" priority? and, second, if so entitled, does section 64b, cl. 4, of the Bankruptcy Act supersede and limit such right to priority to the maximum allowance of \$300 for work and wages performed within the period of 90 days prior to institution of bankruptcy proceedings, or, if not so entitled to priority under the state statute, are the provisions of section 64b, cl. 4, broad enough, independently, to authorize to petitioners priority for \$300 part of their claim?

Similar statutes to this one of West Virginia have been enacted by many of the states. Inasmuch as its court of last resort has not so far construed the statute of this state to the extent of determining the answer to be given to the first question, we may well be guided by the decisions of other courts construing similar statutes. The Supreme Court of Appeals of this state has determined only three cases involving in any way this statute: *Richardson v. Norfolk & W. Ry. Co.*, 37 W. Va. 641, 17 S. E. 195, *Grant v. Cumberland Valley Cement Co.*, 58 W. Va. 162, 52 S. E. 36, and *Griffith v. Blackwater Boom & Lumber Co.* (first decision) 46 W. Va. 57, 33 S. E. 125 (second decision) 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124. In the *Richardson Case*, it was held that a *subcontractor* was not within the terms of the statute because no direct contractual relation existed between him and the railroad company for whom the work was done. In the *Grant*

Case, the questions determined related solely to the sufficiency of the account and affidavit filed under section 8 to perpetuate the lien claimed and the methods of court procedure taken in the cause to enforce it. In the Griffith Case, Thompson had a contract with the corporation to cut and log its timber. The company became insolvent and went into the hands of a receiver. Thompson, among others, filed a claim for some \$98,000 for damages in the nature of profits which he would have secured by the execution of his contract, if it had not been repudiated by the company and its receiver. This claim was decreed to him as an unsecured one, payable pro rata with others of that class. In the first decision the Supreme Court of Appeals held that, by reason of its becoming insolvent and passing into the hands of a receiver, all contracts of a corporation thereby in law became abrogated, and that damages for the loss of profits that would be derivable from execution of such contracts were not subject to recovery; that, however, the contractee was entitled to recover a just compensation for the actual expenditure of labor and money by him in fulfillment of his contract, subject to a deduction of all sums paid to him thereunder; and that for this compensatory sum he was entitled to a preference under this state statute. The whole basis of the controversy having been changed, the cause went back to enable Thompson to establish the amount that would be a just compensation for the actual money and labor expended. He did establish such compensation to be justly some \$80,000, and it was decreed to him. A second appeal was taken, in which his right to preference was bitterly contested. The court sustained it, saying:

"As this question was adjudicated on the former appeal, the court below could not, nor can this court now, disturb that conclusion and determination. * * * That decision may be wrong, though we do not say it is; but it is and must remain the law of this case, however erroneous it may be."

And upon petition for rehearing it again answered this objection in the same way. The limit therefore, that the ruling in this case goes is that where a corporation has become insolvent, and been put in the hands of a receiver, and its contracts thereby abrogated, a contractee logger, entitled to compensation for work and labor done, comes within the terms of this statute and is entitled to preference. The difference between a logger performing the initial work of severing the timber, cutting it into required log lengths, and transporting these logs to the mill, there to be converted into the finished lumber product, and that of a sales agent, receiving the finished product from the mill and selling it, or negotiating its sale, to be delivered direct from the mill, for a fixed commission upon the quantity and value sold, is entirely obvious.

I was one of counsel for Thompson in this Griffith Case, and never have felt satisfied of the soundness of this ruling, either as to the doctrine of the legal abrogation of the contracts of insolvent corporations, or that Thompson, as a logging contractor, was entitled to a preference under this statute. On the contrary, I have always believed the original decree, ascertaining his damages because of the breach of the contract and decreeing such damages to be an unsecured claim

payable pro rata with all others of that class out of the assets of the company, to be the true solution of the controversy. In this conclusion, as regards the question of the law's abrogation of the contract, I am sustained by the conclusion of the author of a very exhaustive note to the case found in 69 L. R. A. 124.

It must be admitted, I think, that if the contention of the petitioners here is to be sustained, the terms of this statute must be construed to be broad enough to secure almost every one that may perform any service for a corporation, such as its officers, directors, attorneys, physicians, chemists, and civil engineers. In other words, the words used, "work and labor," must be construed to mean "service." Without extending discussion upon this proposition, it will be sufficient for me to say that I do not believe the statute capable of such broad construction, but, on the contrary, that its true intent and meaning is to secure only those engaged in the manual labor involved in the manufacture, mining, or construction of the product or work it is undertaking. In this view, while there is some conflict when it comes to drawing the line in particular instances and classifications, I conceive myself to be sustained by the great weight of authority derived from constructions of similar statutes in other states.

In *Latta v. Lonsdale*, 107 Fed. 585, 47 C. C. A. 1, 52 L. R. A. 479, an attorney employed on yearly salary was excluded. So was an insurance adjuster in *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; a lumber inspector in *In re Sayles*, 92 Mich. 354, 52 N. W. 637; a store manager in *Lawton v. Richardson*, 118 Mich. 669, 77 N. W. 265; draftsmen in *In re Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; bookkeepers in the same case, but per contra in *Hanner v. Brewing Co.*, 8 Ohio S. & C. P. Dec. 399, and *Consolidated Coal Co. v. Keystone Chemical Co.*, 54 N. J. Eq. 309, 35 Atl. 157; laundrymen in *Steininger v. Butler*, 17 Pa. Co. Ct. R. 97; a chemist in *Cullum v. Iron Co.*, 5 Pa. Dist. R. 622; and an independent contractor in *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310. And until the amendment of 1906, expressly naming them, traveling salesmen or agents selling on salary or on commission were held to be outside the privileges of section 64b, cl. 4, of the Bankruptcy Act. In *re Mayer* (D. C.) 101 Fed. 227; *In re Scanlan* (D. C.) 97 Fed. 26; *In re Greenewald* (D. C.) 99 Fed. 705.

Considerable confusion exists in the decisions of the courts of New York and Ohio, and it is held in *In re Luxton & Black Co.*, 35 App. Div. 243, 54 N. Y. Supp. 778, that an agent selling pianos on commission was included in the act, and in *Lewis v. Dawson*, 6 Ohio Cir. Ct. R. 243, that a person selling the product of a manufacturing company partly on salary and partly on commission was entitled to its benefit. But, while this is true, such cases can clearly be distinguished from the one here, in one important particular at least, for in those cases a single individual was employed to sell such of the product as his effort would enable him to do, to the exclusion of other employment by others; here a firm composed of several individuals, located in a large city and engaged in the business of selling agents, undertakes by con-

tract to sell the output of the corporation solely for a commission. It does not appear how many different and independent contracts from other manufacturing companies this partnership, as selling agents, may have; but from what is disclosed it is a reasonable assumption that their sole employment is not confined to that with bankrupt.

Finally, the Circuit Court of Appeals for this Fourth Circuit in *Tucker v. Bryan*, decided February 4, 1913, but for some reason delayed in its publication in the Federal Reporter until December 31, 1914 (217 Fed. 576), construing the Virginia statute, has held "persons contracting to log and cut timber for a stated price per thousand feet for the lumber produced" are not entitled to a lien under the terms of the statute. Therefore, convinced as I am that these statutes were enacted for the protection of those engaged in some capacity involving physical and manual labor in connection with the manufactured product of a corporation like bankrupt, I hold these petitioners not entitled to a lien under this West Virginia statute.

[2] This conclusion obviates any necessity of answering the first proposition contained in the second question, to the effect that, if entitled to preference, does section 64b, cl. 4, of the Bankruptcy Act limit petitioners' right to preference to a maximum of \$300. In order, however, that uniformity may exist in the decision of this question by referees in this district, I hold that it does so limit the right in all bankruptcy cases, regardless of state statutes to the contrary. To my mind the reasoning and conclusion of the Circuit Court of Appeals for the Seventh Circuit (*In re Rouse*, 91 Fed. 96, 33 C. C. A. 356) is decisive of the question.

[3] This brings us to the last proposition—whether section 64b, cl. 4, of the Bankruptcy Act independently is broad enough to authorize to petitioners a preference for \$300, part of their claim. Grave doubt arises as to this. It certainly was not, as hereinbefore shown, prior to the amendment of 1906. The whole question must turn upon the construction to be given the words thereby inserted, "traveling or city salesmen." What is meant by "city salesmen"? Are we to construe them to refer to that class of men who canvass cities for wholesale dealers or manufacturers, for the purpose of selling their goods and wares to retail merchants, or to persons, like petitioners, located in the cities, undertaking as selling agents to sell the product of manufacturers and miners operating elsewhere, or are the words broad enough to include both? The referee manifestly thought the latter. No objection in this regard was taken by contesting creditors to his ruling. Besides, all these objections have arisen solely on the motion to file petitioners' claim, not upon evidence taken as to its validity or character. The objections made were in the nature of a demurrer to the proof of claim, and had, at the time made, to be determined alone upon the allegations of fact contained in these proofs. Even if in doubt as to whether or not petitioners were entitled to \$300 preference, it was perfectly proper for the referee to allow the claim to be filed and contest be made, if desired by trustee or creditors afterwards as to its validity as a preference.

I am therefore of opinion that the ruling of the referee complained of is without error, and should be in all respects affirmed.

In re HANDY.

Petition of PEERLESS FERTILIZER CO.

(District Court, D. Maryland. January 13, 1915.)

1. SALES (§ 3*)—NATURE OF TRANSACTION—AGENCY OR SALE.

A contract between a fertilizer company and a dealer provided that it would furnish him fertilizers at specified prices, to be sold at such advanced prices as he might elect, such advance to constitute his entire commission and profit, that by August 1st and October 1st of each year he would make full settlement in cash or notes of purchasers, indorsed by him, and guarantee the payment of all notes and accounts, that he would hold all fertilizers as the company's property, and store and insure same at his expense for its account, and that, when sold, the entire proceeds of sales, including cash, notes, open accounts, and collections, were to be turned over to it until his obligation to it had been settled in full. *Held* that, when the agreement was fully performed by a complete settlement for the fertilizers received by the dealer, the result would be precisely the same as if there had been a sale, but until that time the relation was that of bailor and bailee, or principal and agent, and the company had all the right to the fertilizer that it would have had if the dealer had been its sales agent and nothing more.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 6-19; Dec. Dig. § 3.*]

2. SALES (§ 48*)—NATURE OF TRANSACTION—AGENCY OR SALE.

Such contract was contrary to no statute or rule of public policy, though the company might be estopped to assert its title to the prejudice of third persons dealing with the agent under the belief that he was the owner of the fertilizer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101-107; Dec. Dig. § 48.*]

3. SALES (§ 89*) — NATURE OF TRANSACTION — MODIFICATION BY SUBSEQUENT AGREEMENT.

While the parties could end the relation created prior to a settlement by the dealer by a mutual agreement, an intention to change the relation should not be lightly inferred from casual words, or even acts, in view of the fact that it is difficult for laymen to keep clearly in mind the differences between sales and deliveries to del credere agents for sale; but when, by a long and consistent course of dealing, they either put one of two or more possible constructions upon the contract, or upon a sufficient legal consideration mutually agreed to alter it, such construction or agreement was binding.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259; Dec. Dig. § 89.*]

4. BANKRUPTCY (§ 139*)—LIENS—NATURE OF TRANSACTION—MODIFICATION BY SUBSEQUENT AGREEMENT.

Where, prior to August 1, 1913, the company requested settlement at that time for fertilizer "purchased" the previous spring, but accepted the dealer's note for four months, allowing a discount as if it were a cash settlement, several times renewed the note, and accepted part cash and a new note for the balance due on such note and the open account due August 1, 1914, and at no time inquired as to his collections from his customers, or showed any interest in the state of accounts between him and his customers until after he became bankrupt, but apparently treated the adjustment by means of the notes and part payments as final settlements, it lost its rights to his customers' accounts, and was merely a general creditor of the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 198, 199, 210-219; Dec. Dig. § 139.*]

In Bankruptcy. In the matter of Samuel J. Handy, bankrupt. On petition of the Peerless Fertilizer Company to require the trustee to turn over to it open accounts due the bankrupt. Petition denied, and petitioner adjudged a general creditor of the estate.

James U. Dennis, of Baltimore, Md., for trustee.

L. Wethered Barroll, of Baltimore, Md., for Peerless Fertilizer Co.

ROSE, District Judge. [1] The Peerless Fertilizer Company makes and sells fertilizers. It will be called the company. Samuel J. Handy kept a country store at Shelltown, in Somerset county. He engaged in other activities. He bought from the farmers in his neighborhood, as well as sold to them. On the 7th of October, 1914, he was on his own petition adjudicated a bankrupt. He will be referred to as such. The company asks that his trustee turn over to it open accounts to the amount of about \$1,000 due the bankrupt by various persons to whom he sold fertilizers obtained from it. Prior to 1912 it and its predecessors had built up in Somerset county a considerable demand for its goods. The bankrupt wanted to handle them, and so told its salesman. In January, 1912, it made a contract with him. The terms were for the most part printed. It was in a form drafted by the counsel for a number of fertilizer manufacturers and used by many of them. A similar agreement was made between the bankrupt and the company early in 1913, and again in 1914. By each of these contracts it agreed to furnish him for sale at certain named prices fertilizers to be sold by him at such advanced prices as he might elect. It was stated that such advance was to constitute his entire commission and profit. On or before a date named, which in 1913 and in 1914 was August 1st, he was to make full settlement in cash or notes of the purchasers indorsed by him, which notes were to mature not later than November 1st. He was to receive a discount of \$5 a ton for all cash settlements made on or before August 1st for spring, and on or before October 1st for fall, goods. He guaranteed the payment of all notes and accounts at maturity. He undertook to hold all the fertilizers as the company's property. He was to store and insure them at his expense for its account. When sold, the entire proceeds of the sale, including cash, notes, open accounts, and collections thereon were to be kept separate, and turned over to it, until his obligation to it had been settled in full. After it had shipped the fertilizers, it was to be at no expense whatever. In 1912, and again in 1913, he agreed to take not less than 20 tons a year, and in 1914 not less than 30. It reserved the right to cancel the contract at any time, should his financial standing or manner of doing business be found unsatisfactory.

By such agreement the parties intend that when it is fully performed the result will be precisely the same as if the goods had been sold by the one to the other, but until that time the original owner of them shall have all the security he would have, had the other party been his sales agent and nothing more.

[2] No policy of the law forbids such a contract. In the absence of statute to the contrary, it is binding. *Ludvigh v. American Woolen Co.*, 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345; *In re Smith &*

Nixon Piano Co., 149 Fed. 111, 79 C. C. A. 53; John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422; In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611; Walter A. Wood Co. v. Eubanks, 169 Fed. 929, 95 C. C. A. 273; Walter A. Wood Mowing & Reaping Machine Co. v. Vanstory, 171 Fed. 375, 96 C. C. A. 331.

It is true that the principal may sometimes be estopped to assert his title to the prejudice of some third person who has dealt with the agent under the belief that he was the owner. It is not necessary here to consider what rights those who owe the accounts in controversy may have to offset any sums due by the bankrupt to them.

[3] The agreements between the company and the bankrupt did not make or evidence conditional sales, nor did they create secret liens in favor of the company upon property which had once been his. They established, and they were intended to establish, between them the relation of bailor and bailee, of principal and agent. That relation, however, necessarily came to an end whenever complete settlement was made by the bankrupt for the fertilizers received by him from the company. It could have been ended at any earlier period by the mutual agreement of the parties. Such an agreement could have been evidenced by words or by deeds. It must be borne in mind, however, that it is difficult for laymen to keep clearly in mind at all times some of the differences between sales and deliveries for sale to *del credere* agents. An intention to change the relation which has been carefully created should not be lightly inferred from casual words or even acts. In *re Smith & Nixon Piano Co.*, *supra*.

Where, however, by long and consistent course of dealing they show, either that they have put one of two or more possible constructions upon their original contract, or have, upon sufficient legal consideration, mutually agreed to alter it, they have the right to do so, and what they have done is binding upon them.

[4] The trustee in this case contends that the contracts call for a final settlement on August 1st in each year, either in cash or in notes of the purchasers indorsed by the bankrupt. He says that such settlement was made. It is true that it was not made in cash, but it was in notes of the bankrupt, which the trustee asserts were accepted by the company as cash. Were they? All the dealings between the parties appear to have been conducted by correspondence. The bankrupt produces the company's letters to him. It says that his to it have been mislaid. On July 28, 1913, it wrote him that it had about \$11,000 to pay on August 1st; that it had gone over its books to see which of its friends it could call upon to help it out, and had come across his account "for fertilizer purchased this past spring." It told him that, if he could conveniently let it have a check on or before August 1st, it would be highly appreciated. He did not give it his check, but did give it his four-months note payable December 1st. In arriving at the amount of this note he was allowed the discount of \$5 a ton as if it were a cash settlement. It turned out that some part of the account was for fall goods, for which he was not required to settle until October 1st. The note he gave, therefore, included four months' interest on the price of such of the goods as should have been paid for August

1st, and two months' interest on those the bill for which was not due until October 1st. Not one word was said by either of the parties as to his turning over accounts or customers' notes. No question was asked, then or at any other time prior to the bankruptcy, as to whether he had such accounts or notes. His note was for \$1,106.07. When it fell due in December he asked the company to renew it. It told him that, if he would reduce it to \$1,000, it would. There was here no suggestion that he should turn over what he had received from his customers. The amount by which he was asked to reduce it was precisely the sum which would leave the note an even \$1,000. It was again renewed in the succeeding April, and again nothing was said about his accounting for what he had received from purchasers of the fertilizer.

This note matured in August, 1914, at the time at which he should have made settlement for the spring goods of that year. At that time it pressed him for the total amount of the 1914 purchases, although the price of such of them as were fall goods was not payable until October 1st. His 1914 purchases amounted to \$814.60, so that, with his \$1,000 note, representing the balance due by him for his 1913 purchases, the total indebtedness was \$1,814.60. It was willing to give him until October 1st on \$1,500 of it. Interest on \$1,500 for two months would be \$15, making his total indebtedness as of October 1st \$1,829.60. It offered to take from him \$329.60 cash and his note at two months for the remaining \$1,500, and it said, if he wished, he could have the time for the payment of that note extended 30 days. He accepted the proposition, paid the \$329.60, and gave his note for the \$1,500. The company never as much as asked him what collections he had made from any of the persons to whom he had sold fertilizers. It and he evidently treated the adjustment with him on the 1st of August of each year as a final settlement. It showed no interest in the state of accounts between him and his customers. It took his notes as the equivalent of cash, allowing him the discount he would have been entitled to for a cash payment. All the transactions between them up to the 1st of August of each year were merged in the notes it then took from him. The course of dealing was such as to fully justify him in treating his customers' accounts as his, and as to at least \$500 he did so.

The company is a general creditor of the estate, and is not entitled to the outstanding accounts due the bankrupt for fertilizers obtained by him from it and sold to his customers.

CLARK MONTANA REALTY CO. v. FERGUSON et al.

(District Court, D. Montana. December 31, 1914.)

No. 18.

1. MINES AND MINERALS (§ 9*)—PLACERS—PATENT—INCLUDED LODES.

Where proof, on application for a placer patent, shows known existing lodes within the placer claim, they are excluded from the placer patent, and the patentee enters and pays for only the net area of his placer claim, which alone is conveyed, but, if the proof is that lodes are not known to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

exist within the placer claim, the applicant enters and pays for the entire area, and patent issues to him, conveying the whole, the Land Department inserting in the patent an exception that, should any lode be known or claimed to exist when patent is applied for, it is excepted or excluded, though not defined, from the grant, and since lodes known to exist are excepted from the placer grant, title continues in the name of the United States, and they are open to location as lodes in public land by any one at any time.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9.*]

2. MINES AND MINERALS (§ 38*)—PLACER CLAIM—INCLUDED LODGE LOCATION—BURDEN OF PROOF.

The burden is on claimant of a lode within a patented placer claim to prove that the lode was known to exist when the placer patent was applied for, by clear and convincing evidence, which inspires confidence to produce conviction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

3. MINES AND MINERALS (§ 38*)—PLACER PATENT—LODE LOCATION—PROOF.

To establish that a lode was known to exist within the boundaries of a placer claim when the placer patent was applied for, it must be shown that at that time the lode was clearly ascertained and defined, and of such known existence and content that, in view of all circumstances and conditions affecting its worth, such as the importance locally attached to like lodes under similar conditions, ease or difficulty of development, facilities for ore treatment, cost of mining and reducing ores, reasonable probabilities of development, etc., so that it would have justified development and exploitation, and because of which it, and the area attaching to or excluded with it, were more valuable than for placer mining.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

4. MINES AND MINERALS (§ 43*)—PLACER PATENT—INCLUDED LODGE—"KNOWN TO EXIST."

Float, outcrop, lodes, and abandoned locations, separately or combined, within the limits of a patented placer claim, are not sufficient to constitute a lode "known to exist," within the exception of the placer patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 125-129; Dec. Dig. § 43.*]

5. MINES AND MINERALS (§ 43*)—PLACER PATENT—INCLUDED LODGE.

Whether a lode within the limits of a patented placer claim was known to exist, so as to except it from the placer patent, must be determined by the conditions as they were when the placer patent was applied for, and hence subsequent development and results, however marvelous, are immaterial.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125-129; Dec. Dig. § 43.*]

6. MINES AND MINERALS (§ 38*)—PLACER PATENT—INCLUDED LODGE.

On an issue as to whether a lode within the limits of a prior placer patent was known to exist, and therefore excluded, evidence of annual labor performed by defendants on the lode claim and their good faith is immaterial, since if the lode was not known to exist when the placer patent was applied for, defendants' good faith cannot aid them, and if known to exist, their bad faith would not deprive them of their right to the claim under the exception in the placer patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

7. MINES AND MINERALS (§ 38*)—PLACER CLAIMS—INCLUDED LODE—EXISTENCE—KNOWLEDGE—EVIDENCE.

Evidence *held* insufficient to warrant a finding that a lode was known to exist within the limits of a patented placer claim at the time of the application for the placer patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

In Equity. Suit by the Clark Montana Realty Company against W. H. Ferguson and others. Decree for complainant.

Geo. F. Shelton, Fred J. Furman, and A. J. Verheyen, all of Butte, Mont., for plaintiff.

Gunn, Rasch & Hall, of Helena, Mont., and W. I. Lippincott, of Butte, Mont., for defendants.

BOURQUIN, District Judge. This is a quartz placer controversy. Plaintiff's placer patent was applied for by its predecessors in interest on July 18, 1879, and upon part of the land conveyed by it defendants' Zeta lode claim was located on January 1, 1901. Defendants have failed to establish that this lode was "known to exist" when the placer patent was applied for, and so plaintiff is awarded decree quieting its title.

Amongst several witnesses presented by defendants, only two, Baxter and Yountz, prior to or on July 18, 1879, had any acquaintance with visible conditions upon the premises involved. Their acquaintance was casual, limited, slight; their recollection somewhat general, vague, and uncertain. In substance Baxter testified that in the spring of 1878, passing, he saw in the vicinity of some visible outcrop some men prospecting in a small hole 3 feet deep, wherein he saw what "looked like pretty good quartz." This was 100 feet, or 40 or 50 feet, east of a road now a city street, and he believes somewhat doubtfully that a certain old hole or shaft about 100 feet east of said street and upon the Zeta lode, and the nearest to said street of several holes or shafts thereon, occupies or is about the site of said prospect hole.

Yountz testified that in the spring of 1879 one Turner claimed the premises, that he casually visited the same, and there saw "quartz and ore," very little outcrop, and a hole 5 or 6 feet deep near 100 feet east of the said road, and that is now the shaft referred to by Baxter. In answer to a question whether he saw "evidence of a vein" in said hole he said, "Yes," saw "quartz and iron," and that it was "pay ore," wherein he could see gold and silver with the unaided eye.

The premises involved were and are in the vicinity of Butte, Mont. They are upon and near the foot of a gentle slope that, from the hills in which are the great mines of Butte, descends a mile and a half to Silver Bow creek. They were a valuable placer mine; one of defendants testifying that he profitably worked them for placer gold. Of evidentiary circumstances and conditions in 1879 little appears, save that in the locality of the premises involved subterranean water was within 8 to 10 feet of the surface, Butte was without railroads and, until late in 1881, silver was worth around \$1 per ounce, and ore milling and smelting facilities were limited, the charges for treatment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—61

being \$30 to \$60 per ton. How far the Butte district had progressed beyond its condition in 1873, described in *Barnard v. Nolan* (D. C.) 215 Fed. 997, is not disclosed, and neither party has asked the court to judicially notice facts of common or historical knowledge in relation thereto.

It is evident, however, all was yet relatively primitive, one witness for defendants testifying that the people of Butte did not then know the possibilities of the district, that they even considered Anaconda Hill (the richest on earth) worthless, and any one there working crazy, and that the consensus of opinion was that if the Alice mine (then the noted lode mine of the district and located upon the hills more than two miles from these premises) "went down" 500 feet, the "camp was good" for at least a short time. There is evidence that after the date of the application for the placer patent development disclosed that the Zeta lode is from 8 to 26 feet wide, and continuous for about 900 feet here involved; that numerous holes or shafts were sunk along it at a cost of more than \$5,000; that in the surface workings the lode is of broken, disintegrated, and mixed matter, quartz, altered granite, talc, iron oxides, etc.; that what Turner did is unknown; that "in the early 80's" some one near the west end and about where Baxter saw men prospecting in 1878 sunk a shaft 60 feet deep and drifted therefrom, wherein Baxter saw a "vein in place," and they had some "pretty good ore"; that later Baxter was interested in a lode location made upon the premises in 1889, performed some annual labor upon it, and in 1894 from lessees received about \$70 or one-third of 25 per cent. royalties; that defendants have continuously performed annual labor upon the Zeta lode; that therein in 1914 they extracted 4 tons of ore carrying 23 ounces of silver and \$9.40 of gold per ton; that this was from the east end, and a winze wherein was one foot of ore; that the water was "too strong," and they quit work; that present samples from the Zeta discovery shaft, about 250 feet east of the said street, assayed from eight-tenths of an ounce of silver and 60 cents of gold per ton to 10.6 ounces of silver and 10 cents of gold per ton; that a great many lode claims were located in the vicinity of the premises, some prior to 1879, and since said date from some of them valuable ores have been mined, and perhaps profitably; that, since the placer patent issued, patents have also issued for 12 lode claims upon the premises by the placer patent conveyed; that in 1878 one of the placer patentees and others located a lode claim, which in 1879 was relocated by Turner, and that said locations were on the now Zeta lode; that the said placer patentee, and before whom the lode location in which he had a part was verified, had no knowledge thereof, save that it was one of scores wherein prospectors included him in consideration that he paid recording and other fees; that the Zeta lode presents the same appearance (now) as all other lodes in the vicinity; that no lodes are now being worked in the vicinity; and that present smelter charges for ore treatment are \$6 to \$8 per ton.

A number of witnesses for plaintiff in rebuttal testified to some acquaintance with the locality involved before and after July 18, 1879; that they prospected it thoroughly, assayed samples, and found no lodes warranting location; that the quartz found had no value, and that,

while they cannot assert they so prospected the now Zeta lode, they are of opinion they did so far as it was exposed or indicated and as a part of the locality. Baxter, Yountz, and other witnesses visited the premises immediately before this trial. By way of conclusions from observation, Baxter testified that in 1878 he would have assayed what he saw in the small prospect hole before expending much upon it, and upon being asked if the appearance would have induced him to spend money to determine the character and value of the ore, he answered, "Yes." Yountz, in response to the question whether in 1879 the appearance of what he saw would have justified him to expend time and money to develop it, answered, "Yes." Barker and Corry, mining engineers presented by defendants, testified the Zeta lode would now justify an ordinarily prudent man in the expenditure of money in its development, and that he could reasonably expect to disclose a valuable mine.

[1] Before commenting upon this evidence it may be observed that, when a placer patent is applied for, the Land Department requires evidence in relation to the character of the land. Affidavits are presented by the applicant. If the proof is that lodes are known to exist within the placer claim, the applicant is required to survey them, and if not claimed and as known lodes included in his application he is required to exclude them, whereupon he enters and pays for only the net area of his placer claim, and patent issues to him, conveying said net area alone. If the proof is that lodes are not known to exist within the placer claim, the applicant enters and pays for the entire area of his placer claim, and patent issues to him, conveying the whole thereof; but the Land Department inserts in the nature of an exception that, should any lode be known or claimed to exist when the patent was applied for, it is expressly excepted or excluded (though not defined) from the grant. There is no warrant in law for this insertion, and it is broader than the law implies, if the statute implies any exception. Perhaps the reason it is held that the law does imply an exception of known lodes, contrary to the holding in the matter of patents by virtue of analogous laws and inappropriate to lodes and mineral lands, is that this Land Department practice confronted in the first case involving the question, if not given undue weight, at least suggested the exception—more suggested it than did settled principles of construction. Since lodes known to exist are excepted from a placer grant, title to them continues in the United States, and they are open to location as lodes in public land and by any one at any time.

[2] If located, in any controversy involving the respective rights of the lode claimant and the placer patentee, the burden is upon the lode claimant to prove the lode was known to exist when the placer patent was applied for. And the proof in effect impeaching the patent proceedings, if not the patent, for fraud, seeking to withdraw or except from a solemn grant over the seal of the United States premises *prima facie* conveyed by it, must be clear and convincing, in quality and quantity that inspires confidence and produces conviction.

[3] To so establish that a lode was known to exist when the placer patent was applied for, it must appear that at that time the lode was clearly ascertained and defined, and of such known extent and con-

tent that, in view of all circumstances and conditions affecting its worth, such as the importance locally attached to like lodes under similar conditions, ease or difficulty of development, facilities for ore treatment, cost of mining and reducing ores, reasonable probabilities of development, and the like, it then would have justified location, development, and exploitation, and because of which it and the area attaching to or excluded with it then were valuable, and more valuable than for placer mining purposes.

[4, 5] Float, outcrop, lodes, and abandoned lode locations, separately or combined, are not sufficient to constitute a lode "known to exist," within the exception of a placer patent. In addition must be the known quality above defined. And the reason is lodes exist throughout the mining country. Not one in hundreds justifies development and proves of value. No reason exists to except the valueless from placer patents or grants, and such patents issued or grants made without excluding them *prima facie* lodes of value did not exist. The issue is determined now by conditions as they were when the placer patent was applied for, even as though tried and determined then. Subsequent development and results, however marvelous, are immaterial. For if they are received in evidence and given evidentiary value, judgment is not based upon conditions as they were when the placer patent was applied for, but upon subsequent events, not consequences—the most fallible and dangerous of all criteria. The sanctity of a solemn grant of lands by the United States and the definiteness and certainty that should attach thereto and the stability of titles evidenced thereby, can only thus be preserved. See *Iron Silver Case*, 143 U. S. 405, 12 Sup. Ct. 543, 36 L. Ed. 201; *Migeon v. Railway Co.*, 77 Fed. 256, 23 C. C. A. 156; *Thomas v. Mining Co.*, 211 Fed. 106, 128 C. C. A. 33; *Mason v. Mining Co.*, 214 Fed. 34, 130 C. C. A. 426.¹

To revert to the evidence herein, all of subsequent development, disclosures, results, and conditions not consequent, is inadmissible and not considered. It will not do to contend that what is upon the premises now is some evidence of what was upon them then, for that is not the issue; it being what was *known* to be upon the premises then. There are circumstances, not here involved, in view of which such evidence would be competent for limited purposes. For instance, if a known lode was made to appear, to determine its course and distances, or if the placer patentee asserted no lode existed even at the time of trial, to rebut the assertion, or the like. Subsequent events conditionally admitted in a trial to the court are harmless, but in a trial to a jury would tend to obscure the real issue, to deceive, to injustice.

[6] Likewise evidence of annual labor performed by defendants. Defendants' attitude is not involved. If the Zeta lode was not known to exist when the placer patent was applied for, defendants' good faith aids them none; if it was known to exist then, their bad faith would not deprive them of the decree. The certified copies of recorded notices of location aforesaid by one of the placer patentees and by

¹ If *Noyes v. Clifford*, 37 Mont. 138, 94 Pac. 842, is for a rule more liberal to the lode claimant, it is at variance with the construction of the placer mining law declared by the Supreme Court of the United States, and so lacks authority.

Turner are inadmissible, in that by the law of the state when made they were void for defective verification, and so not evidence of anything. And it is not at all clear they were upon the lode involved. In view of the monuments in them referred to, the most that can be said is that they *may* have been. That subsequent to issuance of the placer patent 12 lode claim patents have issued for parts of the patented placer is immaterial, in that the lode patents are not evidence the lodes so patented, to say nothing of the Zeta lode, were known to exist on July 18, 1879. *Iron Silver Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155.²

[7] The fact may be a striking illustration, however, of the situation induced by the prevailing construction of the placer mining law. The testimony of Baxter and Yountz is practically all that is competent and tending to sustain defendants' contention of a known lode. Tested by the rules hereinbefore set out, their testimony is wholly insufficient for defendants' purpose. The small prospect hole they casually saw once each prior to July 18, 1879, was the only exposure then of what now proves to be the Zeta lode. It does not appear this hole actually demonstrated that at that point was an ascertained and defined lode, clearly or at all. If the hole was in the disintegrated material at the surface or apex of the Zeta lode, neither Baxter nor Yountz observed the walls of the lode; neither of them testify it was a lode. There is no evidence of value at that point, then or now. Yountz's conclusion it was "pay ore" is unwarranted by any information he then had, or that appears now. It is a mere guess. If he saw gold and silver therein with the unaided eye (which may or may not indicate value), it would seem some one could see it now. So, likewise, his conclusion that what he there saw in 1879 would have justified development then.

Doubtless in the light of all the succeeding years he honestly so believes. Knowledge after the event is always easy, and to the untrained mind, influenced by time and results, and perhaps by regrets for lack of foresight in earlier years and for opportunities not grasped, it is difficult to consider only what was known then, to now judge as it would have judged then. It inclines to judge by the event.

To give the testimony of Baxter and Yountz all the value to which it is entitled, the most that can be said is that prior to July 18, 1879, they saw upon the premises involved what indicated a possible lode of possible mineral of value possibly sufficient to justify further exploration—so far short of a lode "known to exist" that, as they describe it, it is doubtful if it would support a location. See *Chrisman v. Miller*, 197 U. S. 320, 25 Sup. Ct. 468, 49 L. Ed. 770.

The defendants have failed to prove that on July 18, 1879, the Zeta lode was "known to exist." The court finds it was not known to exist, plaintiff's placer patent conveys title to the premises involved, and plaintiff is entitled to recover.

Decree accordingly.

² Note that this case is difficult to reconcile with the theory that a placer patent does not convey known lodes by defeasible title but excepts them altogether, in that it denies that the Land Department can thereafter issue patents to such lodes to the prejudice of the placer patentee, "who has a prior patent for the land."

KELLY v. DOLAN et al.

(District Court, E. D. Pennsylvania. January 7, 1914.)

No. 1237.

1. CORPORATIONS (§ 319*)—INJURIES—RIGHT TO SUE.

Where a corporation is stripped of its assets by act of its directors, the right of action is not only primarily, but until it has passed to others, is always, in the corporation, and the recovery is for its benefit; it being necessarily a party.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1415, 1416-1425; Dec. Dig. § 319.*]

2. CORPORATIONS (§§ 499, 506*)—INJURIES—RIGHT OF ACTION.

Where a corporation is injured by the acts of its directors, it in general may sue or withhold the right to sue, and the action, when brought, must be brought by it and in its name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919, 1958-1970, 2030; Dec. Dig. §§ 499, 506.*]

3. CORPORATIONS (§ 206*)—INJURIES—STOCKHOLDER'S ACTION.

Where a corporation is injured by being deprived of its assets by directors, and on demand of a stockholder fraudulently refuses to sue, the stockholder may maintain a bill for its benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. § 206.*]

4. CORPORATIONS (§ 560*)—RECEIVERS—RIGHT TO SUE.

Where a chancery receiver is appointed to administer the affairs of a corporation, the corporation continues to own its assets, and such receiver cannot bring a suit in a foreign jurisdiction for the benefit of the corporation; but a statutory receiver acquires the legal title to the corporation's property, and for this reason may sue in a foreign jurisdiction for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.*]

5. CORPORATIONS (§ 560*)—RECEIVERS—SUIT IN FOREIGN JURISDICTION.

Where a statutory receiver has been appointed for a corporation, neither the corporation nor a stockholder can maintain an action for alleged loss of the corporation's assets without the sanction of the court appointing the receiver, but with such sanction a suit for the corporation's benefit may be brought in a foreign jurisdiction in which defendants can be served.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.*]

6. CORPORATIONS (§ 202*)—INSOLVENCY—RECEIVERS—STOCKHOLDERS—RIGHT TO SUE.

Where a statutory receiver has been appointed for a corporation, a stockholder, with the consent of the court appointing the receiver, may sue in equity, for the benefit of the corporation and its receiver, to redress, in a foreign jurisdiction, an injury to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 777-780, 822; Dec. Dig. § 202.*]

7. CORPORATIONS (§ 211*)—STOCKHOLDER'S BILL—ALLEGATIONS—COURT RULES.

Equity Rule 27 (198 Fed. xxv, 115 C. C. A. xxv), providing that a stockholder's bill must be verified by oath and allege that plaintiff was a shareholder at the time of the transaction of which it complains, or that his share has devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and must set forth the efforts of plaintiff to secure action through the cor-

poration's directors and trustees, etc., was intended only to exclude cases brought by a stockholder collusively in order to give an apparent jurisdiction to a court which would not have it if the suit were by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814–818, 820, 821, 823, 824; Dec. Dig. § 211.*]

8. EQUITY (§ 118*)—PARTIES.

Parties in equity proceedings are not to be regarded as parties plaintiff and defendant are regarded at law, unless there is some requirement of a statute or of the equity rules to constitute them parties in that sense, parties in equity having no fixed status as plaintiff or defendant, but may be realigned for jurisdictional purposes according to interest.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 258, 554, 590; Dec. Dig. § 118.*]

9. COURTS (§ 317*)—JURISDICTION—DIVERSE CITIZENSHIP.

Where a stockholder of a corporation for which a statutory receiver had been appointed brought suit in a federal court in a foreign jurisdiction against persons alleged to have wrongfully dissipated the corporation's assets and erroneously made the receiver, who was of the same citizenship as complainant, a defendant, the court, in order to establish the requisite diversity of citizenship, could properly realign the parties, making the receiver a complainant, since the stockholder could only recover for the receiver's benefit, and any recovery had must necessarily be administered by him, and leaving the individual defendants, who were of different citizenship, sole defendants.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 317.*]

In Equity. Suit by Richard B. Kelly against Thomas Dolan and others. On motion to dismiss bill. Denied.

Strong & Mellen, of New York City, and Alfred J. Niles and James Gay Gordon, both of Philadelphia, Pa., for plaintiff.

Ellis Ames Ballard, Morgan, Lewis & Bockius, and John G. Johnson, all of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The facts, as averred in the bill of complaint, necessary to an understanding of the questions involved, are these: The plaintiff is a stockholder in the defendant corporation, which for brevity is referred to as the Central Company. All its property was leased, and through this lease and subsequent assignments of it passed into the control of another company or companies. The substantive complaint is that through the acts of the individual defendants the Central Company was stripped of all its possessions. With the truth of the averments made we, of course, have now no concern. The Central Company went into the hands of a receiver appointed by the Supreme Court of the state of New York.

[1-3] The grounds of the motion to dismiss are six in number. For the purposes of discussion they may be grouped as raising certain questions. The one which goes to the root of the whole controversy is whether the plaintiff has a cause of action. The general principles by which this is to be determined are well settled. The injury complained of is more than primarily, it is necessarily and essentially, an injury to the corporation. A stockholder suffers damage, if at all, because he shares in the injury to the corporation. The right of action is not only primarily, but, until it has passed to others, is always, in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

corporation, and the recovery is for its benefit. It is therefore necessarily a party. Moreover, generally speaking, it may bring or withhold bringing an action to redress the injury, and the action, when brought, must be brought by it and in its own name. The reasons for holding this to be the general rule are obvious. Where, however, the injury to the corporation is unredressed, the damage to the stockholder, although indirect, is none the less real. Whenever the corporation, on demand made, refuses to act, and such refusal is fraudulent, as, for illustration, because its action is controlled by the defendants, the stockholder may then maintain his bill. This cannot be predicated upon any statement of his legal rights, and is not, in a narrow sense, a logical remedy. It is sustained upon the broad ground that there would otherwise be a failure of justice. It is, although less logical, analogous to the Pennsylvania practice of permitting an equitable plaintiff to bring an action to his use in the name of the legal plaintiff, and to override any objections which the latter may interpose.

[4] Were there no receivers in the case, this plaintiff might maintain his bill upon the averment of demand made upon the corporation and its refusal to sue, and that the refusal was fraudulent and due to the control exercised over the managers of the corporation by the defendants. As, however, the affairs of the corporation are in the hands of a receiver, certain consequences result from this. These consequences, or at least some of them, differ according to the character of the receivership. A chancery receiver is but the hand of the court, which has taken over the administration of the affairs of the corporation. The corporation continues to be the owner of all that belongs to it. One effect of the interposition of the court is to take from the corporation the control of its affairs. Another consequence is that it receives the protection of the court against the interference of others. Within the jurisdiction of the court appointing the receiver no action can be taken by the corporation or against it without the sanction of the court. If anything is to be done by the corporation, it must be done through and by the receiver. Outside of the jurisdiction of the court by which the receiver was appointed, he has no power or authority to act. There the right to act for itself does not, however, revert to the corporation, because a court in another jurisdiction will not permit the corporation to do what it would not be permitted to do by the court having jurisdiction over its affairs; nor will the court of the other jurisdiction assume to administer the affairs of the corporation, the administration of which has already been taken in hand by another court, except through a process ancillary to the original receivership.

Inasmuch as the right of a stockholder to bring his action, as has been above shown, is predicated upon a fraud perpetrated against him by the managers of the corporation, and as no such finding could be made against the court, or against a receiver who is the representative of the court, it would follow that this ground upon which the right of the stockholder is based would be taken away. A chancery receiver cannot bring an action in his own name outside of the jurisdiction of the court of his appointment, because he does not have the legal title to the property of the corporation or the chose in action, and his representative capacity does not extend beyond the limits of the jurisdiction by

which he was appointed. The effect of a statutory receivership, however, may by force of law be to transfer to the receiver the legal title to the property of the corporation including choses in action. The juridical consequence of this is that such a receiver may bring suit outside of the jurisdiction of the authority appointing him, for the reason that he has the legal title and therefore may enforce it by an action.

It does not appear from the bill in this case whether the receiver of the Central Company is a chancery or statutory receiver, except in so far as the inference may be drawn from the character of the proceedings in which he was appointed under the laws of the state of New York and this court taking cognizance of what these laws are. The inference to be drawn in this case we understand to be that the receiver here is a statutory receiver, and we further understand that at the argument counsel on both sides proceeded upon this as the fact in the case and it will therefore be so considered.

[5] This, therefore, brings us to two conclusions, and one of these involves a third or additional one. Neither the corporation nor the stockholder can maintain an action without the sanction of the court appointing the receiver. With that sanction, however, a suit may be brought in this jurisdiction as it might have been brought in New York, if service could have been had upon the defendants there. This brings up the question of whether this suit has the sanction of the court, and we are constrained to find that it has. Inasmuch as the corporation itself could not maintain the action, the question of its willingness or refusal to bring it is now of no consequence. If the plaintiff has the right to maintain his action at all, it is not upon the principle of a refusal of the corporation to act, but upon the principle that the action has the sanction of the court having jurisdiction over the affairs of the corporation. Put into a somewhat different form, the propositions of law involved are these:

A corporation is injured by the acts of others. Where the affairs of the corporation are under the care of a management to which they have been committed by the stockholders, and those managers are in the bona fide exercise of the powers committed to them, every principle of the regular and orderly administration of the law and of the logical development of legal procedure, and every principle of sound, legal policy, as well as a due regard to the rights of the defendants, forbid that any stockholder, or any one, other than the corporation itself, may institute an action to redress its wrongs. Where, however, the wrong done to the corporation is followed by a second wrong to the stockholders, wrought by means of a mala fide refusal to redress the first wrong, there the stockholders may themselves seek redress. The right of the stockholder, however, is based, not upon the first wrong, but the second. When, again, the power to redress the first wrong has passed from the hands of the corporation into the hands of a court, the possibility even of such second wrong cannot be supposed. The right of the stockholders which rests upon it has therefore lost its entire support. The plaintiff in this case has therefore no right of action, unless it can be planted upon some other principle. A distinction, as has already been noted, must be made between a chancery re-

ceiver and a statutory receiver, who has succeeded to the title to the subject-matter of the action.

[6] In the case of a chancery receivership, the receiver cannot maintain an action outside of the jurisdiction of the court of his appointment, for the reason that his appointment has no extraterritorial existence. The corporation itself will not be permitted to maintain its action because no other court will countenance disloyalty to the sovereign to which it owes allegiance. The sound principle would seem to be that it is denied only the right to do the things which the court of its appointment has prohibited it from doing. If that court sanctions the exercise of the right, it would further seem that the court of another jurisdiction should permit it to do (if no other reason exists for refusal) what the court of its appointment would permit to be done there. This view, although in conflict with *Harper v. News Co.* (C. C.) 128 Fed. 979, would seem to be in accord with *Porter v. Sabin*, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. Ed. 815. *Harper v. News Co.*, moreover, was the case of a chancery receivership, and the present case is being considered as one of a statutory receiver, upon whom has devolved the title to the chose in action. Such a receiver, because he has the legal title, may assert his right of action anywhere, on the principle that title under the law of the situs is a good title everywhere. As the title is thus in the receiver, and in him alone, it would logically follow that no one else, and therefore no stockholder, could maintain the action.

If this were an action at law, this result would surely follow. Inasmuch, however, as it is a proceeding in equity, it may be that it can be sustained as a proceeding for the redress of an injury to the corporation to which the receiver is a necessary party, because he has succeeded to the rights of the corporation, and to which the stockholder is also a party, because required to be one in order to meet the terms of the permission to sue granted by the court of the receiver's appointment, and in order that the stockholder may be made answerable for the costs. This would further appear to accord with the requirements of the real situation. If injury has been done to the corporation, the wrong should be redressed. Whether the injury has been done can only be determined by an action. The action might be brought by the receiver. The court could require its receiver to bring the action. Permitting it to be brought for the benefit of the corporation and of the receiver by a stockholder would seem to be in effect the same thing. As it is clear the corporation could not maintain an action, application to it would be futile. The other objections to a stockholder being ordinarily permitted to maintain an action do not apply, when the action can be brought only when it has the sanction of the court. As the question here involved will remain in the case until final decree, it is not necessary for us now to go further than to decline to dismiss the bill at this time on this ground.

[7] This brings us to the consideration of rule 27 (198 Fed. xxv, 115 C. C. A. xxv), the application of which is involved in the conclusion already reached. It may be premised that the plaintiff has in terms complied with the requirements of rule 27 and has brought himself within it. Moreover, the rule has merely a formal, not a real, application to the present case. Its purpose is to exclude cases brought by a

stockholder collusively, in order to give an apparent jurisdiction to a court which would not have it if the suit were by the corporation. No such state of facts exists here. It is sufficient to say we have reached the same conclusion with respect to this ground or reason for dismissing the bill. We would not feel justified in dismissing the bill because of rule 27.

[8] This disposes of reasons Nos. 1, 2, and 3 as set forth in the motion. This in turn brings us to the remaining reasons, which may be grouped and characterized as diverse citizenship. As the plaintiff has arrayed the parties to this controversy, he has placed citizens of the same state with himself along with citizens of another state as defendants. This ordinarily would prevent this court from exercising jurisdiction. Parties in equity proceedings, however, are not to be regarded as parties plaintiff and defendant are regarded at law, unless there is some requirement of a statute or of the equity rules to constitute them parties in this sense. The law may be administered through legal forms or through chancery processes. The former are fixed and rigid. The latter are mobile, and adapt themselves to every contingency and requirement of the application of equitable principles. A party therefore (outside of the exceptions referred to) has no fixed status as either plaintiff or defendant, but is whatever the requirements of equity necessitate him to be. There may therefore be a realignment of parties.

[9] As the plaintiff has no rights, legal or equitable, which he is at liberty to enforce in this case, except with the sanction of the court by which the receiver was appointed, and as whatever recovery there may be would be for the benefit of the corporation, and its proceeds would be administered and distributed by the court having the administration of the affairs of the corporation in charge, which court would exercise its powers through the receiver by it appointed, and as there can be no decree here against either the corporation or the receiver, the corporation, receiver, and the stockholder plaintiff, all of whom are citizens of one state, are properly, logically, and naturally arrayed against the individual defendants here, all of whom are citizens of another state. In this view of it, and if the parties are so aligned, the court has jurisdiction.

The motion to dismiss is therefore disallowed, with leave to defendants to move for time within which to answer over.

In re ELKIN.

(District Court, D. New Jersey. November 5, 1914.)

1. BANKRUPTCY (§ 395*)—EXEMPTIONS—DETERMINATION—BANKRUPTCY COURT—JURISDICTION.

It is the duty of a bankruptcy court to determine claims of a bankrupt to exemption, and to sever the exempt property from the bankrupt's estate, but not to grant exemptions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. § 395.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 399*)—EXEMPTIONS.

A bankrupt's exemptions are created by the state law, and the exempt property constitutes no part of the estate in bankruptcy, the trustee not being vested, except sub modo, with the title to such property; and hence it does not lie in his power to deprive the bankrupt of the right to his exemptions on the ground that he has withheld assets from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Sigmund Elkin. On petition of the trustee to review a referee's order allowing the bankrupt's claim of exemptions. Affirmed.

Solomon S. Leff, of New York City, for petitioning creditors.

H. H. Wittstein, of Trenton, N. J., for bankrupt.

Lesser Bros., of New York City, for creditors opposing discharge.

HUNT, Circuit Judge. After a most attentive examination of the testimony in this case and of the law, my conclusions, briefly stated, are that, while there is a great deal of evidence tending to show a willful course of fraudulent conduct on the part of the bankrupt, particularly in the matter of the payment of \$1,000 to his sister and \$500 to his nephew, and while the evidence is quite strong concerning omissions to keep proper accounts of sales during the sale had just prior to the filing of the petition in bankruptcy, yet I seriously doubt whether the strength of the evidence tending to show such fraud and dishonesty is sufficient to justify the court in overruling the findings of the referee to the effect that it was not clearly proven that the bankrupt had failed to turn over to the trustee or to account for any moneys in his possession, or that the bankrupt had failed to turn over moneys received from the sale of merchandise in his store within 10 days prior to the filing of the petition in bankruptcy.

[1, 2] It is to be borne in mind that this is not an action brought directly trying the validity of the transactions between the bankrupt and his sister and his nephew, but is one presenting the question whether or not the bankrupt can avail himself of the statutory right to exemptions as provided by the laws of the state of New Jersey. While the duty of a court of bankruptcy is to determine claims of a bankrupt to an exemption, the jurisdiction appears to be, not to grant any exemptions, but merely to define that upon which the law operates. The power of the bankruptcy court is to sever the property found to be an exemption from the estate of the bankrupt, the title remaining in the bankrupt. Such seems to have been the opinion entertained by Justice Bradley in the case of *In re Bass*, 2 Fed. Cas. 1004. That learned judge took the view that the exempted property constitutes no part of the estate in bankruptcy, that the exemption is created by the state law, and that the function of the bankruptcy court is merely to determine, if there be a dispute, what the law acts upon. There are cases which hold to the contrary. In *re Alex* (D. C.) 141 Fed. 483. As helpful in ascertaining the divergent opinions, see Remington on Bankruptcy, § 1098; Collier on Bankruptcy (9th Ed.) pp. 186, 198-203.

But the principle being that under the statute the trustee is not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

vested, except sub modo, with the title to property which is exempt, it does not lie within his power to deprive the bankrupt of the right to an exemption upon the ground that he has withheld assets from the trustee. In re Park (D. C.) 102 Fed. 602. The question presented in this case might very appropriately be reviewed by the Court of Appeals, and I hope that it may be.

The referee's findings are affirmed.

UNITED STATES v. JONES.

(District Court, D. Oregon. December 21, 1914.)

PUBLIC LANDS (§ 123*) — SPECIAL LIMITATION — EFFECT — FRAUDULENT PATENTS.

Act March 3, 1891, c. 561, 26 Stat. 1099, providing that suits by the United States to vacate and annul any patent previously issued shall only be brought within five years from the passage of the act, and suits to vacate and annul patents afterwards issued shall only be brought within six years after the date of the issuance of the patent, does not apply to actions by the United States to recover damages for alleged fraud committed in procuring the government's title to public lands through fraudulent entry and proof under the Homestead Act.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 123.*]

At Law. Action by the United States of America against Willard N. Jones. On demurrer to complaint. Overruled.

Clarence L. Reames, U. S. Atty., and E. A. Johnson, Asst. U. S. Atty., both of Portland, Or., for the United States.

Fulton & Bowerman and Schwartz & Saunders, all of Portland, Or., for defendant.

WOLVERTON, District Judge. The government seeks by this action to recover damages for alleged fraud committed by the defendant in procuring from the government title to several tracts of public lands through fraudulent entry and proofs under the Homestead Act.

The statute of limitations adopted March 3, 1891 (26 Stat. 1099, c. 561), has run against annulment of the patents issued. The statute reads as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

It is contended that the statute bars, not only the remedy, but the right, and therefore no other right of action will lie for recovery on account of the fraud perpetrated in acquiring title to the lands. The effect of the statute is tersely stated by Mr. Justice Holmes, in *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450, 28 Sup. Ct. 579, 580 (52 L. Ed. 881), as follows:

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell v. Warren*, 2 Black, 599, 605 [17 L. Ed. 261];

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Sharon v. Tucker, 144 U. S. 533 [12 Sup. Ct. 720, 36 L. Ed. 532]; *Davis v. Mills*, 194 U. S. 451, 457 [24 Sup. Ct. 692, 48 L. Ed. 1067]. This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476 [17 Sup. Ct. 368, 41 L. Ed. 789]."

And in a later case—*Louisiana v. Garfield*, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92—it is said:

"In *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447 [28 Sup. Ct. 579, 52 L. Ed. 881] it was decided that this act applied to patents, even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy, but validated the patent."

In other words, the running of the statute has the effect to vest in the patentee a perfect title to the land. Very true, but the statute is concerning suits to vacate and annul patents, and comprises but one remedy. That remedy having lapsed, the patent is validated, and the title becomes perfect in the holder under the patent. The language does not give it broader scope or operation.

It is settled law that the general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound. *United States v. Insley*, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968. The United States, like an individual, may have more than one right of suit or action growing out of the same transaction, and there exists no good reason why the government may not waive or avail itself of its remedies in like manner as can an individual. The point is well illustrated by the case of *Southern Pacific Co. v. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507, wherein it appears that the government, through mistake, patented to the railroad company quite a large body of land, which subsequently passed into the hands of innocent purchasers. The government sued to recover the value of the land, and the suit was sustained. In disposing of the case, Mr. Justice Brewer, speaking for the court, says:

"When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property."

If the government may sue to recover the value of lands procured from it through mistake, why may it not sue to recover the value of lands procured through fraud? In either case there are simply two remedies: One for the recovery of the land, where it has not passed to innocent holders; and the other for the value of the lands taken. It has its choice of remedies, and it may therefore waive one remedy and proceed upon the other. That, it seems to me, is all the government has done in the present case. Desiring to give stability to titles depending on patent from the government, it has preferred to confirm such titles after six years in the patentee, and thereby waive any right of action it may have had for annulment of the patent; but the language of the limitations act is not susceptible of broader construction,

and indicates no intendment to bar the government of its right of action to recover the value of land obtained through fraud.

I hold, therefore, that the present action is not barred by the statute. I make no decision as to the measure of recovery in damages.

Demurrer overruled.

In re CENTER.

(District Court, S. D. Georgia, E. D. December 22, 1914.)

1. ALIENS (§ 68*)—NATURALIZATION—SUFFICIENCY OF EVIDENCE.

On an application for naturalization, evidence *held* to show that the applicant, because of misinformation regarding the requirements of the law governing naturalization, had acted as a citizen under the impression that he was a citizen.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

2. ALIENS (§ 68*)—NATURALIZATION—STATUTORY PROVISIONS.

Under Act June 25, 1910, c. 401, § 3, 36 Stat. 830, amending Act June 29, 1906, c. 3592, § 4, par. 2, 34 Stat. 597 (Comp. St. 1913, § 4352), to provide that any person qualified under existing law to become a citizen of the United States who has resided constantly in the United States for five years next preceding May 1, 1910, and who because of misinformation regarding his citizenship or the requirements of the law governing naturalization has labored and acted under the impression that he was or could become a citizen, and in good faith exercised the rights or duties of a citizen or intended citizen, may, if the court in its judgment believes that he has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen, receive a final certificate of naturalization without proof of a former declaration of his intention to become a citizen, it is not necessary that the applicant should have been entitled to naturalization more than five years prior to May 1, 1910, and where an applicant had resided in the United States for more than five years prior to that date he was entitled to naturalization in 1914, though he did not become of age and entitled to be naturalized until 1906.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

Application by Henry Center for naturalization. Application granted.

Shelby Myrick, of Savannah, Ga., for applicant.

Oran T. Moore, of Washington, D. C., for the United States.

NEWMAN, District Judge. [1] Henry Center has applied for naturalization under the third section of the act of June 25, 1910, which provides for the naturalization, without the previous filing of a declaration of intention of persons belonging to the class of persons who were authorized and qualified under the then existing law to become citizens of the United States, who have labored and acted under the impression that they were or could become citizens of the United States, and have, in good faith, exercised the rights or duties of citizens or intended citizens of the United States because of wrongful information and belief. The question is whether, under the facts in this case, Henry Center is entitled to naturalization.

He was born in January, 1885, in Russia. He came to the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States, landing in New York, in July, 1901, and came, in three days from the time he landed, to Savannah, Ga., where he has continuously resided since, except he resided a little while in Jacksonville, and came right back to Savannah. No point, I think, is made upon the fact that his residence has been practically continuous in Savannah ever since he came to this country. He became of age in January, 1906, and during that year he registered and voted. He claims that he was informed, and understood all the time, that because of his coming to this country as a minor he became a citizen on becoming 21 years of age. He says he has been paying his taxes and registering every year since 1906.

Center has served in the National Guards of Georgia, enlisting in a Savannah Company. He has been a member of the fire department of Savannah, has been a policeman in Savannah, and is now a sergeant of police in that city. He established his good reputation as a citizen by witnesses who are native citizens. Center had a brother and uncle who were naturalized, and, as I understand his testimony, he says he thought they were naturalized because they were of age when they came to this country, but that he did not need naturalization papers, because he was a minor when he came over.

The act in question provides, first:

"That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten."

Center clearly comes within this provision of the act. He had, in May, 1910, resided constantly in the United States for nearly 9 years, having come to this country in July, 1901.

The next provision is:

"Who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief."

It is clear from the evidence that Center has acted under the impression that he was a citizen of the United States, and so acted because of misinformation. He has established an excellent character, and evidently allowed himself to be registered and was registered under the impression on his part that he was a citizen. I am satisfied of that from the evidence, and that he then proceeded to exercise the rights and duties of a citizen because of that belief. His having filled the different positions he has, it seems to me, shows that he considered himself a citizen and entitled to the rights of citizenship. One of the witnesses, Mr. Eason, who was lieutenant in Company I, First Infantry of Savannah, speaks very highly of him, and he says he was "as good as a man could be—never knew him to be in any trouble at all. So far as I know he was a good citizen." And he then speaks of his taking the oath a man must take to join the Guards, and says "it was the War Department oath."

[2] The next language of the act is:

"And the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States."

Just as this point is the only serious question in Center's case. It has been held that the period of 5 years spoken of in this part of the act must be 5 years prior to May 1, 1910. I am unable to agree with this view of the statute. It seems to me entirely clear that the statute means that the person applying for citizenship must have been, for a period of more than 5 years prior to the time of filing his application for naturalization, entitled to be naturalized as a citizen of the United States. Center's application was filed in 1914, considerably more than 5 years after he became entitled, under proper proceedings, to be naturalized; that is to say, he arrived in this country in 1901, and was entitled after he became of age to institute proceedings for naturalization. I do not see any reason whatever why the act should be restricted to a period of 5 years prior to May 1, 1910. He must have resided in the United States 5 years before May 1, 1910, but I do not think it was necessary that he should have attained the age of 21 years 5 years before that time. The time that he must have been entitled, upon proper proceedings, to be naturalized, is 5 years prior to the filing of his application. I am wholly unable to agree with the cases to the contrary (In re Urdang [D. C.] 212 Fed. 557; In re Peters [D. C.] 213 Fed. 541), and, with the highest respect, I must differ with the conclusions they have reached.

It is my opinion that Center is entitled to naturalization under the act in question. Proper proceedings will be taken when opportunity offers in open court in Savannah.

In re W. A. SILVERNAIL CO.

(District court, D. Kansas, Second Division. June, 1914.)

BANKRUPTCY (§ 312*)—CREDITORS ENTITLED TO PROVE CLAIMS—ESTOPPEL.

A person who loaned money to a corporation, taking shares of stock of a par value equal to the amount of the loan, under an agreement that at his option he might surrender the stock and demand payment of the loan, or surrender the note evidencing the loan and become the absolute owner of the stock, and who thereafter appeared upon the books of the corporation as a stockholder, and acted as treasurer, and had not made his election, pursuant to the agreement, prior to the bankruptcy of the corporation, was estopped from demanding his rights as creditor, to the prejudice of other creditors, who became creditors subsequent to the agreement mentioned.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-500; Dec. Dig. § 312.*]

In Bankruptcy. In the matter of the W. A. Silvernail Company, bankrupt. On certificate of the referee to review an order denying the claim of one Waterhouse. Order affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 218 F.—62

E. L. Foulke, C. A. Matson, and Jesse D. Wall, all of Wichita, Kan., for trustee.

Paul Brown and Silas Brown, both of Wichita, Kan., for claimant.

POLLOCK, District Judge. The facts are: The bankrupt company, a corporation of the state of Massachusetts, engaged in business at the city of Worcester, in that state, and, being desirous of removing the business of said corporation to the city of Wichita in this state, and being in need of funds, on August 20, 1912, borrowed of claimant (Waterhouse) the sum of \$6,000, in accordance with the terms of a written agreement between the bankrupt and claimant, which, in substance, provides as follows:

The bankrupt executed to claimant its promissory note for the amount borrowed, due on demand, however, to run five years from date, without interest, unless sooner demanded by claimant. It was further provided in said contract that certificate should issue to claimant for 60 shares, par value \$100 each, of the capital stock of the bankrupt corporation, and it was therein provided claimant was to have his election to become the absolute owner of the shares and surrender the promissory note, or to surrender the shares and demand payment of the note, at his option. Further, claimant was to become treasurer of the corporation and sign checks issued by it, all of which was done. The stock register of the corporation shows claimant to be the absolute owner of the 60 shares of its capital stock. An application was made to the secretary of state of this state to do business as a foreign corporation in this state. This application was signed and sworn to by claimant, and showed the shares so issued to him to be his property. The minutes of the books of the corporation showed the transaction to be that expressed in the written agreement.

In this condition of the records of the corporation creditors represented by the trustee in bankruptcy became such after removal of the business of the company to this state. At the date bankruptcy intervened claimant had not exercised his option to keep the stock and surrender the note, or to surrender the stock and rely upon his promissory note. The question presented is: Do these facts estop claimant from now demanding his claim from the estate as against other creditors?

It is evident, from the terms of the written agreement entered into, the purpose was to allow claimant the right to exercise his option of relying on his promissory note as a creditor in the event the business of the company did not prove prosperous, or, on the contrary, of permitting him to assert the rights of a stockholder in the corporation if its business prospered and its shares came to be worth more than their par value—all this at his election, as time might demonstrate. Meanwhile, awaiting such developments, he, as treasurer of the company, had at all times the advantage of such position to advise himself as to the business affairs of the corporation, and during this time permitted himself to stand on the records of the corporation, of which he was an officer, as a stockholder. It is evident he could not in fact be both a stockholder to the extent of the 60 shares and, at the same time,

a creditor to the extent of the amount evidenced by the promissory note. As he did not elect which position he would assume under the terms of the contract until the indebtedness of the company had accumulated to such an extent as to render it in bankruptcy, in fairness and justice to the other creditors of the bankrupt corporation, he should now be estopped from demanding his rights as a creditor.

It follows the order of the referee in denying the demand of claimant as a creditor, to the prejudice of other creditors, was right, and, being right, must be affirmed.

It is so ordered.

In re W. A. SILVERNAIL CO.

(District Court, D. Kansas, Second Division. July, 1914.)

1. BANKRUPTCY (§ 165*)—CREDITORS ENTITLED TO PROVE CLAIMS—EFFECT OF PREFERENCE.

Where, within four months before the institution of bankruptcy proceedings, a corporation, being then insolvent, paid a note on which its treasurer was a guarantor, the treasurer received a preference, precluding him from proving another claim, unless he returned the preferential payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

2. BANKRUPTCY (§ 303*)—PREFERENCES—KNOWLEDGE OF INSOLVENCY.

The treasurer of a corporation, to whom it made a preferential payment while insolvent, will be presumed to have known its true financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In Bankruptcy. In the matter of the W. A. Silvernail Company, bankrupt. On certificate of the referee to review an order disallowing a claim of one Waterhouse. Order affirmed.

E. L. Foulke, C. A. Matson, and Jesse D. Wall, all of Wichita, Kan., for trustee.

Paul Brown and Silas Brown, both of Wichita, Kan., for claimant.

POLLOCK, District Judge. [1] The bankrupt corporation owed a promissory note of \$3,000 to the Fourth National Bank of Wichita, on which the sum of \$500 had been paid. The claimant, Waterhouse, was a guarantor on this note, and after the institution of the proceedings in bankruptcy he paid the same, and, as the bank could have proven it as a demand in the bankruptcy proceedings, claimant will be entitled to do the same, unless prevented from so doing on other grounds presently to be mentioned.

The ground on which the demand is resisted by the trustee arises out of the fact that the bankrupt company had made a note for \$2,500 to one Samuel Rosenthal, on which claimant, Waterhouse, and W. A. Silvernail, president of the bankrupt company, were guarantors. This note came into the hands of Strauss Bros. and was paid, principal and interest, aggregating \$2,650, February 20, 1913, by the bankrupt com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany, and this claimant, Waterhouse, was relieved from his obligation as guarantor on the note.

As this payment was made within four months next preceding the institution of the bankruptcy proceedings, and as at the time such payment was made Waterhouse was treasurer of the bankrupt company, and as it is contended by the trustee the bankrupt company at this time was insolvent, and known to so be by the claimant, Waterhouse, its treasurer, he thus received a preferential payment which must be returned by him as a condition to his being permitted to prove his demand based on the balance of the \$3,000 note by him paid to the Fourth National Bank of Wichita.

[2] The order of the referee so found and held. That the now bankrupt company was insolvent on February 20, 1913, at the time the note of Strauss Bros. was paid by it, seems quite apparent from the proof in the case. As Waterhouse was its treasurer at this time, he is presumed to have known its true financial condition. *Walters v. Zimmerman* (D. C., Ohio) 30 Am. Bankr. Rep. 776, 208 Fed. 62. In fact, he must have known quite accurately its true financial condition at this time, from reports which he received from the company, although the bankrupt was doing business in Wichita, in this state, and its treasurer, Waterhouse, resided in the state of Massachusetts. In so far as payments were made by the bankrupt of debts on which he was obligated, when it was insolvent, it seems from the authorities, in so far as he is concerned the same must be held preferential in character. *Swarts v. Fourth National Bank of St. Louis* (C. C. A., 8th Cir.) 8 Am. Bankr. Rep. 673, 117 Fed. 1, 54 C. C. A. 387; *Swarts v. Siegel* (C. C. A., 8th Cir.) 8 Am. Bankr. Rep. 689, 117 Fed. 13, 54 C. C. A. 339; *Kobusch v. Hand* (C. C. A., 8th Cir.) 19 Am. Bankr. Rep. 379, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660.

It follows the order of the referee in refusing the allowance of the demand of Waterhouse, based on the \$3,000 note by him paid to the Fourth National Bank of Wichita, unless the preferential payment by the bankrupt of the promissory note to Strauss Bros., on which claimant was guarantor, is returned, is correct, and, being correct, must be affirmed and approved.

It is so ordered.

In re LOUGHNEY et al.

(District Court, W. D. Washington, N. D. December 29, 1914.)

No. 5190.

1. BANKRUPTCY (§ 483*)—COSTS—FEES OF CLERK.

Custom of a clerk's office to charge 40 cents for each copy of petition, order, and notice of a bankrupt's application for discharge, or the fact that clerks in other districts made such charge, did not establish the clerk's right to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 887; Dec. Dig. § 483.*]

2. BANKRUPTCY (§ 483*)—APPLICATIONS FOR DISCHARGE—PETITION—NOTICE—COPIES—FEES.

Bankr. Act July 1, 1898, c. 541, § 58a, 30 Stat. 561, as amended by Act June 25, 1910, c. 412, § 9½, 36 Stat. 841 (Comp. St. 1913, § 9642), provides that creditors shall have 30 days' notice of all applications for discharge, and section 52a (section 9636) declares that clerks shall receive as full compensation for their services to each estate a filing fee of \$10, except when a fee is not required from a voluntary bankrupt. General Order 35 (89 Fed. xiii, 32 C. C. A. xiii) provides that the fees allowed to clerks shall be in full compensation for all services performed in regard to filing petitions or other papers required by the act to be filed by them, or in certifying or delivering or paying out money, "but shall not include copies furnished to other persons or expenses necessarily incurred in publishing or mailing notices or other papers." *Held* that, while clerks are required and authorized to send out to creditors copies of a bankrupt's application for a discharge and notice, etc., they are not entitled to charge therefor under Rev. St. §§ 828, 840 (Comp. St. 1913, §§ 1383, 1405), authorizing clerks in Washington to charge for a copy of an entry of record or any paper on file 20 cents a folio; the clerks for sending out such notices being only entitled to charge the necessary expense incurred in publishing and mailing notices.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 887; Dec. Dig. § 483.*]

In Bankruptcy. In the matter of bankruptcy proceedings of A. M. Loughney and Neal Loughney. On motion by the bankrupts for an order directing the clerk to send out an order and notice of the bankrupt's application for discharge. Motion denied.

G. A. Custer, of Seattle, Wash., for the motion.

NETERER, District Judge. The bankrupts herein move the court for an order directing the clerk "to compare with the original petition of said bankrupts for discharge and order of notice thereon on file herein, the copies of said petition and order, stamped, addressed, and furnished to said clerk by said bankrupts, and to forthwith mail said copies." This motion is supported by affidavit in which it appears, in substance, that upon filing petition for discharge and obtaining an order thereon the bankrupts have had printed a sufficient number of true copies of the order and notice on postal cards, duly addressed to all of the known creditors, and requested the clerk to compare the same and mail such notices to the creditors, which the clerk declined to do, until his services for such work were paid, which was fixed at the sum of 40 cents for each notice.

An answering affidavit is filed by the clerk, in which he states that the charge for mailing such notices is the charge which was made by his predecessors in office, the charge that has been uniformly made in his office, and is the charge that is made by the clerk of the district of Oregon, and likewise in the Eastern district of Washington; that such charge is in excess of the cost of preparing and mailing such notices, but that the charge is in conformity with the statute; and that it is his duty as the clerk and agent for the government to make such charge and collect such fee, irrespective of who may prepare such notices, or the actual cost of preparing the same, his office being a fee office.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The fact that for a long period of time the clerk's office has made a charge of 40 cents for such notices would not establish a right thereto, nor would the fact that clerks in other districts make such charge. From the record it appears that there is not a uniformity of charges for such service, except in Washington and Oregon.

[2] The Bankruptcy Act provides that the creditors shall have "thirty days' notice of all applications for the discharge of bankrupts" (section 58a of Bankruptcy Act, as amended June 25, 1910), and pursuant to official form No. 57, the clerk was ordered to send by mail to all creditors copies of said petition and order, addressed to them at their places of residence as stated. Section 52a, *supra*, provides that:

"Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt."

General Order 35 (89 Fed. xiii, 32 C. C. A. xiii), promulgated by the Supreme Court pursuant to section 30a of the Bankruptcy Act provides:

"1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering or paying out moneys; *but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.*"

Rule 10 of General Orders (89 Fed. vi, 32 C. C. A. vi), *supra*, provides that:

"Before incurring any expense in publishing or mailing notices, the clerk may require from the bankrupt indemnity for such expense.

Under the provisions of this act it manifestly appears that the only fixed charge to be made by the clerk is \$10, which is paid upon the inauguration of the bankruptcy proceeding, and when an affidavit in forma pauperis is filed no fee can be exacted. The concluding phrase in General Order 35, *supra*, however, provides that the clerk shall be paid *expenses necessarily incurred in publishing or mailing notices or other papers.*

It is suggested by the clerk that his charge is based upon sections 828 and 840 of the Revised Statutes of the United States (Comp. St. 1913, §§ 1383, 1405). Section 828 provides that a charge shall be made, "for a copy of any entry or record, or of any paper on file, for each folio, ten cents."

Each notice and petition contained two folios, and section 840, *supra*, provides that in Washington and other states named the fees provided by section 828 shall be double, making a charge of 40 cents (after January 1, 1915, under the act of Congress of August 1, 1914, the double fee provision will not apply in Washington or Oregon). And it is contended that by General Order 35 (89 Fed. xiii, 32 C. C. A. xiii) the notices and petitions were copies furnished to other persons, for which a charge would be allowed, and there being no other provision of law more nearly applicable, section 828, *supra*, would apply.

I do not think that the phrase referred to has any relation to the charges as set forth in this case, as that clearly must refer to copies of records of the bankruptcy proceeding furnished to persons making a demand therefor, other than notices, etc., to creditors, and has no relation to the preparation of notices or copies of petitions and mailing the same as required by the act. If that construction should be adopted, then the clerk should charge 40 cents for each notice and petition, and an additional charge for expenses necessarily incurred in publishing, mailing, etc. Section 30, *supra*, does not empower the Supreme Court to provide for compensation to the clerk. It does empower the court to make all "rules, forms, and orders as to procedure, and for carrying them in force and effect." The expense incident to the preparation and mailing, etc., of the notices, etc., is necessary to carry the act in force, and this the rule 35 requires to be paid. The duties required of the clerk are in consummation of the purposes of the Bankruptcy Act, involving persons directly interested in the proceeding and not strangers (other persons) to the proceeding.

A consideration of the act makes it manifest that it was not the intention of the Congress to have the clerk paid a fee for services herein stated, but General Order 35 enlarges the scope of section 52a by requiring the payment of the clerk's expenses, etc., with relation to preparation and mailing of the notices. This is not as compensation to the clerk, but rather to reimburse him for expenses incurred in such publishing and mailing, pursuant to the court's order for carrying the act in force; one of the purposes of the act being to afford an honest creditor opportunity to be discharged from liabilities by surrendering all of his property, and the bankrupt in no sense can be considered a stranger (other person) to the record. The copies furnished to officers of the court are provided for in the \$10 fee, and the charge for copies in issue is the expense incident thereto, which under rule 35, *supra*, may be charged. This refers to actual expense. The expense is practically the same in each case, and should be ascertained as nearly as possible and a charge made which is uniform and applied to all cases.

The duties of the clerk are exacting, and involve much responsibility. To properly discharge his duties he must keep an efficient corps of assistants, and the number of such assistants must depend upon the business of the office. I believe that the Supreme Court, by General Order 35, intended that the clerk should prepare or supervise the printing, mailing, etc., of the notices required, and did not intend that the field of the clerk should be invaded, and the prerogatives of his office usurped, and an arm of the court impaired by uncertainty in the discharge of such functions of his office, by persons preparing the copies of petition and notice, and require the clerk to certify and mail them. I think the clerk should prepare, or cause to be prepared, copies of petitions and notices, and mail to the creditors, as may be directed by the court, the expense thereof to be paid by the bankrupt.

The motion is denied, with direction to the clerk to make his charges in conformity to this opinion.

SABIN v. LARKIN-GREEN LOGGING CO.In re **CONSUMERS' LUMBER & SUPPLY CO.**

(District Court, D. Oregon. December 21, 1914.)

No. 6561.

1. BANKRUPTCY (§ 11*)—COURT OF BANKRUPTCY—JURISDICTION.

A court of bankruptcy is one of limited jurisdiction, in the sense that it can take cognizance only of particular subjects, to wit, those included within the intendment of the Bankruptcy Act; but its jurisdiction is unlimited in respect of its powers over proceedings in bankruptcy, specifically made subject to its jurisdiction by Bankr. Act (Act July 1, 1898, c. 541) § 2, 30 Stat. 545 (Comp. St. 1913, § 9586).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

2. BANKRUPTCY (§ 100*)—ADJUDICATION—COLLATERAL ATTACK.

A bankruptcy adjudication is conclusive, unless reversed on appeal or writ of error, and cannot be collaterally attacked in a suit by the trustee against a third person.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. § 100.*]

3. BANKRUPTCY (§ 100*)—ADJUDICATION—COLLATERAL ATTACK.

A bankruptcy court having jurisdiction to adjudicate a corporation a bankrupt, the fact that it erred in overruling a demurrer to the petition could not be urged as a defense to a subsequent action by the trustee against a third person.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. § 100.*]

4. BANKRUPTCY (§ 363*)—ADJUDICATION—PROOF OF CLAIM—EFFECT.

Defendant, having proved its claim against a bankrupt's estate as unsecured and participated in subsequent proceedings, was estopped to subsequently question the bankruptcy court's jurisdiction to make the adjudication to that effect in an action by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.*]

In Equity. Suit by R. L. Sabin, as trustee in bankruptcy of the Consumers' Lumber & Supply Company, against the Larkin-Green Logging Company. On motion to dismiss for alleged want of jurisdiction in the bankruptcy court to pass the adjudication on which plaintiff's appointment as trustee was based. Motion denied.

Beach, Simon & Nelson and Sidney Teiser, all of Portland, Or., for plaintiff.

Kollock, Zollinger & McDowall, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit by the trustee in bankruptcy of the estate of the Consumers' Lumber & Supply Company to determine his title to certain logs, free and unincumbered by a lien by way of an attachment against the supply company, which the defendant claims it has by right of a valid and still existing levy. A pe-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion was filed in bankruptcy by certain creditors of the supply company April 17, 1913, which sets forth that said company—

“committed an act of bankruptcy, in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers’ Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December 18, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceeding, after April 18, 1913. That said Consumers’ Lumber & Supply Company has done nothing to vacate or set aside said attachment, and has not gone into bankruptcy voluntarily, and its failure so to do will thereby create a preference in favor of said Larkin-Green Logging Company, by reason of the attachment levied by said Larkin-Green Logging Company on said December 18, 1912. Said attachment is still a lien on all the assets of said debtors. That unless said Consumers’ Lumber & Supply Company is adjudicated a bankrupt, and unless this petition is filed forthwith, a preference will be gained and obtained by said Larkin-Green Logging Company, as well as by Linnton Savings Bank, which levied a writ of attachment and attached all of the assets of said Consumers’ Lumber & Supply Company on December 26, 1912, and therefore on April 26, 1913, said Linnton Savings Bank will also obtain a preference, as said Consumers’ Lumber & Supply Company has done nothing to set aside said attachment, nor has it filed a voluntary petition in bankruptcy. That the said obligations owing to said Larkin-Green Logging Company and Linnton Savings Bank are for prior indebtedness, which was owing to the said attaching creditors prior to said December 18, 1912. That by reason of the foregoing facts said Consumers’ Lumber & Supply Company has permitted and suffered a preference in favor of said Larkin-Green Logging Company and Linnton Savings Bank, which can only be set aside through an adjudication in bankruptcy of said Consumers’ Lumber & Supply Company.”

All this is set out in the complaint, which further shows that the supply company was insolvent at the time of the attachment and at all times up to the time of the filing of the petition.

A demurrer to the petition was interposed by the logging company, assigning as a ground therefor that the facts stated do not constitute an act of bankruptcy, and, after a hearing, was overruled by the court. Subsequently the supply company filed an answer, admitting the allegations of the petition, and prayed that it be adjudged a bankrupt, and on May 7, 1913, the adjudication followed. The logging company challenges the sufficiency of the complaint by motion to dismiss, on the ground that the court in bankruptcy was without jurisdiction to pass the adjudication, and that it does not state facts to entitle plaintiff to the relief demanded.

Practically the only question presented is whether the court in bankruptcy had jurisdiction to adjudicate the supply company a bankrupt upon the petition before it. The logging company insists that the court was without jurisdiction because the petition failed to state an act of bankruptcy. The attack is one collateral in character, and the consideration must proceed upon that basis.

[1, 2] The court of bankruptcy is one of limited jurisdiction, in the sense that it can take cognizance of particular subjects only, namely, those included within the intendment of the statute; but its jurisdiction is unlimited in respect of its powers over proceedings in bankruptcy specifically made subject to its jurisdiction by section 2 of the Bankruptcy Act. And it is said:

"When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity." *Edelstein v. United States*, 149 Fed. 636, 638, 79 C. C. A. 328, 330 (9 L. R. A. [N. S.] 236).

See, also, *In re First Nat. Bank of Belle Fourche et al.*, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; *In re Columbia Real Estate Co.* (D. C.) 101 Fed. 965, 970; *In re Marion Contract & Construction Co.* (D. C.) 166 Fed. 618.

In the First National Bank Case, which was in bankruptcy, it is said:

"The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal, or vacated by some direct proceeding."

[3] Advancing to the sufficiency of the petition, it must be conceded that the court committed an error in overruling the demurrer thereto (*Citizens' Banking Co. v. Ravenna National Bank*, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, recently decided by the Supreme Court); but my conviction is that, the court having the power to adjudicate, its adjudication as to the sufficiency of the petition became final and binding upon the parties concerned until set aside by review or appeal, and that it cannot now be questioned in a collateral way.

There was an attempt to set up the third act of bankruptcy. The petition failed in that, but it does not follow that the petition might not have been amended so as to state a good cause, and, the court having jurisdiction to decide, its adjudication must be held final until vacated by direct attack, especially as the bankrupt has itself admitted insolvency and prayed for the adjudication.

[4] There exists another reason, however, why the defendant should not be permitted to resist the suit, which is that it has subsequently proved its claim as unsecured, and participated in the subsequent proceeding. Having done this, and it is so alleged, it cannot object to the jurisdiction of the court to make the adjudication. *In re Hintze* (D. C.) 134 Fed. 141; *In re Worsham*, 142 Fed. 121, 73 C. C. A. 665; *In re New York Tunnel Co.*, 166 Fed. 284, 92 C. C. A. 202.

Motion denied.

MEMORANDUM DECISIONS

BOWRON v. SIBERT. (Circuit Court of Appeals, Fifth Circuit. October 30, 1914.) No. 2668. Appeal from the District Court of the United States for the Northern District of Alabama; W. I. Grubb, Judge. Suit in equity by J. Carl Sibert against James Bowron, as trustee in bankruptcy of the Southern Iron & Steel Company. Decree for complainant, and defendant appeals. Affirmed. Augustus Benners, of Birmingham, Ala., for appellant. Amos E. Goodhue and A. R. Brindley, both of Gadsden, Ala., for appellee. Before WALKER, Circuit Judge, and CALL and CLAYTON, District Judges.

PER CURIAM. A question is raised by the counsel for the appellee as to the scope of the review of the proceedings of the trial court which it is permissible to make under the appeal by which the case is brought into this court. A determination of that question is not necessary. The result is the same, whether the scope of the review is restricted, as claimed by the counsel for the appellee, or is broad enough to present the questions discussed by the counsel for the appellant. Assuming that those questions are presented for review, yet the result of an examination of the record is that we reach the conclusion that it does not disclose any ground for a reversal of the judgment. We do not concur in the view, urged by the counsel for the appellant, that the evidence adduced failed to support either count of the complaint. Affirmed.

BRAY et al. v. UNITED STATES FIDELITY & GUARANTY CO. (two cases). In re **EVANSVILLE CONTRACT CO.** (Circuit Court of Appeals, Fourth Circuit. December 7, 1914.) Nos. 1246, 1260. Appeal from and Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Northern District of West Virginia, at Parkersburg, in Bankruptcy; Alston G. Dayton, Judge. In the matter of bankruptcy proceedings of the Evansville Contract Company. On petition by M. J. Bray and others to superintend and revise in matter of law certain proceedings resulting in a decree affirming a referee's order in favor of the United States Fidelity & Guaranty Company, with separate appeal by Bray and others from the same decree. Petition dismissed, and decree affirmed. H. P. Camden, of Parkersburg, W. Va., for petitioners and appellants. B. M. Ambler, of Parkersburg, W. Va. (W. W. Van Winkle and Mason G. Ambler, both of Parkersburg, W. Va., on the brief), for respondent and appellee. Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. We are satisfied that the court below was correct in confirming the report and order of the referee and dismissing the petitions for review, and deem it unnecessary to repeat the argument in support of these conclusions. In our opinion the petition to superintend and revise should be dismissed, at the cost of petitioners, and the decree of the trial court appealed from affirmed, at the cost of the appellants; and it is so ordered.

DIETER-WENZEL CONST. CO. v. EPPLER. (Circuit Court of Appeals, Fifth Circuit. December 9, 1914.) No. 2660. In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge. Victor Lee Brooks, of Austin, Tex., and Thad B. Landon, of Kansas City, Mo., for plaintiff in error. S. W. Fisher and Chas. L. Black, both of Austin, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. None of the assignments of error on this writ are well taken. See *City of Key West v. Baer*, 66 Fed. 443, 13 C. C. A. 572; *Adams v. New York Life Ins. Co.*, 113 Fed. 303, 51 C. C. A. 263; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Lehnen v. Dickson*, 148

U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Dooley v. Pease*, 180 U. S. 126-131, 21 Sup. Ct. 329, 45 L. Ed. 457; *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 127 et seq., 22 Sup. Ct. 55, 46 L. Ed. 113; and also *Alpha Portland Cement Co. v. Curzi*, 211 Fed. 580-587, 128 C. C. A. 180, and cases there cited. Judgment affirmed.

FIRST NAT. BANK OF WATSEKA, ILL., v. BARKLEY et al. (Circuit Court of Appeals, Fifth Circuit. November 30, 1914.) No. 2584. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. William J. Berne, of Ft. Worth, Tex., for appellant. J. C. Terrell, Jr., of Ft. Worth, Tex., for appellees. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. The proper decision of this case turns upon the evidence, which is conflicting on the main issues, but we find that the preponderance is with the appellees. Affirmed.

GROOM v. BARRETT.† (Circuit Court of Appeals, Fifth Circuit. November 30, 1914.) No. 2591. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. S. H. Madden and W. H. Kimbrough, both of Amarillo, Tex., David W. Armstrong, of New York City, and H. E. Hoover, of Canadian, Tex., for plaintiff in error. Sam J. Hunter and Ray Hunter, both of Ft. Worth, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. At a former term a branch of this case was before this court (see *Groom v. Mortimer Land Co. et al.*, 192 Fed. 849, 113 C. C. A. 173), in which nearly all the vital questions presented in this suit were involved and passed upon adversely to the pretensions of the plaintiff in error herein, and as then decided have been followed by the District Court in the present suit. We have considered the assignments of error, and find no reversible error assigned or patent on the record. We notice and have considered the motion for assessment of damages under the second paragraph of our rule 30, to the effect that where it shall appear that a writ of error has been sued out merely for delay, and has delayed proceedings on the judgment in the inferior court, damages at a rate not exceeding 10 per cent. in addition to interest shall be awarded upon the amount of the judgment, and we are not prepared to hold that the writ of error in this case was sued out for delay. Affirmed, with costs.

KRUEGEL et al. v. STANDARD SAVINGS & LOAN ASS'N et al.‡ (Circuit Court of Appeals, Fifth Circuit. January 20, 1915.) No. 2714. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Suit by Herman Kruegel and others against the Standard Savings & Loan Association and others. Decree for defendants, and plaintiffs appeal. Modified and affirmed. Herman Kruegel, of Dallas, Tex., for appellants. Leroy A. Smith and R. W. Flournoy, both of Ft. Worth, Tex., for appellees. Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. An examination of the record in this case has led us to the conclusion that there was no error in the decree appealed from. In the argument of the case it was made known to the court that the appellees did not object to the appellants having further time to redeem the land described in the judgment of the District Court, the execution of which the bill in the case sought to have perpetually enjoined. Treating that suggestion as a consent by the appellees to the modification of the decree appealed from, that decree is modified, by allowing appellants 60 days from this date to make the payments which the decree appealed from provided should have the effect of preventing the issuance of the execution ordered to be issued if such payments should not be made within the time allowed therefor by the decree. Except as thus modified, the decree appealed from is affirmed, all costs to be

† Rehearing denied January 4, 1915.

‡ Rehearing denied February 22, 1915.

taxed against the appellants, and to be paid within the time herein allowed as a condition to a withholding of the issuance of the writ of execution.

MEDLIN MILLING CO. v. HALL-BAKER GRAIN CO. (Circuit Court of Appeals, Fifth Circuit. December 4, 1914.) No. 2655. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. George Thompson and David T. Bomar, both of Ft. Worth, Tex., for appellant. S. B. Cantey, of Ft. Worth, Tex., for appellee. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. From an examination of the record and evidence, we are satisfied that this case was correctly decided in the District Court, and the decree appealed from is accordingly affirmed.

MEDLIN MILLING CO. v. J. ROSENBAUM GRAIN CO. (Circuit Court of Appeals, Fifth Circuit. December 4, 1914.) No. 2656. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. George Thompson and David T. Bomar, both of Ft. Worth, Tex., for appellant. S. B. Cantey, of Ft. Worth, Tex., for appellee. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. From an examination of the record and evidence, we are satisfied that this case was correctly decided in the District Court, and the decree appealed from is accordingly affirmed.

NATIONAL SURETY CO. v. CHRISTOPHER & SIMPSON ARCHITECTURAL IRON & FOUNDRY CO., Inc., et al. (Circuit Court of Appeals, Fifth Circuit. December 2, 1914.) No. 2633. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Henry E. Jackson, of San Angelo, Tex., for appellant. Frances Marion Etheridge, Joseph Manson McCormick, Henri Louis Bromberg, and Wendel Spence, all of Dallas, Tex., and S. B. Cantey and W. T. Bartholomew, both of Ft. Worth, Tex., for appellees. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. The decree appealed from appears to be in accordance with the preponderance of evidence and equity in the case, and it is therefore affirmed.

READ MACH. CO. v. JABURG et al. (Circuit Court of Appeals, Second Circuit. November 10, 1914.) No. 74. Appeal from the District Court of the United States for the Southern District of New York. This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding a patent valid and infringed as to claims 6 and 10 thereof. The patent is No. 966,765 issued August 11, 1910, to Harry Read, for a mixing machine. The opinion of the District Court is reported in 212 Fed. 951. J. Edgar Bull and A. G. N. Vermilya, both of New York City, for appellants. Edmund Wetmore and O. W. Jeffery, both of New York City, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judge Hunt has very fully discussed the issues presented, and, as we concur in his reasoning and conclusions, it is unnecessary to write another opinion. Decree affirmed, with costs.

ROBERTSON et al. v. AYLOR. (Circuit Court of Appeals, Fifth Circuit. December 3, 1914.) No. 2632. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Ocie Speer, I. W. Stephens, and George E. Miller, all of Ft. Worth, Tex., and E. J. Hamner, of Sweetwater, Tex., for plaintiffs in error. A. H. Kirby and

Theodore Mack, both of Ft. Worth, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. We find none of the assignments of error well taken. The judgment of the District Court is affirmed.

ROLLER v. BURKETT et al.† (Circuit Court of Appeals, Fifth Circuit. November 30, 1914.) No. 2590. Appeal from the District Court of the United States for the Eastern District of Texas; Gordon E. Russell, Judge. Thomas J. Gibson, of Mexia, Tex., and John E. Roller, of Harrisonburg, Va., for appellant. Chas. S. Todd, of Texarkana, Tex., and A. D. Preston, of Beckley, W. Va., for appellees. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. This case, submitted on a motion to dismiss the appeal and on the merits, having been carefully considered, we conclude that, while there may be some question as to whether the appeal was taken or sued out within the time fixed by the statute, there is no doubt that on the merits of the case the decree of the District Court was correct, and should be affirmed; and it is so ordered.

TEXAS & P. RY. CO. v. BIGGER et al. (Circuit Court of Appeals, Fifth Circuit. December 9, 1914. Rehearing Denied January 5, 1915.) No. 2648. In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge. T. D. Cobbs, of San Antonio, Tex., for plaintiff in error. H. C. Carter, P. J. Lewis, Ernest Fellbaum, and Claud J. Carter, all of San Antonio, Tex., for defendants in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. We find none of the assignments of error in this case well taken. With regard to excessive damages, see *Alpha Portland Cement Co. v. Curzi*, 211 Fed. 580-587, 128 C. C. A. 180, and cases there cited. The judgment of the District Court is affirmed.

TEXAS & P. RY. CO. v. HARTFORD FIRE INS. CO. et al. (Circuit Court of Appeals, Fifth Circuit. January 6, 1915.) No. 2678. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Action by the Hartford Fire Insurance Company and another against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed. F. H. Prendergast, of Marshall, Tex., for plaintiff in error. S. P. Jones, of Marshall, Tex. (William Thompson, of Dallas, Tex., on the brief), for defendants in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. We think it follows, from the decision in the companion case of *Texas & Pacific Railway Co. v. Rosborough, Home Insurance Company, North British & Mercantile Company, et al.* (December 14, 1914) 235 U. S. 429, 35 Sup. Ct. 117, 59 L. Ed. —, that there was no reversible error in the rulings in this case which are urged as grounds for a reversal, and that the judgment should be affirmed; and it is so ordered.

THE TITANIC. (Circuit Court of Appeals, Second Circuit. October 30, 1914.) Motion for writ of mandamus to the District Court of the United States for the Southern District of New York. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. An injunction in limited liability proceedings is not a matter of discretion of the District Court, but a matter of statutory right. If the form of the injunction issued does not conform to the intention of Congress, any one aggrieved may insist upon its being made to do so. Our previous modification of this particular injunction concerned only death claimants. We gave them the privilege of beginning actions within one year from the death, so as to preserve the cause of action created by Lord Campbell's Act

† Rehearing denied January 5, 1915.

In the event that the proceedings to limit liability were dismissed after that period had expired. In re Oceanic Steam Nav. Co., 204 Fed. 260, 124 C. C. A. 352. The District Judge, in declining to dispose of the motion to alter the form of the injunction in this case, seems to have been influenced both by a sense of propriety and by a doubt of power. There is nothing in what we have heretofore said to prevent him from controlling the injunction in any other particular than the one we decided. We leave the motion to be disposed of by him, without issuing any peremptory mandamus.

TOMLINSON et al. v. BOURN. (Circuit Court of Appeals, Fifth Circuit. December 3, 1914.) No. 2686. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. William J. Berne, of Ft. Worth, Tex., for appellants. John M. Wagstaff, of Abilene, Tex., and James L. Shepherd, of Colorado, Tex., for appellee. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. We find no reversible error in the rulings of the court on the pleadings and admission of evidence, and the evidence adduced supports the decree rendered. **Affirmed.**

UNITED STATES ex rel. and to Use of TEXAS PORTLAND CEMENT CO. et al. v. McCORD et al. (Circuit Court of Appeals, Fifth Circuit. November 30, 1914.) No. 2252. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Frances Marion Etheridge, of Dallas, Tex., for plaintiffs in error. George A. Carden, Charles W. Starling, and W. C. Kimbrough, all of Dallas, Tex., for defendants in error. Before PARDEE, Circuit Judge, and MAXEY, District Judge.

PER CURIAM. Certain jurisdictional questions having been heretofore certified and submitted to the Supreme Court (see United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893), and the same having been answered in the negative, it follows that the judgment of the Circuit Court was correct, and should be affirmed; and it is so ordered.

VACUUM ENGINEERING CO. v. DUNN. (Circuit Court of Appeals, Second Circuit. November 9, 1914.) Appeal from the District Court of the United States for the Southern District of New York. Edwin J. Prindle and Arthur Wright, both of New York City, for appellant. L. F. H. Betts, of New York City, for appellee. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. This is an application to recall the mandate (209 Fed. 219, 126 C. C. A. 313), to admit as part of the record certified copies of certain foreign patents, and to issue a new mandate thereon, similar to the one in the suit of Patents Selling Company against this same defendant ([D. C.] 204 Fed. 99), where the same patents were in like manner introduced. To do this will undoubtedly be equitable, and since there is no technical, nor indeed any other, objection made to the granting of the relief prayed for, the application is granted.